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LAW SCHOOL ADMISSION COUNCIL, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,

Plaintiff,

v.

LAW SCHOOL ADMISSION COUNCIL, INC.,

Defendant.

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

LAW SCHOOL ADMISSION COUNCIL, INC.,

Defendant.

No. CV 12-1830-JCS

LSAC'S BRIEF IN OPPOSITION TO DFEH'S MOTION FOR CIVIL CONTEMPT ORDER OR, IN THE ALTERNATIVE, MODIFICATION OF THE CONSENT DECREE

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INTRODUCTION

By way of a Consent Decree entered on May 29, 2014, the California Department of Fair Employment and Housing ("DFEH"), the United States of America, and the Law School Admission Council ("LSAC") agreed to resolve the underlying lawsuit on an amicable basis, before there had been any findings of fact or conclusions of law. The Decree's four-year term ends this year, on May 29, 2018. (Dkt. 203 at ¶ 30).

All parties agreed in the Decree to use an ADA Monitor to audit LSAC's compliance. Likewise, all parties subsequently agreed upon the individual who would serve as the Monitor, Arthur Coleman. Mr. Coleman is a former Deputy Assistant Secretary in the U.S. Department of Education's Office for Civil Rights. In a report dated February 16, 2017, he concluded that LSAC "has substantially complied" with all provisions of the Decree subject to his review.

Disagreeing with the Monitor's findings, DFEH has filed a Motion for an Order Holding Defendant in Civil Contempt and in the Alternative for Modification of the Consent Decree or an Order to Show Cause Re Civil Contempt and Why Monitor Should Not Be Removed (Dkt. 254). DFEH's co-plaintiff, the United States, has **not** joined in DFEH's motion.[1]

Heated rhetoric aside, there is nothing in DFEH's submission to support a finding of contempt, extension of the Decree's term, or dismissal of the ADA Monitor. In the first place, the violations alleged by DFEH (involving the so-called "50% email," alleged misclassification of partial denials, alleged denial of appeal rights, etc.) have already been fully addressed by actions voluntarily taken by LSAC following its participation in the dispute-resolution process called for by the Decree. Civil contempt is intended to compel compliance with a court order going forward, or to compensate a party for losses sustained because of alleged non-compliance. The relief requested by DFEH would do neither.

[1] A collection of disability rights advocates have submitted an *amicus* brief in support of DFEH. (Dkt. 265). The brief largely focuses on the pre-Consent Decree time period, which is not relevant to the current dispute. *Id*. at 1-4. The *amici* also provide a general discussion of the ADA, *id*. at 5-7, which they say is "predicated upon the notion that accommodation decisions are to be made on an individualized basis," *id*. at 7. LSAC fully agrees. Unfortunately, however, the practices imposed on LSAC by the so-called "Best Practices" panel do not result in accommodation decisions being made on the individualized, objective basis contemplated by the ADA. Finally, the *amici* try to bolster DFEH's inappropriate attempt to become the *nationwide* steward of LSAC's compliance with the Decree *Id*. at 8. The Decree, however, assigns that role to the U.S. Department of Justice, which has not joined in DFEH's motion for an extension of the Decree's term and replacement of the ADA Monitor.

Further, the facts do not support holding LSAC in contempt. DFEH's arguments are based on grossly inaccurate characterizations of LSAC's actions and anecdotal information from only three examinees, from among thousands who have received accommodations while the Decree has been in effect. DFEH puts pejorative labels on LSAC's conduct and motivations, but it falls well short of showing by clear and convincing evidence that LSAC violated any specific and definite provisions of the Decree. It also inappropriately ignores the many areas in which LSAC's compliance cannot be questioned. A finding of contempt is unwarranted.

Nor does Fed. R. Civ. P. 60(b) provide a basis for extending the Decree or removing the Monitor. The Court is being asked by a single party to the Decree to modify one of the Decree's negotiated provisions, its four-year term. That would not be equitable or appropriate, given LSAC's compliance with the Decree's terms over the past three-plus years and its voluntary cessation of the practices to which DFEH has objected. Nor is replacement of the Monitor appropriate. The facts do not support DFEH's attacks on Mr. Coleman, and his removal cannot be justified as a Decree modification because the Decree did not appoint Mr. Coleman. The Decree states that the parties are to agree on the Monitor. They agreed on Mr. Coleman. The U.S. Department of Justice has not joined in DFEH's call to remove the Monitor.

At bottom, DFEH's motion seeks to punish a non-profit entity that has already been punished to a degree that finds no parallel in the history of the U.S. Department of Justice's enforcement of the ADA or DFEH's enforcement of the Unruh Act. LSAC paid more than $8.73 million to resolve the underlying claims, has since spent well over a million dollars more complying with the Decree (*see* Decl of Kim Dempsey at ¶¶ 11-13, filed herewith) ("Dempsey Decl."), and has implemented accommodation policies that are not required under the ADA or imposed on any other testing organization.[2] If further nationwide obligations are to be imposed on LSAC, that should happen only as the result of a notice-and-comment rulemaking that produces reasonable standards that apply to all testing entities. Because LSAC has substantially

[2] To our knowledge, no other testing entity employs or is subject to similar practices – and there are hundreds of such testing entities. *See* 79 Fed. Reg. 4839, 4853-57 (Jan. 30, 2014) (estimate by DOJ that roughly 1,400 testing organizations are required to provide accommodations under the ADA).

complied with all of its obligations over the years in which the Decree has been in effect and has voluntarily addressed DFEH's core concerns, the additional relief requested in DFEH's motion is unwarranted, unnecessary and improperly punitive.

PROCEDURAL HISTORY

This case began with a complaint filed by DFEH in 2012. DFEH alleged that LSAC violated the Americans with Disabilities Act ("ADA") in handling requests for accommodations on the Law School Admission Test (the "LSAT"), and that the alleged ADA violations in turn constituted violations of California's Unruh Act and Fair Housing and Employment Act. *See* Complaint ¶¶ 1, 187-216 (Dkt. 1). DFEH brought the case on behalf of 17 named individuals and a putative class consisting of "all disabled individuals in the State of California who requested a reasonable accommodation for the [LSAT] from January 19, 2009 to February 6, 2012." Complaint ¶¶ 2, 7, 8. LSAC denied all of DFEH's claims. (*See* Dkt. 58).

The United States moved to intervene as an additional plaintiff, noting that its "enforcement authority under the ADA" was "directly implicated" by DFEH's claims. (Dkt. 47 at 4). The Court granted the motion, agreeing that the lawsuit "directly implicates" the ability of the United States "to craft 'clear, strong, consistent, enforceable standards' in implementing the [ADA]," and noting that "a stated purpose of the ADA was 'to ensure that the Federal Government plays a central role in enforcing the standards established [in the Act] on behalf of individuals with disabilities.'" (Dkt. 60 at 2). The Court also found that DFEH could not adequately represent the interests of the United States in enforcing the ADA "on a national scale" because DFEH's "jurisdiction is confined to the State of California" and DFEH "does not have direct enforcement authority over the ADA." *Id.*

The parties subsequently participated in a lengthy mediation that resulted in the Consent Decree. All parties agreed that it was in their best interests, the "public interest of California," and the broader public interest, "to fully and finally resolve this matter on mutually agreeable terms without trial of any issues of fact or law raised in any of the Plaintiffs' complaints, and without resort to protracted litigation." (Dkt. 203 at 2). There was "no adjudication" of any claims raised. *Id.*

Pursuant to the Decree, LSAC agreed to pay a total of **$8,730,000** to amicably resolve the plaintiffs' claims. (Dkt. 203 at ¶¶ 11-18, 21). It is undisputed that LSAC has complied fully with these monetary obligations, which were among the Decree's core terms.

LSAC agreed to stop annotating accommodated test scores (*id*. at ¶ 9).[3] It has done so.

LSAC agreed to prepare detailed reports regarding all accommodation requests that it receives (*id*. at ¶ 23). It has provided those reports, which take hundreds of hours of staff time to prepare for each test administration.

LSAC agreed to significantly revise its accommodation policies, and it has done so. Some of the revised policies implement the Decree (*e.g.*, *id*. at ¶¶ 5, 6), while others implement recommendations made by the "Best Practices" panel after the Decree was entered.

