********** MEMORANDUM **********

To: Kathleen O'Toole, Chief of Police

From: Rebecca Boatright, Chief Legal Officer
Brian Maxey, Chief Operating Officer

Date: August 1, 2017

Re: *Analysis Re: "Full and Effective Compliance" with the Consent Decree*

EXECUTIVE SUMMARY

For the past five years, the Seattle Police Department has worked tireless and collectively towards institutionalizing a commitment to on-going evolution and reform that has catapulted the Department well beyond the bare requirements of the Consent Decree to a position of leadership in the national dialogue around 21st century policing. For example:

- Under Assistant Chief Lesley Cordner, the Professional Standards Bureau has successfully implemented rigorous schedules of innovative training that now provide Seattle police officers with five times the training as previously received – including de-escalation, force investigation, and crisis intervention training all developed in-house but which is now sought out by agencies nationwide as models of best practice. Since 2015, the Department has been substantively engaged by more than 100 agencies or related entities, at local, state, federal, and international levels, with respect to its work towards not only meeting but building upon Consent Decree requirements. Included in this engagement are often days-long sessions in which the Department has played host to agencies that include New York, Cleveland, Baltimore, Newark (New Jersey), Albuquerque, and Portland, as well as, in some instances, their monitoring teams. The Department continues to field inquiries almost daily.

- Under Assistant Chief Steve Wilske, officers in patrol are responding to an increasing volume of incidents of often substantial complexity, ones that call for expertise well beyond the scope of "traditional" law enforcement. Often on the front-lines of the City's homelessness epidemic, the opioid crisis, and attendant mental health concerns, officers are more than ably rising to these challenges – they are meeting these challenges with unmatched compassion and empathy. These facts are borne out in the data: The number of crisis intervention certified officers continues to climb, with nearly 65% of patrol officers CI-certified. Of the approximately 9,150 contacts with persons in crisis over the 12-month period ending May 14, 2017, only 128 (less than 1.5%) involved any use of force, with the vast majority (70%) of force comprising no greater than low-level, Type I force; high-level, Type III force was used on only three occasions.

- In the two and a half years since new policies around use of force were put in place, the accuracy, thoroughness, and timeliness of force reporting, investigation, and review has risen to a level that places the Seattle Police Department well at the forefront of agencies nationally. The data, which empirically prove uses of force to be statistically rare events, which

qualitatively show a near-uniformity of de-escalation tactics when safe and feasible under the circumstances, speak for themselves. Reflecting its commitment to open data and transparency as a further layer of accountability, allowing others to "see for themselves" the work of the Department in the aggregate, the Department has not only greatly expanded the breadth of information now available to the public in raw form through the City's open data portal, but has independently provided mechanisms for easy navigation and query of data relating to use of force and officer-involved shootings through public-facing dashboards.[1]

- Recognizing the limitations of what had initially been called for with respect to developing a business intelligence solution, the Department, on its own initiative, brought what had been contemplated as a static, backwards-looking reporting model to the forefront of data analytics, offering supervisors, executives, and analysts the capacity for real-time, data-driven "situational awareness" of the activity of officers in the field, with respect to all core elements of the Consent Decree relating to use of force, stops and detentions, and crisis response. The level of sophistication of review provided by the Data Analytics Platform is, simply put, second to none currently existing in the field.

- As a result of the Department's ability to examine its data and performance, real-time and with a level of granularity that far exceeds what most other departments are able to do, the Department is increasingly being called upon to participate in, and often lead, the national dialogue around critical issues in modern policing. For example, empirical research and practical experience have called into question, if not outright debunked, now-outdated systems for "early warning" or "early intervention" that are premised on a traditional model of threshold-based triggers that operate based on the quantity, rather than quality, of activity. In addition to providing data to numerous researchers for independent review, the Seattle Police Department is one of several major police departments (including Los Angeles, Oakland, Detroit, Houston, New Orleans, and New York) that have been recruited, along with smaller agencies, academic researchers, medical professionals, and behavioral health experts to "return to the drawing board" in a project funded through the DOJ, Bureau of Justice Assistance, to re-think and re-design a new model for employee mentoring and wellness.

- In addition to its active participation in national committees and task forces, the Department has institutionalized its commitment as a willing academic partner in advancing research in the social science of policing. Serving as a ready source of data, the Department currently has numerous research agreements in place, with universities, national policing organizations, and non-profit think tanks. Of particular note, the Department's success in both implementing requirements under the Consent Decree and establishing a governance structure to assure a culture of ongoing reform that continues to be internally driven is currently the subject of a robust case study by the Harvard Business School.

[1] https://www.seattle.gov/police/information-and-data/use-of-force-data/use-of-force-dashboard

The Department, and in particular its officers, deserve to be acknowledged for this accomplishment. Aspirations of some to tie the Seattle Police Department's performance to broader City initiatives may be understandable, particularly with an election upcoming, but it is unfair, and intellectually unsound, to leverage those aspirations at the reputational expense of officers who have accepted, and have worked diligently with principle and commitment, to meet, the expectations and responsibilities of policies and training that stand as some of the most comprehensive, robust, and advanced in American policing.

INTRODUCTION

In 2012, the Seattle Police Department ("SPD" or "the Department") began work on what was contemplated to be a five-year course of implementing, and sustaining work consistent with, paragraphs 69-168 of the Consent Decree that resolved, between the City of Seattle and the United States Department of Justice, claims relating to excessive use of force by Seattle Police Officers.

These paragraphs, coupled with a now-expired (on its terms) Memorandum of Understanding, comprise in full the Seattle Police Department's obligations to achieve "full and effective compliance" with the Consent Decree.

As a matter of well-established law, consent decrees are to be strictly construed – as they are written, not as they might have been written. The Consent Decree between the City of Seattle and the Department of Justice contains 99 paragraphs, comprising by their terms the totality of the Seattle Police Department's obligations. The Consent Decree sets forth two specific, separate and alternative, processes by which the Department might satisfy its obligations: One which contemplates "full and effective compliance" based on regular performance reviews and audits with respect to all process terms; the other which contemplates "full and effective compliance" upon a showing, following rigorous, comprehensive assessment, that Seattle police officers are using force in a Constitutional manner and there is no pattern and practice of excessive use of force. Under this second alternative, the Consent Decree provides that it may terminate in full even if all process terms have not been met.