The substantive and procedural requirements imposed on LSAC far exceed industry norms. They are not evidence-based and they are unworkable. As a consequence, they often disserve the interests of disabled examinees by resulting in the provision of extra testing time and other accommodations to individuals who do not qualify under the ADA for accommodations. Unwarranted accommodations can enable test-takers to inappropriately improve inflate their LSAT scores, thereby obtaining an unfair advantage relative to other examinees, including disabled test-takers for whom accommodations appropriately level the playing field.[4]

For example, the Panel imposed multiple layers of review if LSAC does not conclude that an examinee is entitled to every accommodation he requested, and required that decisions be provided on an expedited basis at each stage (in some instances, in as little as two days). If a candidate appeals LSAC's denial of any part of his request, up to ***six professionals*** might have to review the candidate's file – two internal professionals who work for LSAC, and four external professionals retained by LSAC as independent consultants.

In addition, per the panel report, an external professional can never direct that a candidate

[3] Under LSAC's score-annotation policy, LSAC provided a letter to schools when they received a score report for an individual who tested with extra time. The letter noted (correctly) that scores earned with extra testing time do not have the same meaning as scores earned with standard time, encouraged schools to interpret such scores with flexibility, and reminded schools that "civil rights statutes prohibit discrimination against persons with disabilities."

[4] Numerous professionals submitted letters to the Court explaining why practices recommended by the panel are not "best practices" and would likely harm individuals whom the ADA was intended to protect. *See* Dkt. 222, 230, 232.

is to receive fewer accommodations than LSAC approved, even if the professional believes that no accommodations were warranted, and each external professional is bound by any decision of a prior professional to approve an accommodation. This "one-way ratchet effect" involving up to six professional reviewers, to be conducted in unreasonably compressed time frames, creates enormous pressure on LSAC to grant all requested accommodations regardless of whether the decision reflects a genuine and properly documented need.

LSAC appealed certain panel recommendations to the Court, as it was entitled to do under the Decree. The Court upheld "most of the Panel's Report." (Dkt. 245 at 2).

Although the Court rejected most of LSAC's legal challenges, it remains true that none of the panel's core recommendations were evidence-based or consistent with the practices of other testing entities. Further, the panel did not provide a framework for how LSAC would reasonably operationalize the panel recommendations as it goes about the daily business of processing accommodation requests. The panel did not anticipate numerous issues that have arisen from its recommendations. Likewise, the panel appears not to have contemplated the massive increase in accommodation requests that LSAC has experienced, now that examinees realize how easy it has become to get extra time and other accommodations on the LSAT. LSAC has therefore had to establish procedures that allow the accommodation process to function in an environment of ever-increasing numbers of requests, in a manner consistent with the Decree and the panel's recommendations. It is certain of those procedures that DFEH challenges.

STATEMENT OF FACTS

I. LSAC And Requests For Accommodations On The LSAT

LSAC is a non-profit association whose members consist of law schools in the U.S. and Canada. LSAC develops and administers the LSAT examination. The LSAT is administered under standardized conditions, so as to provide an objective measure of an examinee's abilities that can be reliably compared to scores achieved by other law school applicants.[5]

[5] "[S]tandardization helps to ensure that all test takers have the same opportunity to demonstrate their competencies," and that the scores achieved by one test taker can reliably be compared to the scores of other examinees. *Standards for Educational & Psychological Testing* at 111 (2014).

If an examinee has a mental or physical impairment that substantially limits a relevant major life activity, the examinee is entitled under the ADA to receive reasonable accommodations that will allow the examinee to test in an accessible manner. 42 U.S.C. § 12189. Individuals request accommodations based upon a range of physical and mental impairments, but most rely upon a diagnosis of a learning disability or ADHD. Dempsey Decl. ¶ 4.

Additional testing time is the most commonly requested accommodation. Extra testing time, however, can affect the resulting scores. Studies have shown that LSAT scores earned with extra time are not comparable to scores earned under standard conditions and tend to over-predict performance in the first year of law school.

Because of the impact that accommodations can have on scores, testing entities routinely have policies in place that are intended to protect the integrity of the resulting scores, while respecting the legitimate concerns of *all* relevant parties: *i.e.*, examinees with disabilities who need accommodations to test on a level playing field, disabled and non-disabled examinees who would not want other examinees to receive an inappropriate advantage by getting unwarranted accommodations, and the entities that rely upon the scores to provide reliable information that assists in evaluating applicants for admission, licensure or certification.[6]

LSAC had such policies in place when the underlying complaints were filed in this case. Although it denied the allegations, LSAC found itself confronting years of litigation, enormous expense to defend the claims, and operational disruptions as staff were diverted from processing requests and implementing accommodations. LSAC also confronted a potentially crippling monetary judgment (in addition to fee-shifting). LSAC therefore decided to settle. It did so to "fully and finally resolve" the matter without "protracted litigation." (Dkt. 203 at 2).

In the three-plus years that the Decree has been in effect, LSAC and its staff have endeavored in good faith to fully implement its terms. LSAC has retained additional staff to

[6] *See, e.g., Powell v. Nat'l Bd. of Med. Exam'rs,* 364 F.3d 79, 88-89 (2d Cir. 2004) (noting that NBME has "a duty to ensure that its examination is fairly administered to all those taking it," and that its accommodation policies are intended to ensure that "individuals with *bona fide* disabilities receive accommodations, and that those without disabilities do not receive accommodations that they are not entitled to, and which could provide them with an unfair advantage when taking the ... examination.").

assist with the Decree's extensive data collection and reporting requirements, it has engaged additional external professionals to assist in reviewing requests, it has conducted annual training, and it has put procedures in place that attempt to implement in a reasonable manner the unworkable practices and deadlines imposed under the "Best Practices" report. *See, e.g.*, Dempsey Decl. ¶¶ 12, 34-42; Decl. of C. Mew at Ex P, filed herewith) ("Mew Decl.").

The operational challenges confronting LSAC would have been significant even if the number of accommodation requests post-Decree had remained consistent with pre-Decree levels. That has not happened. Although test volume has remained stable (approximately 101,000 to 110,000 exams administered each testing year), the number of accommodation requests has increased by **over 350%** since the test year that ended shortly before the Decree was entered. LSAC received approximately 1,475 requests in the June 2013-February 2014 test year. It will likely receive more than **5,265 requests** in the current test year.[7] In the past two years alone, the number of requests submitted to LSAC has almost doubled.[8] *See* Dempsey Decl. ¶¶ 7-10.

II. The ADA Monitor Under the Consent Decree

Pursuant to the Decree, the parties "mutually agreed" upon an "independent ADA Monitor" whose purpose is to "assist the United States, the DFEH, and the Court in evaluating LSAC's compliance with the Decree." (Dkt. 203 at ¶ 24). The Decree states that no party "shall

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[7] The enormous increase in the number of accommodation requests and the number of requests granted by LSAC has had a significant financial impact. For example, for the test year just prior to the Decree's entry, LSAC incurred roughly $96,000 in costs for test supervisors, test facility fees, administrative services, and outside disability consultants, and roughly $25,750 in costs to ship materials needed for accommodated administrations. For the comparable four administrations in 2016/2017, those costs rose, respectively, to roughly $567,350 and $137,450. *See* Dempsey Decl. ¶ 11. These cost increases dwarf DOJ's estimate, in 2014, of how much additional cost testing entities would incur following enactment of the ADA Amendments Act. *See* 79 Fed. Reg. 4839, 4853-57 (Jan. 30, 2014) (estimating that the **total annual cost** of having to provide accommodations to more test takers would range from roughly $850 for "small national testing entities" to "approximately $11,818 per medium/large national testing center establishment").

[8] Candidates with a diagnosis of ADHD "overwhelmingly comprised" the category with the most accommodation requests during the Consent Decree period. *See* LSAC Technical Report 17-03, "Accommodated Test-Taker Trends and Performance," at 2 (Sept. 2017) (www.lsac.org/docs/default-source/research-(lsac-resources)/tr-17-03.pdf.). During the Decree's term, the vast majority of these individuals have been granted accommodations on the LSAT. DOJ has noted elsewhere, however, that a significant number of individuals who claim to have ADHD do not, in fact, qualify as disabled under the ADA. 79 Fed. Reg. at 4852 n.11.

The recent LSAT study found that test takers who received extra testing time on the LSAT "had higher average LSAT scores in 18 of the 20 test administrations" covered in the study "compared to the Non-accommodated group." *See* LSAC Technical Report 17-03 at 2.

have any supervisory authority" over the Monitor's activities or "interfere with the independent functions" of the Monitor, *id*., and calls upon the Monitor to conduct three audits of LSAC's compliance with the Decree, *id*. at ¶ 25. The audits would "address LSAC's compliance with the reporting requirements contained in Paragraphs 8 and 23 and LSAC's implementation of the Best Practices discussed in Paragraph 8 [of the Decree]." *Id.*

With the agreement of all parties, Arthur Coleman was retained to serve as the ADA Monitor. An Honors graduate from Duke University's School of Law, Mr. Coleman served for over six years in the U.S. Department of Education's Office for Civil Rights during the Clinton administration, including three years as a Deputy Assistant Secretary. Mew Decl. Ex. Q. In those positions, he had responsibility for developing federal civil rights policies and enforcing federal laws in a range of areas, including standards reform, test use, students with disabilities, affirmative action, sexual and racial harassment, and gender equity. *Id*. He has testified before the U.S. Senate and the U.S. Commission on Civil Rights, he has served as an adjunct professor at two law schools, and he has spoken and published extensively on issues involving education and testing. *Id.*

On February 16, 2017, Mr. Coleman released a report that combined the first and second audits called for under the Decree. *See id.* Ex. R. Based upon his review of accommodation files onsite at LSAC, reports that LSAC provided in accordance with the Decree, and discussions with LSAC personnel, Mr. Coleman concluded that LSAC has "substantially complied with all provisions" of the Decree subject to his review. *Id*. at 4. He has one more audit to conduct, at the end of the Decree's term in May 2018. (Dkt. 203 at ¶ 25).

III. Decree Provisions Regarding Resolution of Post-Decree Disputes

The Decree anticipated that disputes might arise regarding its interpretation and implementation. It states (in ¶ 31) that "a good faith effort shall be made by the Parties" to resolve any such dispute, using the procedure set forth in the Decree. Under that procedure, the parties are required to "meet and confer by telephone and attempt to resolve the issue informally." *Id*. If those efforts do not succeed, any party may "pursue the issue with the Court." *Id*. The Decree further states that, in "any enforcement motion brought by any Party, no Party will object

to the admissibility, on hearsay grounds, of the ADA Monitor's Audit Reports." *Id.*

IV. LSAC Actions Challenged In DFEH'S Contempt Motion

DFEH's Contempt Motion centers around LSAC's use of so-called "50% emails" when processing certain accommodation requests, starting with the February 2016 administration of the LSAT. Without conceding any previous lack of compliance, LSAC voluntarily stopped using "50% emails" as of the December 2017 administration of the LSAT. Dempsey Decl. ¶ 53. The "50% email" is no longer used. Thus, none of the Decree violations and harms allegedly resulting from this prior form of communication are occurring now or will occur going forward.

The term "50% email" is a short-hand reference that LSAC used internally to identify letters that LSAC emailed to candidates whose documentation, based on a preliminary review, supported some but not all of the accommodations they requested. Some of these candidates had received accommodations on another standardized test, thereby entitling them to receive the same accommodations on the LSAT under Paragraph 5(a) of the Decree, but the candidate asked for additional accommodations. For example, a candidate might have received 50% extra testing time on the SAT college admissions test, but then asked for 100% extra time on the LSAT. In response to such a request, LSAC would send a "50% email." The email would say that LSAC had confirmed that the candidate was eligible for 50% extra testing time but could not determine whether the candidate was entitled to 100% extra time. LSAC would then give the candidate the option of revising his request to ask for the accommodations that his documentation supported, or submitting additional documentation that would support the additional time requested. Some but not all of the 50% emails also stated that, if the candidate did not reply to the email (thereby enabling LSAC to confirm the approved accommodations and make the necessary arrangements), the candidate would remain registered to take the LSAT for the upcoming administration as a standard test taker, with no accommodations.[9] *See* Dempsey Decl. ¶¶ 54-60 and Ex. R.

[9] LSAC began using 50% emails with the February 2016 LSAT. The emails used for that test were typically worded along the following lines: "Based on a preliminary screening of your request for accommodations on the February 6, 2016 LSAT, we are prepared to approve you for [A, B and C accommodations]. However, we are unable to process your request for [D] because the documentation necessary to support this request was not submitted. You have two options: 1. You can revise your request and accept the accommodations described above for which you are currently eligible, **or** 2. You can pursue your request for [D accommodation] by submitting an appropriately documented statement of your need. The statement of need must be received [by] … January [XX], 2016. Please indicate which

Many of the "50% emails" sent by LSAC, however, did not involve Paragraph 5(a) candidates. Instead, they were candidates whose documentation supported some accommodations (often, the 50% extra time that the panel had concluded is sufficient for most examinees),[10] but they asked for more extra time or requested additional accommodations (*e.g.*, stop-the-clock breaks). These candidates were not automatically entitled to receive any accommodations under Paragraph 5(a) (because they had not previously received accommodations on a standardized test). These candidates were also sent "50% emails," for certain administrations of the LSAT. *See* Dempsey Decl. ¶¶ 54-58.

The fact that a candidate received a 50% email does not mean that he was not approved for accommodations. To the contrary, many recipients received everything they requested. Others informed LSAC that the accommodations supported by their initial documentation were acceptable, often thanking LSAC for its communication, and they were approved for those accommodations. *See* Dempsey Decl. ¶¶ 63-64 and Exs. T & U. DFEH's suggestion that examinees felt "pressured" by LSAC's 50% email, or viewed the email as an "ultimatum," DFEH Mot. at 1-3, may be supported by the three examinee declarations that DFEH submitted, but it is not supported by the broader universe of communications that LSAC received in response to 50% emails. *See* Dempsey Decl. ¶ 67. LSAC could perhaps have worded the emails more artfully, but there was no intent to subvert the Decree or deny anyone accommodations to which they were entitled, and certainly no attempt to pressure examinees. *Id.* ¶¶ 66, 82.

The bulk of the non-compliance allegations in DFEH's motion are based upon LSAC's use of the "50% email." The alleged lack of a written statement of reasons for a denial, lack of independent review of denials, and frustration of candidates' ability to appeal a partial denial, are all derivative of the allegations regarding the "50% email."

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option you intend to pursue by replying to this email." The additional language objected to in DFEH's motion (at 1-2) was not added until the June 2017 administration. *See* Dempsey Decl. ¶ 60-61 and Ex. R.

[10] For some candidates, "50% email" was a misnomer and did not reflect what LSAC had actually approved. For example, LSAC may have approved 100% extra testing time for a candidate because that was what was previously accorded on another standardized test, but the candidate was seeking 150% extra testing time on the LSAT.

V. LSAC Did Not Attempt To Hide Its Actions

DFEH suggests that LSAC used white-out on tracking forms to prevent DFEH from discovering LSAC's alleged violations. *See* DFEH Mot. at 2, 15, 19. There is no substance to that unfounded allegation. *See generally* Dempsey Decl. ¶¶ 75-82.

The Decree requires LSAC to track and report voluminous amounts of information. Forms are used to capture that information. The individuals who enter the required data into Excel spreadsheets are often temporary staff, brought on to do this additional work required by the Decree. To make sure that these staff members capture accurate information for the spreadsheets, LSAC's core accommodations personnel use often use white-out to make changes on the tracking forms. *Id*. ¶¶ 78-79.

For example, white-out is used to correct misspelled candidate names or dates that have been entered inaccurately. It has also been used to increase the amount of testing time that a candidate has ultimately been approved for, where a lower amount had been recorded previously. Likewise, if a given candidate revised his initial request to change the accommodations requested – in response to a 50% email or for some other reason – LSAC accommodations staff would reflect the change on the tracking form in the candidate's file by whiting out the accommodation that had initially been requested and then writing in the revised request. This ensured that the tracking form had updated and accurate information when it was used by staff members to enter data required to be reported under the Decree. *Id*. The tracking form remained in the candidate file, clearly showing that white-out had been used, and so did the candidate's accommodations request form and any "50% email," showing what the candidate had initially asked LSAC to provide. *Id*. ¶¶ 80-81. Thus, when DFEH, DOJ or the ADA Monitor reviewed a given candidate's file, they had a complete and accurate history of that candidate's request and how it had been handled by LSAC. There was no effort to conceal anything. *Id*. ¶ 82.