Following a robust and rigorous, but generally collaborative, process of policy revisions and substantially expanded and overhauled training (all of which was approved by the Court), the Monitoring Team began the third year of its tenure by proposing an ambitious schedule of outcome assessments. These assessments were structured under the higher standards of assessment set forth in paragraph 186 for examination of force, but, conflating the two processes, were directed towards assessing all process terms as contemplated under paragraph 184 as to whether the Department was now demonstrating that it was "carrying out in practice" those policies and trainings.

In other words, the Department was assessed with more rigorous scrutiny, across a broader spectrum of performance, that contemplated under either of the two pathways for compliance.

Based on this higher standard review, beginning with the Monitor's first assessment, filed September 24, 2015, and concluding with the Monitor's tenth assessment, filed June 18, 2017, the

Monitor has now found, pursuant to these high standards, that the Department is, in fact, "carrying out in practice," over material periods of time and sufficient numbers of incidents, the requirements of each of paragraphs 69-98 and 100-168 of the Consent Decree. *See* Attachment A. **Terminology aside, as is detailed in this memorandum, and as supported by the Monitor's findings, there can be no dispute that Seattle Police Department has not only met – but exceeded and continues to exceed – over material periods of time <u>each</u> of the process terms set forth, thus proving itself to be in "full and effective compliance" <u>under each</u> of the two alternative pathways for such determination.**

Under paragraph 223, it is SPD's burden to demonstrate it has sustained "substantial" compliance for a two-year period following a finding of "full and effective compliance." Under paragraph 99, SPD demonstrates it has sustained compliance by continuing "to analyze the force data captured in officers' force reports and supervisors' investigative reports on an annual basis to determine significant trends, to identify and correct deficiencies revealed by the analysis, and to document its findings in an annual public report." As demonstrated through SPD's quarterly release of data to the public, its public-facing use of force dashboards, its annual Use of Force Report issued on January 31, 2017, and its Crisis Intervention Annual Reports issued August 15, 2016, and August 15, 2017, the Department is, in fact, well on its way to satisfying this requirement.

Moreover, separate and apart from the individual requirements of the Consent Decree, over the past five years the Seattle Police Department has worked tirelessly to institutionalize a commitment to on-going evolution and reform that has catapulted the Department well beyond the bare requirements of the Consent Decree to a position of leadership in the national dialogue around 21st century policing. For example:

- Under Assistant Chief Lesley Cordner, the Professional Standards Bureau has successfully implemented rigorous schedules of innovative training that now provide Seattle police officers with five times the training as previously received – including de-escalation, force investigation, and crisis intervention training all developed in-house but which is now sought out by agencies nationwide as models of best practice. Since 2015, the Department has been substantively engaged by more than 100 agencies or related entities, at local, state, federal, and international levels, with respect to its work towards not only meeting but building upon Consent Decree requirements. Included in this engagement are often days-long sessions in which the Department has played host to agencies that include New York, Cleveland, Baltimore, Newark (New Jersey), Albuquerque, and Portland, as well as, in some instances, their monitoring teams. The Department continues to field inquiries almost daily.

- Under Assistant Chief Steve Wilske, officers in patrol are responding to an increasing volume of incidents of often substantial complexity, ones that call for expertise well beyond the scope of "traditional" law enforcement. Often on the front-lines of the City's homelessness epidemic, the opioid crisis, and attendant mental health concerns, officers are more than ably rising to these challenges – they are meeting these challenges with unmatched compassion and empathy. These facts are borne out in the data: The number of crisis intervention certified officers continues to climb, with nearly 65% of patrol officers CI-certified. Of the approximately 9,150 contacts with persons in crisis over the 12-month period ending May 14, 2017, only 128 (less than 1.5%) involved any use of force, with the vast majority (70%) of force comprising no

greater than low-level, Type I force; high-level, Type III force was used on only three occasions.

- In the two and a half years since new policies around use of force were put in place, the accuracy, thoroughness, and timeliness of force reporting, investigation, and review has risen to a level that places the Seattle Police Department well at the forefront of agencies nationally. The data, which empirically prove uses of force to be statistically rare events, which qualitatively show a near-uniformity of de-escalation tactics when safe and feasible under the circumstances, speak for themselves. Reflecting its commitment to open data and transparency as a further layer of accountability, allowing others to "see for themselves" the work of the Department in the aggregate, the Department has not only greatly expanded the breadth of information now available to the public in raw form through the City's open data portal, but has independently provided mechanisms for easy navigation and query of data relating to use of force and officer-involved shootings through public-facing dashboards.[2]

- Recognizing the limitations of what had initially been called for with respect to developing a business intelligence solution, the Department, on its own initiative, brought what had been contemplated as a static, backwards-looking reporting model to the forefront of data analytics, offering supervisors, executives, and analysts the capacity for real-time, data-driven "situational awareness" of the activity of officers in the field, with respect to all core elements of the Consent Decree relating to use of force, stops and detentions, and crisis response. The level of sophistication of review provided by the Data Analytics Platform is, simply put, second to none currently existing in the field.

- As a result of the Department's ability to examine its data and performance, real-time and with a level of granularity that far exceeds what most other departments are able to do, the Department is increasingly being called upon to participate in, and often lead, the national dialogue around critical issues in modern policing. For example, empirical research and practical experience are routinely called into question now-outdated systems for "early warning" or "early intervention" that are premised on a traditional model of threshold-based triggers that operate based on the quantity, rather than quality, of activity. In addition to providing data to numerous researchers for independent review, the Seattle Police Department is one of several major police departments (including Los Angeles, Oakland, Detroit, Houston, New Orleans, and New York) that have been recruited, along with smaller agencies, academic researchers, medical professionals, and behavioral health experts to "return to the drawing board" in a project funded through the DOJ, Bureau of Justice Assistance, to re-think and re-design a new model for employee mentoring and wellness.

- In addition to its active participation in national committees and task forces, the Department has institutionalized its commitment as a willing academic partner in advancing research in the social science of policing. Serving as a ready source of data, the Department currently has numerous research agreements in place, with universities, national policing organizations, and non-profit think tanks. Of particular note, the Department's success in both implementing

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requirements under the Consent Decree and establishing a governance structure to assure a culture of ongoing reform that continues to be internally driven is currently the subject of a robust case study by the Harvard Business School.

Yet even as the Department and its employees continue to lead the charge as ambassadors for reform and innovative dialogue nationally, as the Department is regularly cited as a model of a Consent Decree that has worked, and as officers and commanders alike are being sought out to assist other agencies in implementing their own reforms, the question locally as to whether the Seattle Police Department is in compliance with the Consent Decree – whether the Department has met *its* obligations as set forth in that documented – has become increasingly conflated with broader concerns around topics that are not within the four corners of the Consent Decree itself, such as labor relations and bargaining processes, body-worn video cameras, and an overhauled system for independent oversight of the Department. What has become lost in the dialogue is that the Department supports body worn cameras, was tremendously encouraged by the results of a pilot program earlier this year, and is actively rolling body worn cameras to all officers currently in patrol. It has also become lost that the Department wholly supports a strong, robust system for external review, and is committed to serving as an "honest broker" in what will hopefully be a straightforward, authentic, and collaborative process.

But as the City collectively works to strengthen police operations and accountability in ways tangential to the requirements of the Consent Decree itself, **it is critical for purposes of both protecting the intellectual integrity of the Consent Decree process and recognizing the work of individual officers, day in and day out, that the Department's performance with respect to its obligations under the Consent Decree not become lost or subjugated to City processes that are outside of its control.**

As we have both been involved in this process since the beginning of the Department of Justice investigation in 2010, have managed at different times the litigation as Assistant City Attorneys, and now serve in senior executive management positions with the Seattle Police Department and are tasked with ensuring both the success of the Consent Decree and a commitment to reform that is engrained across all Department administration and operations, we bring a unique perspective that no others involved can claim: one that is grounded in law, data, the history of the investigation, Settlement Agreement, and subsequent Consent Decree; discussions with the Department of Justice and the Monitoring Team regarding the measures of, methods for, and schedule of reviews; and the day-to-day work across the Department of implementing Consent Decree requirements and other initiatives operationally, administratively, technologically, and budgetarily. Importantly, we have also witnessed first-hand the cultural transformation of this Department.

It is against that backdrop that we provide you this memorandum to further discussions with City and external partners. We do not urge that this memorandum be considered by any reader an effort to be "relieved" of the Consent Decree, or to urge that the Consent Decree be terminated; the Department itself is not a party to the agreement and has no standing to make such request. Our recommendation is simple and Department's request is simple and two-fold: (1) Regardless of what additional *City* obligations the parties may read into the agreement, where the *Department* has been found to have met each of *its* obligations under the Consent Decree, the men and women of the SPD, who have worked tirelessly and committedly not only to meet the requirements of the

Consent Decree but to advance this Department to the forefront of modern progressive policing, deserve to have their work so acknowledged. (2) Now approaching the sixth year of the Consent Decree, and the Department having demonstrated an institutionalized commitment to the terms of the Consent Decree, the Department asks for a determination that the Department's pathway to termination of the Consent Decree is through a showing of sustained "substantial" compliance through the framework set forth under paragraph 99.

ISSUES FOR CONSIDERATION

The core issues are (1) how is the Consent Decree to be interpreted; (2) what is "full and effective compliance" under the language of the Consent Decree; (3) how does the Consent Decree call for "full and effective compliance" to be measured; (4) what is the process by which "full and effective compliance" is to be established; (5) is SPD in "full and effective compliance" as defined by the Consent Decree with its obligations under the Consent Decree, and (6) whether the Department satisfies the requirement to demonstrate sustained compliance by meeting the requirements of paragraph 99 of the Consent Decree.

HOW IS THE CONSENT DECREE TO BE INTERPRETED?

The Consent Decree is a Court-enforced order that memorializes the terms of a bargained-for settlement between the Parties. The Settlement Agreement provides that it, and an accompanying Memorandum of Understanding, "include the policies, supervision requirements, training, and procedures agreed to by the Parties, [and] will constitute the entire integrated agreement of the Parties." Dkt. #3 at ¶ 218.

The United States Supreme Court has stated the governing rule of construing consent decrees:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. … [T]he decree itself cannot be said to have a purpose; rather the parties have purposes … and the resultant decree embodies as much of those [generally] opposing purposes as the respective parties have the bargaining power and skill to achieve. ***For these reasons, the scope of a consent decree must be discerned within its four corners, and not by what might satisfy the purposes of one of the parties to it.***

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (emphasis supplied). "A consent decree is not to be liberally construed. … It is to be interpreted strictly in accordance with its own language and not in accordance with its purposes." *Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc.*, 789 F.2d 582, 585 (7th Cir. 1986). A consent decree "must be construed as it is written, and not as it might have been written[.]" *Armour*, 402 U.S. at 681-82; s*ee also United States v. Atlantic Refining Co*., 360 U.S. 19 (1959); *Hughes v. United States*, 342 U.S. 353 (1952).

Consent decrees are construed as contracts for purposes of enforcement. *United States v. ITT Continental Baking Co*., 420 U.S. 223, 238 (1975); *see also Hook v. AZ Dept. Corrections*, 972 F.2d 1012 (9th Cir. 1992) ("[C]onsent decrees are essentially contractual agreements that are given the status of a judicial decree."). "It has been a fundamental precept of common law that the intention of the parties to a contract control[s] its interpretation." *Beta Sys., Inc. v. United States*,

838 F.2d 1179 (Fed.Cir. 1988). "'That intention must, in the first instance, be derived from the language of the contract.'" *Nicholson v. United States*, 29 Fed.Cl. 180, 194 (1993) (*quoting* 4 Samuel Williston, *A Treatise on the Law of Contracts* § 601 (3d ed. 1961)).

The plain language of a contract "must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *TEG-Paradigm Envtl., Inc. v. United States*, 463 F.3d 1329, 1338 (Fed.Cir. 2006) (internal quotations omitted). The plain language is controlling if it is unambiguous on its face. *Coast Fed. Bank, FSG v. United States*, 323 F.3d 1035, 1040-41 (Fed.Cir. 2003); *see also TEG-Paradigm*, 465 F.3d at 1338 ("When the contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions."

The court may not introduce extrinsic evidence "to create an ambiguity where the language is clear." *City of Tacoma, Dep't of Pub. Utils. v. United States*, 31 F.3d 1130, 1134 (Fed.Cir.1994); *see also Beta Sys*., 838 F.2d at 1183 ("The general rule is that extrinsic evidence will not be received to change the terms of a contract that is clear on its face.")

A contract is ambiguous if it is "susceptible to more than one reasonable meaning." *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375-76 (2004). Although differing interpretations of contract terms do not necessarily create an ambiguity, *Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed.Cir. 1993), a contract will be considered ambiguous if "it sustains the interpretations advanced by both parties to the suit." *Pacificorp Capital, Inc. v. United States, 25 Cl.Ct.* 707, 716 (1992).