VI. LSAC's Discontinuation Of "50% Emails"

LSAC stopped using 50% emails during its processing of accommodation requests for the December 2017 LSAT. Dempsey Decl. ¶ 53. The change was made in early to mid-October 2017, before DFEH filed its Contempt Motion. When LSAC made the change, it had already

begun processing accommodation requests for the next test. Approximately 40 individuals who requested accommodations on the December 2017 LSAT received a "50% email," *id.* – out of the 1,640+ individuals who requested accommodations on that test. *Id.* Upon deciding to stop using 50% emails, LSAC approved all accommodations requested by these 40 individuals regardless of how, or whether, they had responded to LSAC's 50% email, with the exception of 3 individuals who were inadvertently overlooked. Those three individuals responded to LSAC's 50% by choosing to test with the accommodations that were supported by their documentation, and LSAC approved those accommodations. *See id.*

VII. Illustration Of The Panel's Review And Appeal Procedures

To give the Court a sense of how the Panel's review and appeal processes operate with respect to an actual candidate, LSAC provides the following example using a request for accommodations that LSAC received for the December 2017 LSAT.[11] This candidate had been diagnosed at a relatively late point in his educational progression as having an Attention Deficit Hyperactivity Disorder (ADHD) and a Learning Disability Not Otherwise Specified. Dempsey Decl. ¶¶ 15, 24. Although he had not received accommodations on any other standardized admissions test, *id,* he asked LSAC to provide 100% additional testing time and numerous non-time accommodations:

> **Step One --** LSAC reviewed the request and approved almost all of the requested accommodations. Dempsey Decl. ¶ 24 & Ex. E. LSAC approved (i) 100% extra time, (ii) additional break time, (iii) private testing room, (iv) snacks and drinks, (v) ear plugs, (vi) scratch paper, (vii) mechanical pencil, (viii) medication, (ix) backpack and (x) white noise machine. *Id*. at 1-2. The only accommodation that LSAC staff believed had not been supported was the request that he not have to take the experimental section of the test (also known as the variable section), which LSAC administers to pre-test questions. *Id*. at 2.
>
> **Step Two --** Before communicating its decision to the candidate, LSAC referred the candidate's entire file to an external professional for review. *Id.* at 1. By the terms imposed by the "Best Practices" panel, the professional could not reduce the accommodations already approved by LSAC, even if he concluded that the candidate had not shown that he is disabled or needed any accommodations. The professional could only address LSAC's denial of the candidate's request to be exempted from the experimental section. Per panel requirements, the external professional had two days

[11] Here and elsewhere, LSAC has redacted personally identifiable candidate information.

to complete his review and provide written findings. *Id.*

The external professional agreed that the candidate had not shown a need for the additional accommodation. He also noted that LSAC appeared to be giving the candidate "far more time" than his "condition warrants," and that double testing time had been shown in research studies to "significantly over-compensate[] students with ADHD." *See* Dempsey Decl. Ex. F. Under the procedure imposed by the Panel, however, the external professional had no authority to override LSAC's decision.

Step Three -- Because this professional agreed that the additional accommodation was unwarranted, LSAC was required under the panel's report to seek the opinion of another external professional. On October 10, 2017, LSAC forwarded the first external professional's report to a second independent expert for review. *See* Dempsey Decl. Ex. G.

The second external professional agreed that no justification had been shown for exempting the candidate from the experimental section of the test. Dempsey Decl. Ex. H. at 1. In doing so, he noted that there was "insufficient evidence to establish the presence of the learning disability and ADHD that [the candidate] reports," or that the candidate "requires any extended time to access the LSAT." *Id.* Under the panel procedures, however, he could only make a recommendation regarding the single denied accommodation, even though he saw no basis for any accommodations.

Step Four -- Only after its own two internal professionals and two external professionals had reviewed the candidate's documentation did LSAC communicate with the candidate. LSAC's letter informed the candidate that he had been approved to receive almost all of his requested accommodations, explained why LSAC had decided to deny one of his requested accommodations, and described the manner and deadlines for filing an appeal. *See* Dempsey Decl. Ex. I.

Step Five -- The candidate appealed LSAC's decision. Per panel recommendations, this triggered a requirement that LSAC send the file out for review by at least one and potentially two additional external experts (again subject to very short deadlines).

The first additional professional concurred with LSAC's decision and the decision of the two other external professionals that there was no basis for the additional accommodation. In doing so, he noted that the "ADHD diagnosis was not adequately substantiated" and characterized the accommodations that LSAC had approved as "numerous and generous." Dempsey Decl. Ex. L.

Step Six – LSAC then sent the candidate's file to another external professional. This professional also concluded that there was no basis for exempting the applicant from the experimental section of the test, noting in the process that the approved accommodations were "extremely generous" given the candidate's supporting documentation. Dempsey Decl. Ex. M.

Step Seven -- On October 23, 2017, LSAC informed the candidate of the results of the appeal. Dempsey Decl. Ex. N.

STANDARD OF REVIEW

DFEH seeks a finding of civil contempt, DFEH Mot. at 17-22; or Decree modification, *id*. at 23-25; or an order to show cause why LSAC should not be held in contempt, *id*. at 25.[12]

I. Legal Standard for Civil Contempt

"A court may wield its civil contempt powers for two separate and independent purposes: (1) 'to coerce the defendant into compliance with the court's order;' and (2) 'to compensate the complainant for losses sustained.'" *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016). Thus, a finding of civil contempt should be entered only when the requested relief would "coerce obedience to a court order" with regard to actions required by the order but not yet taken, and/or to compensate the moving party for "'actual losses'" it has sustained as the result of the alleged past violations of the court's order. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986).

The moving party in a civil contempt proceeding has the burden of showing by "clear and convincing evidence" that the alleged contemnor '"violated a specific and definite order of the court."' *Henderson v. Lincoln Square, LLC,* No. 12-1938-JCS, 2015 WL 1885497, *3 (N.D. Cal. April 24, 2015) (citation omitted). A finding of willfulness is not required, *id*., but "a person should not be held in contempt if his action 'appears to be based on a good faith and reasonable interpretation of the court's order,'" *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (citation omitted). A court cannot find a defendant in contempt for failing to comply with a consent decree where the defendant has been "reasonably diligent in attempting to accomplish what was agreed to in the Decree," *Thompson v. Enomoto*, 542 F. Supp. 768, 769 (N.D. Cal. 1982), and "[a]ll reasonable doubts must be resolved in favor of the non-moving party," *U.S. v. State of Oregon*, 782 F. Supp. 502, 507 (D. Ore. 1991).

"Substantial compliance" is "a defense to an action for civil contempt." *Henderson*, 2105 WL 1885497 at *3. If the non-moving party shows that it "took all reasonable steps to comply,

[12] *See, e.g., Hawecker v. Sorenson*, 2013 WL 3805146, *3 (E.D. Cal. 2013) ("Although the Government seeks the issuance of civil contempt sanctions by and through its motion, the entry of sanctions is not appropriate at this time…. In general, proceedings for civil contempt 'are instituted by the issuance for an Order to Show Cause …why a contempt citation should not issue and notice of a date for the hearing.") (citations omitted).

technical or inadvertent violations of the order will not support a finding of civil contempt." *Id*.

There is no "precise formula" for evaluating substantial compliance. *Labor/Cmt'y Strategy Ctr. v. L.A. Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1122 (9th Cir. 2009). Instead, the court takes a "holistic view" of all "available information" in determining whether a party's overall compliance with a decree "was substantial, notwithstanding some minimal level of noncompliance." *Id*. In the process, the court must give "due weight" to "the many ways [a party] met or exceeded its obligations" under the decree. *Id*. at 1121.

II. Legal Standard for Modifying a Consent Decree

"Because the decree contains an express expiration date for the court's retention of jurisdiction, any change to that date entails a modification of the decree." *Labor/Cmt'y Strategy Center*, 564 F.3d at 1120. Modification is typically requested under Fed. R. Civ. P. 60(b).

According to DFEH, "the appropriate subdivision of Rule 60(b) for modification of a consent decree is either subdivision (5), which authorizes relief where 'applying [the judgment] prospectively is no longer equitable,' or subdivision (6), which authorizes relief for 'any other reason that justifies relief.'" DFEH Mot. at 23. Although its argument for modification is sparse, *see id*. at 23-24, DFEH appears to be relying on Rule 60(b)(5).

The party seeking a modification under Rule 60(b)(5) "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992). If this "heavy burden" is met, the "court must then determine whether the proposed modification is suitably tailored to resolve the problems created by the changed factual or legal conditions." *U.S. v. Asarco Inc*., 430 F.3d 972, 979–80 (9th Cir. 2005). "The failure of substantial compliance with the terms of a decree can qualify as a significant change in circumstances that would justify the decree's temporal extension," but any instances of noncompliance must be viewed in a "holistic" manner and with due regard for whether other requirements of the decree have been met. *Labor/Cmt'y Strategy Center*, 564 F.3d at 122-23 (refusing to extend the term of a decree where the alleged instances of noncompliance were "nowhere close to the near total noncompliance in cases in which courts concluded that extensions of the consent decree were warranted").

Modification of a court judgment is an "extraordinary remedy." *NLRB v. Harris Teeter Supermkts,* 215 F.3d 32, 35 (D.C. Cir. 2000); *see also S.E.C. v. Worthen*, 98 F.3d 480, 482 (9th Cir. 1996) (modification of a permanent injunction under Rule 60(b)(5) is "'extraordinary relief, requiring extraordinary circumstances'") (citation omitted). This is particularly true when the judgment is a consent decree, because modification allows a party "to escape commitments voluntarily made and solemnized by a court decree." *Harris Teeter*, 215 F.3d at 35.

ARGUMENT

I. DFEF's Contempt Motion Should Be Denied

A. LSAC Has Already Addressed The Alleged Decree Violations

A finding of contempt is not warranted here because it would not serve either of the "two separate and independent purposes" for which courts wield their contempt power: "(1) 'to coerce the defendant into compliance with the court's order;' and (2) 'to compensate the complainant for losses sustained.'" *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016).

LSAC has stopped using 50% emails. Dempsey Decl. ¶ 53.[13] To the extent any of DFEH's alleged violations are not linked to the 50% email, such as certain of the alleged reporting deficiencies, LSAC voluntarily changed its practices, or provided supplemental reports, following participation in the informal dispute-resolution process set forth in the Decree. *See id.* at ¶¶ 48-52. Thus, a finding of contempt is not needed to compel future compliance, even if one accepts DFEH's argument that LSAC's past actions violated the Decree. *See Shell Offshore,* 815 F.3d at 630 (overturning the lower court's civil contempt order because "a coercive sanction would no longer serve any purpose").

B. DFEH Has Not Sustained Any Losses

Nor is a finding of contempt warranted as a basis for compensating DFEH for losses sustained because of alleged past violations. Putting aside its request for reimbursement of $3,000 in airfare costs incurred to review documents at LSAC's offices (where such review was

[13] DFEH's motion questions LSAC's representation that it has stopped using the "50% email." DFEH Mot. at 17. However, that skepticism is not grounded in fact. LSAC voluntarily discontinued its use of the 50% emails beginning last October. *See* Dempsey Decl. ¶ 53.

required to take place under the Decree), DFEH is not seeking relief for any losses it claims to have sustained because of the alleged violations. Nor is it seeking compensation for any losses sustained by individuals who received 50% emails.

Instead, DFEH argues that the Court should "extend the Decree nationwide for two years (to May 28, 2020), as compensation for the two years during which LSAC violated the Court's Orders…." DFEH Mot. at 1. That is not the type of "compensation" that can support an exercise of a court's civil contempt power. The requested relief does not monetarily compensate anyone for losses sustained as a result of the alleged violations. *See Shell Offshore*, 815 F.3d at 629 ("Because civil compensatory sanctions are remedial, they typically take the form of unconditional monetary sanctions….").

C. DFEH Has Not Shown Any Violation Of A Specific And Definite Court Order

DFEH's request for a contempt finding also fails because, even if the relief requested by DFEH warranted an exercise of the Court's contempt power, DFEH has not presented clear and convincing evidence that LSAC violated a specific and definite court order.

DFEH asserts that three "court orders" are relevant here: the Consent Decree, the Final Report of the "Best Practices" panel (Dkt. 220), and the Court's opinion ruling upon LSAC's challenges to the panel's report. DFEH Mot. at 1 n.1. It then proceeds to argue that LSAC violated "the Court's orders" without, in many instances, identifying which purported "order" was violated or quoting any "specific and definite" language.

LSAC believes that only one order should be considered in evaluating DFEH's contempt motion, the Consent Decree. The panel report was not a court order and it is not clear enough in any event to support a finding that LSAC violated any "specific and definite" requirements found in that report. *Cf. Gates v. Shinn*, 98 F.3d 463, 468-69 (9th Cir. 1996) ("[T]hese requirements for specificity within the four corners of the consent decree require a distinction between the specificity of the consent decree, and the specificity of the mediator's recommendations. The consent decree itself, not merely the mediator's subsequent directives, must command the prison officials to provide the level of psychiatric care at issue…."). The Court's opinion on LSAC's challenges to the panel's report was a court order, but it did not impose any independent

obligations on LSAC. (Dkt. 245). Instead, the order "modified," "invalidated," or otherwise explained various provisions in the panel's report, and refused to invalidate other provisions in the report. (Dkt. 245 at 26-27).

Having said this, the outcome should be the same even if the Court adopts DFEH's view of the relevant court "order." With one or two arguable exceptions, which LSAC has already addressed following the meet-and-confer dispute resolution process called for by the Decree, DFEH has not shown, and cannot show, by clear and convincing evidence, that LSAC violated any specific and definite obligation under any of the "orders" relied upon by DFEH.

DFEH left no stone unturned in trying to manufacture alleged violations of the Decree and panel recommendations – so much so that, when it got to the part of its brief that purportedly sets forth how "LSAC Violated Specific And Definite Orders of this Court," DFEH said that the violations were "too numerous to repeat" and instead provided a "few examples." DFEH Mot. at 18-19. LSAC responds in kind below. *See also* Mew Decl. Exs. G, H, I, K & L (letters to Plaintiffs during meet-and-confer process, addressing alleged violations).

1. Alleged Violations of Paragraph 5(a) by Sending 50% Emails

DFEH asserts that the 50% emails that LSAC sent to certain candidates violated Paragraph 5(a) of the Decree, which "required that prior approved testing accommodations be provided '*without further inquiry* or request for additional documentation.'" DFEH Mot. at 19 (quoting Decree ¶ 5(a) (emphasis supplied by DFEH). That is not the case.

The actual language in Paragraph 5(a) provides, in relevant part, as follows: "Upon receipt of … proof [of prior testing accommodations] in accordance with LSAC's established deadlines, without further inquiry or request for additional documentation, LSAC shall grant those previously approved testing accommodations, or the equivalent testing accommodation offered on the LSAT…." (Dkt. 203 at ¶ 5(a)). The 50% emails did not violate this requirement.

True, LSAC did not use the word "granted" in its emails. Instead, the emails told candidates that LSAC was "prepared to approve," were "currently eligible," or had provided the required documentation for the accommodations they received previously. Dempsey Decl. ¶ 60 & Ex. R. The emails did not tell candidates they had to provide additional records to receive the

accommodations they previously received, or make further inquiry regarding those accommodations. Instead, the emails reported on LSAC's preliminary findings and noted in a timely and efficient manner that certain *other* accommodations requested by the candidates had not yet been adequately supported. The emails then asked the candidates to reply to LSAC's email so that LSAC would know how the candidates wanted to proceed: did they want to receive only the accommodations that their documentation supported (*i.e.*, the accommodations received on a prior test), or would they like to submit additional documentation in support of the other accommodations they were seeking?

To the best of LSAC's knowledge, no examinee ever said that he or she felt threatened or intimidated by LSAC's 50% email. Dempsey Decl. ¶ 67. To the contrary, most simply responded to the email as they would to any other communication that occurs as part of the interactive process contemplated under the ADA and expressly called for in the panel report. *See id.* ¶¶ 63-64 & Exs. T & U; *see also id.*, Ex. A at 15. In all events, however, LSAC is no longer using the challenged 50% emails.