If a contract is ambiguous, the court may rely on extrinsic evidence to discern the parties' intent. *Metro. Area Transit, Inc. v. United States* (463 F.3d 2156 (Fed.Cir.2006) ("Having found the contract ambiguous, we may appropriately look to extrinsic evidence to aid in our interpretation of the contract."). Extrinsic evidence may include prior negotiations between the parties, *see Sylvania Electric Prods., Inc. v. United States*, 458 F.2d 994, 1005 (1972); *see also Metro*, 463 F.3d at 1260 ("Expressions of the parties during negotiations for the contract are … a frequent source for interpretation of its text."). The parties' subsequent course of performance under the contract may also be extrinsic evidence of intent. *Id*. at 1260.

In this case, there is no ambiguity as to material terms as to (1) what is meant by "full and effective compliance," (2) the two options under the Consent Decree by which the City may demonstrate "full and effective compliance," and (3) the mechanism for demonstrating sustained compliance. The Consent Decree is clear on its face, and there are no differing interpretations between the parties to the contract that require Court intervention.[3] The plain language of the Consent Decree, accordingly, controls. On this point, the Monitor agrees:

[3] Indeed, the Consent Decree does not allow for the introduction of extrinsic evidence, *see* Dkt. #3 at paragraph 18 ("No prior drafts or contemporaneous communications, oral or written, will be admissible or relevant to for purposes of determining the meaning of any provisions herein in any litigation or other proceeding.") But even were there disagreement between the Parties or reason to review extrinsic evidence, there can be no dispute that, at least as to the Seattle Police Department, the performance of the Department under the contract clearly supports the construction it presents here, at all times with clear concurrence from the Department of Justice.

> As Judge Robart made clear, the Court will give plain meaning interpretation to the Settlement Agreement and the Monitoring Plan.

Monitor's First Semi-Annual Report, Dkt. #7, p. 5.

WHAT IS "FULL AND EFFECTIVE COMPLIANCE"?

The Consent Decree defines "full and effective compliance" in two ways:

Under Section IV.E.1, paragraphs 183-184, "full and effective compliance" means that SPD has '(a) incorporated the requirement into policy, (b) trained personnel as to their responsibilities under that policy, and (c) ensured that the requirement is being carried out in practice.'"

Under Section IV.E.2, paragraphs 186-187, "full and effective compliance" means that the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of excessive force exists.

The Consent Decree does not otherwise define "full and effective compliance."

HOW IS "FULL AND EFFECTIVE COMPLIANCE" TO BE MEASURED?

The Consent Decree does not set forth a particular standard of care by which to measure whether a requirement is being "carried out in practice." In December 2014, in advance of upcoming systemic assessments, however, the Monitor cited *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) as controlling:

> The Monitoring Team will not be evaluating whether SPD is uniformly perfect at all times; rather, it will be considering whether the Department has the systems, processes, capacity, and will to critically identify instances where, for example, an officer might have performed better, a supervisor might have monitored supervisees more closely, or the Department's internal investigations and processes could have been stronger. … Accordingly, rigorous, systemic compliance reviews and assessments will be increasingly necessary over the coming months. Those assessments may be quantitative, qualitative, or contain elements of both. ***Anything on which the Monitoring Team relies to recommend that SPD has reached compliance must generally be supported by sound evidence of the quality demanded in any other federal court proceeding.***

Monitor's Fourth Semi-Annual Report, Dkt. #187, p. 12 (emphasis supplied).

Rule 702 of the Federal Rules of Evidence sets forth the standards for determining the admissibility of a standard of care and performance relative thereto:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 requires that the "'[e]xpert testimony . . . be both relevant and reliable.'" *Estate of Barabin v. Asten Johnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quoting *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001)); Fed. R. Evid. 702.

In determining reliability, the court must rule not on the correctness of the expert's conclusions but on the soundness of the methodology, *Estate of Barabin*, 740 F.3d at 463 (citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010)), and the analytical connection between the data, the methodology, and the expert's conclusions, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007) ("Rule 702 demands that expert testimony relate to scientific, technical or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs."); Fed. R. Evid. 702 advisory committee's notes to 2000 amendments ("[T]he testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case.").

The Supreme Court has suggested several factors that courts can use in determining reliability: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *See Daubert I*, 509 U.S. at 592-94.

WHAT IS THE PROCESS BY WHICH "FULL AND EFFECTIVE COMPLIANCE" IS TO BE ESTABLISHED?

Under the paragraph 182 of the Consent Decree, "the City may demonstrate 'full and effective compliance' with the terms of this Agreement ***either*** through Compliance Reviews and Audits, as described in Section IV.E.1 below, ***or*** through Outcome Assessments, as described in Section IV.E.2 below." (Emphasis supplied).

A. THE MONITOR DID *NOT* CHOOSE TO ASSESS FULL AND EFFECTIVE COMPLIANCE THROUGH COMPLIANCE REVIEWS AND AUDITS AS DESCRIBED IN SECTION IV.E.1.

If full and effective compliance is to be established by way of compliance reviews and audits under Section IV.E.1 (paragraphs 183-185), the Monitor was required, within 120 days of appointment, to develop a monitoring plan setting out deadlines for policy, training, development, and implementation for conducting the compliance reviews and audits. As to the latter requirement, the plan was to (1) clearly delineate the requirements of the Settlement Agreement to be assessed for compliance; and (2) set out a schedule for conducting a compliance review or audit of each requirement of the Settlement Agreement within the first year, and a compliance review or audit of each requirement at least annually thereafter.

The Order appointing the Monitor (Dkt. #35) was filed on October 30, 2012. On March 5, 2013, the Monitor filed the First Year Monitoring Plan (Dkt. #59). This document makes reference to conducting reviews and audits, but neither references a schedule for such reviews within the first year, nor makes reference to the source paragraphs. (The First Year Monitoring Plan, however, does make reference to paragraph 189 and the outcome assessments contemplated therein, noting that the first assessment was to occur by February 27, 2014.)

The First Year Monitoring Plan separately states that the Monitor will prepare and publish two semi-annual reports, as required by paragraph 196, to include, *inter alia*, a listing of all subjects reviewed or audited; the date of review or audit; and the methodology and specific findings for each audit or review conducted.

On April 26, 2013, the Monitor filed his First Semi-Annual Report, pursuant to paragraph 196. In that report the Monitor details general conclusions regarding the core topical areas of the Consent Decree, but does not describe "a methodology and specific findings for each audit or review conducted." Nor does the Monitor suggest that this Report is in regard to any compliance reviews or audits as optioned under Paragraphs 183-185:

> This Report will first describe some important milestones from the last six months as well as challenges confronting the parties and the Monitor. Next, this Report will cover four important areas where the Monitor and the Monitoring Team have devoted substantial effort: Accountability in the review of use of force; OPA investigations; accountability at the precinct level, and the SPD's Crisis Intervention Team (CIT) program. This Report will also describe progress to date for two draft SPD policies – Biased Policing Policy and Stops and Detentions Policy. The Monitoring Plan adopts the language of Paragraph 196 of the Settlement Agreement, which indicates several additional topics that will be addressed in the Monitoring Reports, including outcome assessments and a listing of which Settlement Agreement requirements have been fully implemented. At this stage, it is too premature to address these topics, but they will be addressed in future Monitoring Reports.

Dkt. #71 at p. 3. Similarly, the Monitor's Second Semiannual Report, filed in December 2013, contains no compliance reviews or audits, nor suggests a methodology or findings to such a methodology. Dkt. # 114. At no point did the Monitor submit any schedule for conducting compliance reviews and audits; at no point prior to commencing a series of systemic outcome assessments as contemplated under Section IV.E.2 did the Monitor suggest or present any methodology for conducting compliance reviews or audits or any findings that would follow any such methodology.

B. THE MONITOR CHOSE INSTEAD TO ASSESS FULL AND EFFECTIVE COMPLIANCE THROUGH OUTCOME ASSESSMENTS AS DESCRIBED IN SECTION IV.E.2.

Section IV.E.2, paragraphs 186-187, of the Consent Decree offers an alternative means to determine whether the Department is in "full and effective compliance" with material terms of the Consent Decree:

> The goal of the Parties in entering into the Settlement Agreement is to ensure that SPD's use of force is consistent with the requirements of the United States Constitution and 42 U.S.C. § 14141. As more fulling described in the section on termination of the Settlement Agreement, if the City is able to establish, through outcome measures, that the purposes of the Settlement Agreement have been met, the decree may terminate even if the City is not in full and effective compliance with the process terms.
>
> *Three years after the Effective Date of the Settlement Agreement, the City and SPD may demonstrate "full and effective compliance" by showing that the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of excessive force exists, as demonstrated by the outcome assessments set forth in the Settlement Agreement. The Monitor will conduct these outcome assessments to determine whether SPD is in full and effective compliance by this method.*

(Emphasis supplied.)

The Third Year Monitoring Plan (Dkt. # 195), filed March 17, 2015, stated as follows with respect to Systemic Assessments to be conducted that year relating to Use of Force (Type I, Type II, Type III), Use of Force Reporting, FIT investigations; FRB, OPA, Crisis Intervention, EIS, Supervision, Officer Activity Assessment, Community Perception:

> E. Systemic Assessments
>
> The Monitoring Plan for the third year focuses much more on the Monitor and DOJ's systemic assessments of SPD's progress. With the Department having made notable progress in getting necessary policies implemented, processes up and running, and structures in place***, the Parties, Monitor, and Seattle community must all be able to have confidence that the requirements of the Consent Decree are being carried out in practice*** – not merely on paper.
>
> ***Accordingly, the Monitor and DOJ must independently verify whether the various requirements of the consent decree are "being carried out in practice."*** (Dkt. No. 3-1 ¶ 184.) In the upcoming year, the Monitoring Team will conduct some 15 separate assessments on the extent ***to which various Consent Decree's provisions have taken root in the real world.*** The results of the Monitoring Team's analysis will be filed with the Court, and thereby made available to the public, independent from the Monitor's ongoing semi-annual reports on the status of compliance.

Deadlines under the Third Year Monitoring Plan[4] were as follows:

[4] For various reasons, some due to delays in transferring data and some due to lack of bandwidth on the Monitoring Team, the deadlines originally set under the Third Year Monitoring Plan were extended, often by up to a year or more. Understanding that the time period assessed would represent the "material dates" on which compliance was assessed, the Department did not raise objections to any delays. Attached as Appendix A is a table reflecting the filing dates of the assessments, the date ranges examined, the applicable paragraphs, and whether SPD was in "compliance" as defined under paragraph 184.

Systemic Assessment	Filing Deadline	Associated Paragraphs
Use of Force (Quantitative)	November 13, 2015	69-90; 153
Officer Use of Force (Qualitative)	November 13, 2015	69-90; 127-130
Reporting Force, Type II/III	July 13, 2015	91-97; 103
Reporting Force, Type I	July 13, 2015	100-102
FIT Investigations	July 13, 2015	95; 102; 112-118
Chain of Command Investigations, Type II	July 13, 2015	97-98; 104-111; 156
FRB	September 18, 2015	119-125
OPA Investigations	September 27, 2015	164-168
Crisis Intervention	February 1, 2016	131-133
Stops Assessment	March 14, 2016	138-152
EIS	February 19, 2016	157-163
Supervision	October 2, 2015	104, 107-111, 108, 113, 117, 144, 151-156.
Public Perception	June 19, 2015	130-137; 3-12.

The cited paragraphs cover in full the Department's commitments within the four corners of the Consent Decree, as listed in Section III of that document.

In his Fifth Semi-Annual Report, filed in June 2015, the Monitor explained the purpose of these assessments:

> Upcoming, formal assessments will consider whether the various requirements of the Consent Decree have been translated form paper to practice across SPD's precincts. … These assessments will seek to determine if the policies and procedures – that now exist on paper and have been the subject of hundreds of hours of training – have really taken hold in the field. That is, the Monitor and Department of Justice must independently verify whether the various requirements of the Consent Decree are in fact "being carried out in practice."