2. Other Alleged Violations Attributed to Use of 50% Emails

DFEH asserts that LSAC's use of 50% emails violated "Issue 2" of the panel report, which calls on LSAC to presumptively grant certain non-time accommodations. *See* DFEH Mot. 4. According to DFEH, the Panel instructed that, "if the candidate provides the documentation recommended by the Panel, LSAC must presumptively grant the requested accommodation 'without requiring the candidate to provide additional information.'" *Id.* However, DFEH's own statement of what Issue 2 purportedly requires shows that a 50% email cannot be viewed as violating Issue 2: LSAC alerted the candidate to the need for additional documentation to support one or more of his accommodations because the candidate had *not* provided the documentation that the Panel had recommended as appropriate for such accommodation requests. *See also* Dkt. 245 (stating that panel recommendation in Issue 2 does not "negat[e] the requirement that a candidate … show what accommodation is appropriate by, for example, submitting evidence of past testing accommodations or a 'reasonable explanation for each testing accommodation as it relates to the candidate's disability.'") (quoting panel report).

DFEH asserts that the 50% email violated "Issue 4" in the panel report, which requires that all requests not granted in full "must be reviewed by one or two outside consultants." DFEH Mot. at 4. However, the emails make clear that they reflected LSAC's "preliminary" determination, not a final decision by LSAC staff. Therefore, LSAC was not required at that point to send the candidate's request out for review by external professionals. The same analysis applies with respect to DFEH's assertion that recipients of 50% emails were deprived of their right to pursue an appeal involving one and possibly two additional external professionals, in violation of panel Issue 8. *See id.* at 8. LSAC's determination was preliminary. When a final decision was subsequently made, candidates retained their appeal rights.

DFEH asserts that the 50% emails violated the panel's requirement that LSAC engage "in cooperative and interactive communications with candidates seeking testing accommodation." DFEH Mot. at 5-6. Just the opposite is true, however. The 50% emails evidence precisely the sort of cooperative and interactive communication that was contemplated. DFEH's contrary arguments are based on its assertion that the three examinees who provided declarations to DFEH felt "pressured" by the emails. *Id.* at 6. Those assertions, however, are belied by the declarant's actual communications with LSAC, *see* Dempsey Decl. ¶¶ 83-109, and are at odds with how other examinees responded to the emails, *see id.* ¶¶ 63-64 and Exs. T & U.

DFEH asserts that the 50% emails violated a panel recommendation that LSAT '"not attempt to alter the request for an extended testing time accommodation.'" DFEH Mot. at 7. However, the emails do not reflect any attempt to "alter" a candidate's request. To the extent that the emails involved a time accommodation, they simply told the candidate what amount of extra time was supported and what amount of time was not. They left entirely up to the candidate whether he was content with the amount of time his documentation supported or wanted he wanted to pursue additional time by submitting missing documentation.

3. Alleged Reporting Violation: "No Decision" Designation

DFEH asserts that LSAC violated the Decree when it reported that it made "no decision" on certain candidate requests. DFEH Mot. at 9-10. As a general matter, LSAC reports that it made "no decision" on a candidate request when: (a) the request was received after the deadline;

(b) the candidate had not registered for the test; or (c) the request lacked the necessary baseline documentation. *See* Dempsey Decl. ¶¶ 43-47. In these instances, the request is not approved or denied, because LSAC has not made a substantive decision on the request.

According to DFEH, LSAC can only report the following actions on any given request: granted in full, denied in full, or denied in part. DFEH Mot. at 9-10. The Decree, however, requires LSAC to track "whether" a request was "granted in full or denied in full or denied in part." (Dkt. 203 ¶ 8(a)(k)). Reporting that "no decision" was made on a request complies with this requirement. It reports that a request was neither granted or denied. DFEH's reliance on the panel report as establishing a supplemental reporting requirement, *see* DFEH Mot. at 10, is misplaced. The panel was not asked to address reporting requirements and did not purport to do so in the discussion cited by DFEH. (Dkt. 220-2 at 21 n.11)

DFEH also fails to note that it has been aware of LSAC's practice of reporting certain requests as "no decision" since the outset of the Decree, and that this issue was specifically addressed between the parties in the Decree's first year. In a March 6, 2015 letter, DOJ and DFEH expressed concern that LSAC's September and December 2014 reports did not list any decision for a large number of candidates. *See* Mew Decl. Ex. A. LSAC responded that the Decree does not require LSAC to report decisions if no decision was made on the request: "LSAC is not obligated to provide data for candidates for whom no decision has been made either because the request was late, because a form was missing, or because the candidate was not registered for the test." *See* Mew Decl. Ex. B at 18, C at 4 (Apr. 3, 2015 letters). DOJ and DFEH disagreed with LSAC's interpretation and asserted that LSAC was effectively "denying" a request even where no decision is made. Mew Decl. Ex. D at 5.

The parties subsequently held a meet-and-confer call. Following this call, DOJ and DFEH agreed to receive supplemental reports from LSAC for the September and December 2014 tests. *See* Mew Decl. Ex. E. They also confirmed "that this issue has been resolved in the Feb. 2015 report." *Id.* The February 2015 report listed "no decision" as the outcome of some accommodation requests. *See* Mew Decl. ¶ 18. LSAC sent supplemental September and December 2014 reports on May 5, 2015, which likewise reported "no decision" for many

requests. *See id.* ¶ 17. DFEH and DOJ raised no objections. All of LSAC's reports since that time reported "no decision" for many candidate requests, with a reason provided (*e.g.*, "late," "not registered," "does not meet documentation guidelines," "file incomplete"), *see* Mew Decl. ¶¶ 19-28, and DFEH and DOJ raised no further objection to this practice for almost two years. LSAC's reporting is consistent with the Decree and is the most accurate description of the action taken by LSAC with respect to the "no decision" requests.

4. Other Alleged Reporting Violations

DFEH argues that LSAC failed to report when it requested additional documentation from candidates. *See* DFEH Mot. at 10. DFEH and LSAC, however, have different interpretations of what it means to request "additional" documentation. LSAC believes that a request for additional documentation is made within the meaning of the Decree when a candidate has fulfilled his or her threshold documentation requirements under the Decree and "Best Practices" recommendations (*e.g*, the Candidate Form or evidence of disability when required), and LSAC tells the candidate that supplemental documentation is needed. *See* Dempsey Decl. ¶ 49. DFEH views the requirement far more broadly, to include any request for any "document." While LSAC believes that its interpretation is reasonable and correct, any disagreement in this regard cannot support a finding of contempt because the Decree's language is not specific and definite.

Moreover, despite receiving years of reporting from LSAC, DFEH did not raise this issue until its May 2017 notice of alleged Decree violations. Here, too, despite disagreeing with DFEH's interpretation, LSAC has agreed as part of the meet-and-confer process to report all "no decision" requests based on incomplete documentation as instances where LSAC requests additional documentation from the candidate. *See id.*

DFEH complains that LSAC failed to report the names of outside consultants who reviewed accommodation requests. *See* DFEH Mot. at 10. This was an unintentional oversight that LSAC promptly remedied after the issue was brought to its attention: LSAC provided supplemental reports that included the missing information. *See* Mew Decl. ¶ 29; Dempsey Decl. ¶ 51. DFEH's reliance on LSAC's inadvertent omission of one piece of information from the voluminous reports as grounds for civil contempt is unreasonable and contrary to the terms of the

Decree. *See* Dkt. 203 at ¶ 31 (requiring the parties to resolve issues informally and to seek relief only if an issue cannot be resolved through good faith discussions).

DFEH also takes issue with LSAC's reporting of Kim Dempsey, LSAC's Manager of Accommodated Testing, as the individual who made a substantive decision whether to grant or deny each request. *See* DFEH Mot. at 10. Once again, the parties have differing interpretations of the Decree, but nothing in LSAC's actions constitutes a clear violation of any specific and definite Decree language. And, once again, LSAC has already addressed DFEH's concerns despite disagreeing with DFEH's interpretation. During the meet-and-confer process, LSAC agreed to report the names of other individuals who review accommodation requests, even if those individuals are not technically making substantive decisions to grant or deny the requests, and it has been doing so in its reports. *See* Dempsey Decl. ¶ 52.