Dkt. # 212, p. 8.[5] In his First Systemic Assessment, filed in September 2015, the Monitor acknowledged that these scheduled assessments (set forth under the Third Year Monitoring Plan) represent the totality of the Monitor's review under the Consent Decree:

[5] Under a strict reading of the Consent Decree, the definition of "full and effective compliance" as articulated under paragraphs 183-184 of the Consent Decree ("full and effective compliance" means that SPD has '(a) incorporated the requirement into policy, (b) trained personnel as to their responsibilities under that policy, and (c) ensured that the requirement is being carried out in practice'") is, arguably, specific to the Monitor's option under Section IV.E.1 to determine compliance by way of regular performance reviews and audits. The option provided under Section IV.E.2 (outcome assessments) specifically allows, in contrast, for a finding of "full and effective compliance" upon a showing, three years after the effective date of the Consent Decree, of no pattern or practice of excessive force, *"even if the specific process terms" have not been met*. (Emphasis supplied.) What became apparent well after the Monitor initiated his assessments is that while on the one hand the Monitor chose to assess compliance by way of the outcome assessments contemplated under Section IV.E.2, he did so with respect to the broader scope of inquiry into all core topical areas of the Consent Decree and specific process terms as contemplated under Section IV.E.1. Ultimately, this is a distinction without difference; because the scope of review under Section IV.E.1 effectively encompasses the

> The Monitoring Team is or will soon be evaluating where the Department is across a host of other critical areas. The Monitoring Team is currently assessing the performance of the Force Review Board, including the quality of its review of Type III and officer-involved shootings. … Assessments on several other important topics, including the quality of OPA investigations, SPD supervision, stops and detentions, crisis intervention, and officer use of force generally will be filed over the next six months. ***Collectively, these assessments will cover every area of the Consent Decree.***

Dkt. # 231, p. 4 (emphasis supplied).

WHETHER ANALYZED UNDER SECTION IV.E.1 OR SECTION IV.E.2 OF THE CONSENT DECREE, THE DEPARTMENT IS IN FULL AND EFFECTIVE COMPLIANCE WITH ITS COMMITMENTS UNDER THE CONSENT DECREE.

As noted earlier, the Consent Decree offers two avenues by which the Department may demonstrate "full and effective compliance" – either by way of compliance reviews and audits that measure whether the Department is "carrying out in practice" the policies and training that were Court-approved and implemented (Section IV.E.1, paragraph 184) or by way of demonstrating, by way of outcome assessments, that "the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of excessive force exists, as demonstrated by the outcome assessments set forth in the Settlement Agreement." (Section IV.E.2, paragraph 187). Regardless of which Section applies, there can be no question that the Department has met its commitments under the Consent Decree and is thus in "full and effective compliance" with paragraphs 69-168, inclusive.

A. HAVING DEMONSTRATED A LEVEL OF PERFORMANCE WITH RESPECT TO ALL REQUIREMENTS OVER A MATERIAL TIME PERIOD AND ACROSS INCIDENTS THAT IS "CONSISTENT WITH THE TERMS OF THE CONSENT DECREE," THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED BY THE PARTIES IN PARAGRAPH 184, SECTION IV.E.1 WITH ALL APPLICABLE PARAGRAPHS OF THE CONSENT DECREE.

The Consent Decree is clear as to what constitutes "full and effective compliance" with material terms of the Consent Decree. To the extent that concept is now ambiguous, it is so only because the Monitor, in his semi-annual reports, through his technical assistance, and in the scope of review laid out through the assessments has effectively inserted a nebulous, amorphous, wholly subjective standard of care that cannot be reconciled with either the language of the Consent Decree or the evidentiary requirements of *Daubert*. It should be remembered that the Consent Decree expressly comprises the totality of the agreement between the Parties (see paragraph 218), and the Monitor has no independent authority to either (1) interpret the Consent Decree, or (2) modify through

scope of Section IV.E.2, a finding that the Department is in "full and effective compliance" as contemplated under Section IV.E.2 is implicitly subsumed in a finding that the Department is in "full and effective compliance" as defined in Section IV.E.1.

later-introduced terms or construction the terms and purpose of the Consent Decree as agreed to and intended by the Parties. [6]

It was clear, however, from the Monitor's description of these outcome assessments in the Third Year Monitoring Plan (Dkt. #195) that the purpose was to determine whether or not (yes or no) the Department was "carrying out in practice" the policies and training implemented under the Consent Decree. *See*, e.g.:

Application of Force		
Use of Force Data Systemic Assessment	**The Monitoring Team will assess collected data on use of force (including Type I, Type II, and Type III uses of force and officer-involved shootings) by SPD officers.**	**November 13, 2015**
	Description of Assessment: The Consent Decree called for SPD to revise its use of force policies (¶ 71) consistent with *Graham v. Connor* and other constitutional imperatives and guided by several expressly defined principles (¶ 70). The Court approved the revision in December 2013. (Dkt. No. 115.) As of January 1, 2015, all SPD officers should have received the initial, comprehensive use of force training. (Dkt. 187 at 24.) The Monitor must ensure that the policy revisions are "being carried out in practice." (¶ 184.) This assessment will use the Department's use of force reporting and data to examine and assess trends in officer use of force. It will not involve the qualitative review of officer force; instead, it will analyze aggregate, statistical trends in the nature, circumstances, and features of force that SPD officers are using. Such quantitative analysis is necessary to provide the context for conducting targeted and meaningful qualitative analysis of the Department's use of force. Thus, the assessment is a necessary component of conducting a sufficiently rigorous and focused assessment of individual force incidents, even if various quantitative results or analyses might not directly or by themselves establish partial or full compliance. *Implicated Consent Decree Provisions:* ¶¶ 69–90, 153	

	Description of Assessment: The Officer Use of Force assessment will assess whether force applied by SPD officers is or is not consistent with SPD policy **8.000-8.200 (and any related policy provisions that result from subsequent revisions or adjustments),** and is or is not consistent with constitutional and legal imperatives. The Consent Decree called for SPD to revise its use of force policies (¶ 71) consistent with *Graham v. Connor* and other constitutional imperatives and guided by several expressly defined principles (¶ 70). The Court approved the revision in December 2013. (Dkt. No. 115.) As of January 1, 2015, all SPD officers should have received the initial, comprehensive use of force training. (Dkt. 187 at 24.) The Monitor, as well as DOJ, must ensure that the policy revisions are "being carried out in practice." (¶ 184.) This assessment will assist in determining whether the policy changes have been successfully advanced in practice. It will also consider whether the training that officers have received in 2014 and the first half of 2015 on use of force has been effective in practice. (*See* Fourth Semiannual Report at 24.) *Implicated Consent Decree Provisions:* ¶¶ 69–90, 127–30

The Monitor offered no guidance as to what standard he would be holding the Department to in finding "full and effective compliance." Rather, while he sought to describe his view of "full and effective compliance," he routinely insisted that it was *not* a concept subject to precision (as would be required to some degree under ER 702). For example:

> There is no single threshold number that SPD must reach across each and every area that represents initial compliance. For example, an assessment might judge 70 percent of a given type of investigative report as sufficiently thorough and accurate as consistent with

[6] A non-party to the Consent Decree, the Monitor is an agent of the Court for purposes of "verify[ing] that all of the substantive reform measures included in the Settlement Agreement are implemented as agreed to by the Parties[,]" see paragraph 173(a), but does not have independent authority to either (1) otherwise define "full and effective compliance" or (2) interpret the intent of the Parties with respect to the plain language of the Consent Decree.