5. Alleged Violations Involving Denial of Access to Records

DFEH alleges that LSAC "violated the Decree by systematically denying DFEH access to all 'granted in full' files." DFEH Mot. at 10-11. It also appears to object to the fact that it was required to review records at LSAC's offices. *See id.* at 23 (stating that DFEH had to incur the "unusual expense" of sending attorneys to Pennsylvania to review LSAC's records). These allegations do not support a finding of contempt.

The Decree allows DFEH and DOJ to review certain LSAC records during the term of the Decree. Dkt. 203 at ¶¶ 23, 26(a). Any such review is to take place at LSAC's offices. *Id.* DFEH begrudgingly concedes this fact. DFEH Mot. at 10. Thus, it was neither "unusual" nor inappropriate that DFEH's attorneys had to go to Pennsylvania to review LSAC records.

DFEH's central allegation, however, is that it was wrongly denied access to all "granted in full" files, which it "believes" contain the "the bulk of the '50% email' violations." *Id.* at 11. LSAC has not violated the Decree by denying DFEH access to files.

As DFEH acknowledges, the "Decree is structured so that the Monitor has superior access [than DOJ and DFEH] to LSAC 'data and personnel,'" thereby enabling the Monitor "to conduct the required audits." DFEH Mot. at 10. Nevertheless, in emails leading up to DFEH's and DOJ's visit to Pennsylvania, DOJ sought access to candidate files "for every individual whose request

for testing accommodations was either denied in full or was reported … as a 'no decision' for the Dec. 2015 through Dec. 2016 LSAT administrations." Carrasco Decl. Ex. 10 (12/2/16 and 1/9/17 emails from N. Sinha). DOJ and DFEH subsequently requested an expanded set of candidate files from the December 2015-February 2017 administrations of the LSAT, including "(1) all candidates whose requests for a testing accommodation was denied in part or full, or assigned 'no decision,'" and "(2) for California, all files for candidates whose requests were granted in full…." Carrasco Decl. Ex. 11 (3/16/17 email from N. Sinha). Plaintiffs stated that they "expected" DFEH to be allowed the same access to candidate files as the DOJ, *id.*, even though the Decree provides that DFEH would only be allowed access to California candidate files, *see* Dkt. 203 ¶¶ 23, 26(a). Plaintiffs also stated that they "compromised" in "agreeing" to inspect candidates files onsite in Pennsylvania, *see* Carrasco Decl. Ex. 11 (3/17/17 email from N. Sinha), notwithstanding the fact that the Decree that ***only*** allows DOJ and DFEH on-site access to candidate records, *see* Dkt. 203 ¶¶ 23, 26(a). The parties engaged in further communications regarding files that would be provided for review. *See* Carrasco Decl. Ex. 11 (3/28/18 email from J. Van Tol). Within these communications, DFEH sought access to twenty-one specific candidate files for California, which included candidates whose requests were "granted in full." *See* Carrasco Decl. Ex. 11 (3/30/17 email from I. Trasovan). LSAC agreed to provide access to the files for "denied in full" or "no decision" requests. It declined to provide access to files for candidates whose accommodations were "granted in full." *See* Carrasco Decl. Ex. 11 (4/7/17 email from J. Van Tol).

Subsequently, however, LSAC provided DFEH with copies of "granted in full" files that it requested following its visit to LSAC. *See* Mew Decl. ¶ 31. Thus, LSAC did not, as DFEH alleges, "systematically deny[ ] DFEH access to all 'granted in full' files." *See* DFEH Mot. at 10. DFEH also appears to be mistaken in asserting, as it does in a declaration from one of its attorneys, that DFEH first "discovered" that LSAC was using 50% emails during its review of candidate files at LSAC's offices. Carrasco Decl. ¶ 30 (Dkt. 249-2). LSAC provided DFEH at least one candidate file that contained a 50% email several months ***before*** DFEH reviewed any records at LSAC's offices. In December 2016, LSAC sent DFEH a copy of testing accommodation records for Phillip Movaghar in response to an administrative complaint that Mr.

Movaghar filed with DFEH. *See* Mew Decl. ¶ 33. The file contained 50% emails. *See id.* DFEH was thus on notice about LSAC's use of 50% emails more than a year ago, well in advance of when it reviewed records at LSAC's offices (April 2017), and well in advance of when it first accused LSAC of violating the Decree by sending 50% emails (May 2017). There is simply no basis for DFEH to accuse LSAC of a "bad faith attempt to withhold from Plaintiffs evidence of LSAC's [alleged] violations." *See* DFEH Mot. at 22.

Finally, LSAC has offered on repeated occasions during the meet-and-confer process to allow DFEH additional access to any candidate files that it wants to review. *See, e.g.,* Mew Decl. Ex. G at 10, H at 8, I at 5, K at 3. LSAC has also offered to make it accommodations personnel available for discussions with DFEH, to address any remaining concerns. DFEH has not accepted those offers. Instead, it asks the Court to award DFEH relief for LSAC's purported "contemptuous conduct," including granting DFEH "an additional 15 days of access to documents." DFEH Mot. at 10, 22-23. This relief is unwarranted and unnecessary. DFEH should have continued to discuss its concerns in good faith with LSAC (as it was required to do under the Decree) and accepted LSAC's proposed reasonable resolution of those concerns, instead of pursuing an enforcement action in court.

D. LSAC Has Substantially Complied With Its Obligations Under the Decree

As touched upon previously, LSAC has taken numerous actions to comply with its obligations under the Decree over the past 3 and half years, including the following:

- Paid $6.73 million into a settlement fund (Decree ¶ 11.b)
- Retained a claims administrator/participated in claim administration process (*Id.*, ¶¶12-17)
- Paid the cost of the claims administrator ($172,114) (*Id.*, ¶ 11.b.iii)
- Paid $945,000 to the named individual plaintiffs (*Id.*, ¶ 11.a)
- Paid a $55,000 civil penalty to DOJ (*Id.*, ¶ 10)
- Paid $1,000,000 in attorneys' fees ($900,000 of which went to DFEH) (*Id.*, ¶ 21)
- Stopped annotating scores achieved with extra testing time (*Id.*, ¶ 9)
- Participated in the "Best Practices" panel process (*Id.*, ¶ 7)
- Tracking voluminous amounts of data for every candidate and every exam (*Id.*, ¶ 8.a)

- Preparing extensive reports after each test administration (*Id.*, ¶ 23)
- Retained ADA Monitor and facilitated his review process (*Id.*, ¶¶ 24-27)
- Paid the costs of the ADA Monitor ($70,000 to date) (*Id.*, ¶ 28)
- Modified its website information (*Id.*, ¶¶ 5.e, 5.f, 22)
- Extensively modified its accommodation forms and policies ¶
- Maintained accommodation-related complaints (*Id.*, ¶ 8.b)
- Set up a separate electronic mailbox for submission of complaints (*Id.*, ¶ 8.d)
- Processed > 12,500 accommodation requests, using Decree and panel procedures

These actions are reflected in reports that LSAC has provided to DFEH, DOJ and the ADA Monitor as part of its reporting requirements. *E.g.*, Mew Decl. Ex. P.

II. Modification Of The Decree Is Not Warranted Under Rule 60(b)

DFEH seeks to extend the Decree's term for two years and replace the ADA Monitor as purported modifications of the Decree. DFEH Mot. at 23. The latter relief does not involve a modification of the Decree, however, and is clearly not warranted under Rule 60(b).

Rule 60(b)(5) states, in relevant part, that a court may relieve a party from a final judgment if "applying it prospectively is no longer equitable." That language does not immediately make sense in the present context, because the relief requested by DFEH – a two-year extension of the Decree – does not relieve DFEH or anyone else from the Decree. It keeps everyone bound by the Decree, for an additional two-year term.

What DFEH presumably is arguing, however, is that it should be relieved from the provision in the Decree that says the Decree has a four-year term, because it is "no longer equitable" to leave the agreed-upon term in place. DFEH is wrong. Indeed, it would be fundamentally inequitable to excuse DFEH from having to honor the four-year term to which all parties agreed after extensive negotiations. Doing so would deprive LSAC of the benefit of its bargain on a key Consent Decree term.