> compliance – because the quality of the remaining 30 percent of cases leaving room for improvement but being relatively close to where it should be. On the other hand, even if 90 percent of reports were judged to be sufficiently thorough and accurate, there still might not be initial compliance with the relevant provision of the Consent Decree because the remaining 10 percent of investigative reports were wholly inadequate, disturbingly biased, or insufficiently documented. Thus, initial compliance with provisions of the Consent Decree depends not just on the number of percent of instances where SPD is adhering to requirements but also on the quality or nature of those instances where SPD is falling short.

First Systemic Assessment, Dkt. #231, p. 6.

> In general, the Monitoring Team does not find the SPD has reached initial compliance until there is a solid record of uniform and consistent compliance to support an inference that if that level of compliance continues to be met, it is more likely than not that the court will ultimately find full and effective compliance at a later time.

Seventh Systemic Assessment, Dkt. #360, p. 5.

> There is, however, no magic number or single type of evaluation that by itself can determine whether SPD is in compliance with the Consent Decree. Rather, the Monitoring Team and the Parties have analyzed and balanced the sometimes competing factors in assessing whether SPD is now where it needs to be with respect to how, under its new policies and training, its officers are using force.

Ninth Systemic Assessment, Dkt. #383, p. 2.

The Monitor has not identified a clear methodology, nor weighting formula, by which an independent reviewer would be able to separately assess whether the Department is "relatively close to where it should be" or "falling short," or confirm through the same process either the Monitor's findings - elements that, as this Court separately noted,[7] in analyzing the requirements of ER 702(b), (c), (d)), are part and parcel of the *Daubert* inquiry as to reliability.

1. "INITIAL COMPLIANCE" IS THE SAME AS "FULL AND EFFECTIVE COMPLIANCE" AS RELATES TO SPECIFIC REQUIREMENTS OF THE CONSENT DECREE.

In his First Systemic Assessment, the Monitor introduced the term "initial compliance" as a measure of answering the paragraph 184 inquiry as to whether the Department has "(a) incorporated the requirement into practice; (b) trained all relevant personnel as necessary to fulfill their responsibilities pursuant to the requirement; and (c) ensured that the requirement is being

[7] *See* Case 2:12-cv-00635-JLR Dkt. #39 (filed 05/08/17) (Reliability requires the court to assess "whether an expert's testimony has a 'reliable basis in the knowledge and experience of the relevant discipline.'" *Id.* (internal citations and alterations omitted) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). The Supreme Court has suggested several factors that courts can use in determining reliability: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *See Daubert I*, 509 U.S. at 592-94.)

carried out in practice." The term "initial compliance" is not a term that appears in the Consent Decree – a point the Monitor concedes. He explained:

> The Parties, SPD, and the Seattle community must be careful to understand what the Monitor means and does not mean by "initial compliance" and "partial compliance." These phrases are not expressly used in the Consent Decree itself, although the concept is contained in the Decree. *See* Dkt. 3-1, ¶¶ 185, 230. It is not the same as "full and effective compliance" with the Consent Decree. Rather, it connotes that, ***in the Monitor's opinion,*** the SPD has initially satisfied the requirements of some provisions of the Consent Decree, but that such initial compliance must be maintained as SPD moves systemically toward full and effective compliance with the Consent Decree as a whole.

First Systemic Assessment, Dkt. #231, fn. 3 (emphasis supplied). The Monitor further explained:

> The Monitor's determination of "initial compliance" in a given area or for particular Consent Decree provisions means that SPD's performance over a material time period and across incidents suggests that the Department has reached a level of performance in that defined area that is consistent with complying with the terms of the Court-enforced Settlement Agreement. Likewise, it means that, so long as that performance improves yet further or remains at the level it has been, SPD is in a position, at least for those elements of the Consent Decree referenced, that is consistent with where it needs to be.

Three points are important to note.

First, because the term "initial compliance" is not a term that appears in, or is defined in, the Consent Decree, it cannot, therefore, as a matter of law, have operational significance in terms of measuring whether the Department is "carrying out in practice" the Court-approved policies and training relating to the specific paragraphs of the Consent Decree assessed. *See Armour*, 402 U.S. at 681-82 (A consent decree "must be construed as it is written, and not as it might have been written[.]").

Second, neither of the two referenced paragraphs support the "concept" of "initial compliance." Paragraph 185 gives the Monitor discretion "to refrain from conducting a compliance audit or review of a requirement previously found to be in compliance." As the Monitor did *not* choose to assess compliance by way of performance reviews or audits, as provided in Section IV.E.1, but rather by way of outcome assessments, as provided in Section IV.E.2, paragraph 185 offers no support for a finding of "initial compliance" – in fact, paragraph 185, in relating back to the standard of paragraph 184, assumes full and effective compliance as defined in paragraph 184. Paragraph 230 is exclusively procedural, providing for alternative means by which the City may petition for termination of all, or part, of the Consent Decree, separate from the Monitor's Assessments.

Third, even were there basis to read into either paragraphs 185 or 230 conceptual support for a term that does not appear in the Consent Decree, there is, ultimately, no practical distinction between the semantics for the simple reason that, terminology notwithstanding, there is no articulable difference between what the Monitor terms "initial compliance" ("SPD's performance

over a material time period and across incidents suggests that the Department has reached a level of performance in that defined area that is consistent with complying with the terms of [the Consent Decree]" or, alternatively stated, "SPD is in a position, at least for those elements of the Consent Decree referenced, that is consistent with where it needs to be.") and what the Consent Decree terms "full and effective compliance" (see paragraph 184) and, later, "substantial compliance" (*see* paragraph 223 ("When the United States and the Monitor agree that the City has maintained substantial compliance, the City will be relieved of that portion of the Settlement Agreement.")).

In other words, even were there legal basis to insert into the Consent Decree a concept that is not there, the Monitor's own definition negates any operational distinction.