The review and appellate requirements established by the "Best Practices" panel are unworkable, impose unnecessary costs and administrative burdens, result in accommodations that

often unwarranted, and have caused significant operational problems at testing sites.[14] The requirements (a) are not required under the ADA or any other federal or state law; (b) do not, in fact, reflect "best practices;" (c) often result in arbitrary, non-evidence based decisions; and (d) have the perverse effect of harming individuals who the ADA was intended to protect. Nothing LSAC has done over the past three years in attempting to operationalize the panel's recommendations justifies a finding of contempt or continued imposition of the panel's recommendations.

Moreover, as the Ninth Circuit observed in rejecting a similar attempt to extend the term of a consent decree, the alleged instances of noncompliance here are "nowhere close to the near total noncompliance in cases in which courts concluded that extensions of the consent decree were warranted." *Labor/Cmt'y Strategy Center*, 564 F.3d at 122-23. A recent case in the latter category is *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016), which DFEH relies upon here. *See* DFEH Mot. at 20-21. That reliance is misplaced. This case is far more analogous to *Labor/Cmt'y Strategy* than it is to *Kelly,* where it was "not seriously disputed that [the defendant] was in substantial violation" of a settlement agreement that had been incorporated into a dismissal order, there were "other reasonable steps" the defendant could have taken to get into compliance that the defendant neglected to take, and extension of the decree was need to compel compliance with the settlement agreement and give the plaintiff the benefit of its bargain. *See id.* at 1096-98. Viewing the Decree holistically and with due regard for all the many actions taken by LSAC in compliance with the Decree and the panel recommendations, as required under *Labor/Cmt'y Strategy Center,* it is appropriate to conclude that LSAC has substantially required with all of its

[14] For example, one accommodation that candidates can request is "stop-the-clock breaks." This basically means that the candidate can stop testing at any point, rest, and then resume testing without losing any testing time. The "Best Practices" panel decided to expand upon this accommodation by requiring LSAC to add one minute of testing time whenever an approved candidate takes a break. As a result, some candidates are manipulating the approved breaks to get additional testing time for which they had not otherwise been approved. In December 2017, for example, one candidate took **45 stop-the-clock breaks** during his test (thereby gaining 45 extra minutes of testing time). As a result, an exam that normally lasts a half day did not conclude until roughly 10 p.m., requiring the proctor to spend 14 hours to administer this one test. *See* Dempsey Decl. ¶ 20 & Ex. D. Another examinee used **more than 150 stop-the-clock breaks** after being approved to test over two days, and ended up receiving more than **16 hours of testing time** (compared to three hours provided to examinees under standard conditions). *Id*. 19 & Ex. C. Such manipulation of a panel-required accommodation imposes enormously on test administrators (making them less inclined to assist with future administrations) and significantly increases test administration costs.

obligations under the Decree and the panel report.

Finally, far from being "narrowly tailored," DFEH's proposed relief would impose *all* Decree requirements and *all* panel recommendations on LSAC for an additional two-year term, regardless of whether those requirements are the subject of any alleged violations. In addition, despite its limited jurisdiction, DFEH is seeking relief on a nationwide basis rather than relief that applies only with respect to California examinees.

No modification of the Decree is warranted under Rule 60(b).

III. There Is No Basis For Removing The ADA Monitor

The parties agreed upon the ADA Monitor. The Monitor concluded that LSAC was in substantial compliance with its Decree obligations. Clearly not happy with that result, DFEH accuses the Monitor of "incompetence" (DFEH Mot. at 16), argues that his audit and report are egregiously flawed, and seeks his removal.

DFEH and Professor Peter Blanck take issue with Mr. Coleman's chosen methods of auditing. *See* DFEH Mot. at 12. However, the Monitor was given wide-ranging discretion regarding how he conduct his audits, and the parties were explicitly forbidden from interfering with the "independent functions" of the Monitor. *See* Dkt. 203 at ¶ 24.[15]

DFEH asserts that Mr. Coleman failed to detect various purported "violations" of the Decree, but this assumes that DFEH's scattergun allegations of Decree violations are correct – and they are not. It is true that Mr. Coleman did not note LSAC's inadvertent failure to include the names of outside consultants on its testing reports, *see* DFEH Mot. at 13, but this LSAC oversight was well within DFEH's ability to address directly with LSAC without the assistance of the Monitor and that is exactly what happened (with LSAC promptly remedying the oversight).

DFEH objects that the Monitor "did not mention the fact that in September 2016, LSAC increased by 20% … the length of the LSAT for test takers granted the accommodation of

[15] DOJ and DFEH wanted Professor Blanck to serve as the ADA Monitor, *see, e.g.*, Carrasco Decl., Ex. 3, so the fact that he supports DFEH here is not surprising. LSAC declined to select Professor Blanck as the Monitor because it had significant concerns regarding his objectivity. *See id.* (May 5, 2015 e-mail from R. Burgoyne). In all events, the salient fact here is that DFEH agreed to have Mr. Coleman serve as the Monitor. It did so after DOJ and/or DFEH attorneys interviewed Mr. Coleman, talked to his references, and reviewed other materials regarding his background. *See id.* Exs. 1-3.

additional test time." DFEH Mot. at 13. LSAC did not "increase the length of the LSAT" in September 2016, however, as alleged by DFEH, *see* Dempsey Decl. ¶¶ 69-71, so there was no reason for the Monitor to have addressed that issue.

DFEH objects that Mr. Coleman designated his report as Confidential. *See* DFEH Mot. at 13. However, the Decree explicitly states that "[a]ll non-public information obtained by the ADA Monitor shall be maintained in a confidential manner, and all information obtained by the ADA Monitor shall be used only for the purposes of implementing this Decree." (Dkt. 203 at ¶ 26(a)). Almost all information reported by the ADA Monitor is "non-public," and he was required -- or in all events permitted -- to designate his report confidential.

DFEH objects about the level of detail in the Monitor's billing statements. DFEH Mot. at 13. The Decree requires the Monitor to provide "sufficient detailed monthly invoices." Dkt. 203 ¶ 28. This provision was included for the benefit of LSAC, which bears the entire burden of the ADA Monitor's fees, costs, and expenses. LSAC and Mr. Coleman agreed upon a flat fee for his work, *see* Carrasco Decl. Ex. 3 (10/21/15 email from R. Burgoyne), making detailed invoices unnecessary. Mr. Coleman's invoice provides no basis for removing him as Monitor.

Finally, and most importantly, DFEH has not shown any *legal* basis for its challenge to the Monitor's work -- as relief for purported contempt, as a modification of the Consent Decree or otherwise. The Decree is clear: "No Party, nor any employee or agent of any Party, shall have any supervisory authority over the ADA Monitor's activities or interfere with the independent functions of the ADA Monitor…." Dkt. 203 ¶ 24. Despite this, DFEH repeatedly attempted to interfere with and direct and supervise his activities, going so far as to provide a detailed, redlined revision to his draft audit report, and taking umbrage when he failed to accept their proposed revisions. *See* Carrasco Decl. ¶¶ 18-20 and Exs. 5, 8. The request to have him removed is but the latest attempted interference with the Monitor's "independent functions."

The Decree sets out procedures for a party to seek relief from the recommendations of the "Best Practices" panel, Dkt. 203 at ¶ 7(d)(vii), for addressing disputes relating to the Claims Administrator, *id.* ¶ 11(b)(5), and for resolving a dispute about reimbursement of the Monitor's

fees and costs, *id.* ¶ 28, but nothing in the Decree allows a party to challenge the Monitor's conclusions or seek his removal.[16]

As the Court noted in reviewing LSAC's challenge to the "Best Practices" panel report:

> The Parties elected to delegate certain issues to a panel of experts with experience in relevant fields. That decision is not subject to second-guessing at this stage—the Consent Decree does not permit the Court to substitute its judgment for that of the Panel on the merits of how requests for accommodation should be reviewed and decided. To the extent that the Parties and amici argue merely that the Panel erred in determining how best to resolve those issues actually delegated to it, such arguments are 'out of place.'

Dkt. 245 at 10 (quoting *United States v. Armor & Co.*, 402 U.S. 673, 681-82 (1971)).

CONCLUSION

DFEH's motion should be denied.

Dated: January 12, 2018

Respectfully submitted,

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[16] To the best of LSAC's knowledge, DFEH did not give the Monitor an opportunity to respond to the accusations in its contempt motion and motion in limine before filing those motions, nor has it served the motions on the Monitor.