2. AS DETERMINED BY THE MONITOR'S FIRST SYSTEMIC ASSESSMENT, FILED SEPTEMBER 2015, THE DEPARTMENT IS IN "INITIAL COMPLIANCE," AND THEREFORE "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184, WITH RESPECT TO REPORTING FORCE, TYPE I, II, AND III; FIT INVESTIGATIONS; AND CHAIN OF COMMAND INVESTIGATIONS OF TYPE I USE OF FORCE

On September 24, 2015, the Monitor filed the first of ten scheduled outcome assessments by which the Monitor was to evaluate whether SPD was "carrying out in practice" for particular Consent Decree requirements the policies and training that this Court had approved – or, in the Monitor's words, whether SPD was "where it needs to be." *See* Third Year Monitoring Plan, Dkt. #95; First Systemic Assessment, Dkt. # 231, p. 6.

The Monitor made clear in the introduction to that Assessment that the purpose of these scheduled inquiries was to determine whether SPD performance, "over a material time period and across incidents" is sufficient to show that the Department "has gotten to where it needs to be on a given front or with a part of a Consent-Decree-required process."

> The Monitoring Team calls these evaluations "systemic" because their focus is on whether the Department has the systems, policies, structures, and culture in place" that the Consent Decree contemplates. … The Monitor will, at the same time, insist that there is clear evidence that the various requirements of the Consent Decree are in fact "being carried out in practice" and are sufficiently manifest throughout the Department and across Seattle's diverse communities. … Our examination of individual cases or data will therefore be done with any eye towards determining what those individual instances say, in the aggregate and overall, about the performance of SPD and its officers.

Id., p. 5. Against that background of systemic review, "over a material time period and across incidents," the Monitoring team found as follows:

> With respect to the reporting, investigation, and review of Type I, II, and III force (paragraphs 91-118 of the Consent Decree) the Monitor determined that SPD was in "initial compliance" (or "where it needed to be" in meeting the requirement for "full and effective compliance" as defined in paragraph 184) with respect to *all but* Chain of Command investigation and review of Type II use of force. Specifically, the Monitor wrote:

> Across all of Type III, Type II, and Type I force incidents, the Monitor finds that officers are routinely reporting force to supervisors, that supervisors are responding to the scene and adequately carrying out their on-scene responsibilities in a vast majority of cases, and that officers are thoroughly documenting information about the force that they use. …
>
> FIT's investigations are covering all relevant investigative lines of inquiry, probing important issues and attempting to resolve inconsistencies among statements and evidence. In multiple instances, Monitoring Team reviewers saw the quality of SPD's force response and investigation improve immediately upon FIT's arriving at the scene or beginning to investigate the incident. …
>
> For low-level, Type I force, a sergeant reviews the force. The Monitoring Team found that a majority of those reviews covered the bases – evaluating all relevant evidence and assessing the incident in terms of SPD policy and training. … The Monitor finds that SPD's review of Type I force is in initial compliance with paragraph 102 of the Consent Decree, although some work remains to ensure that compliance is maintained.

First Systemic Assessment, Dkt. #231, pp. 3-4. In contrast, the Monitor found that chain of command (sergeants, lieutenants, captains) investigation and review of Type II use of force are "not yet where they need to be" – a point that becomes significant if there is to be any dispute as to whether the term "initial compliance" is somehow to be construed as a standard of performance less than what paragraph 184 defines as "full and effective compliance" (as the Monitor now seems to suggest). Simply put, the Monitor's rejection of Type II force investigation and review systemically as "not yet where they need to be" under paragraph 184 is clear indication that, where performance fell short of the standard set forth in paragraph 184 (the inquiry at issue, as made clear in the Third Year Monitoring Plan), the Monitor was clear to point that out in no uncertain terms.

The Monitoring team having found that the Department is "where it needs to be" with respect to "carrying out in practice" over "a material time period and across incidents" the Court-approved policies and training required with respect to Type I, II, and III force reporting and Type I and III force investigation and review, the Department is accordingly in "full and effective compliance" with these requirements of the Consent Decree to the standard required under paragraph 184.

3. AS DETERMINED BY THE MONITOR'S SECOND SYSTEMIC ASSESSMENT, FILED NOVEMBER 2015, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO THE FUNCTIONING OF THE FORCE REVIEW BOARD

The Monitor's Second Systemic Assessment focused on "the quality, rigor, completeness, and timelines of Force Review Board reviewed and deliberations on force incidents." This assessment included both quantitative and qualitative aspects. As to the former, reviewers logged on a "yes," "no," or "unable to determine basis "whether officers and supervisors complied with various requirements of SPD policy" (a paragraph 184 inquiry). As to the latter, reviewers evaluated "whether the Board sufficiently, given the facts and circumstances of the incident, evaluated the reasonableness, necessity, and proportionality of force used in the incident." Dkt. 247, p. 7.

As to this assessment, the Monitor found the Department to be in "initial compliance" (*i.e.*, "where it needs to be" with respect to "carrying out in practice" over "a material time period and across incidents" with respect to all requirements of the Consent Decree pertaining to the Force Review Board (paragraphs 119-125).

Moreover, the Monitor's findings in the Ninth Systemic Assessment, which assessed the use of force over a 28-month period from July 1, 2014 through October 31, 2016, supports that SPD has demonstrate sustained compliance in this area:

> Even if a human organization could somehow attain perfection, the Consent Decree does not require a perfect police department. Instead, it requires a police department that, among other things, has rigorous policies governing the use of force; uniformly reports, investigates, reviews, and critically analyzes all use of force incidents in a thorough, fair, and unbiased manner; and has robust, overlapping mechanisms for critical self-analysis that inspire constant innovation and internal improvement. **The Monitoring Team is reassured that, in every case in which it determined officers had not complied with SPD's use of force policy during the later half of the study period, the Force Review Board identified the force as out of policy.** It therefore appears that when an officer performs in [a] manner contrary to SPD's use of force policy, the Department is able to catch and correct the error.

Dkt. #383, p. 9 (emphasis in original).

4. AS DETERMINED BY THE MONITOR'S THIRD SYSTEMIC ASSESSMENT, FILED JANUARY 2016, THE DEPARTMENT HAS "FULLY EMBRACED A COMMUNITY-ORIENTED POLICING APPROACH" THAT IS "RECEIVING NATIONAL ATTENTION AND PRAISE."

As the Monitor noted, this assessment was not conducted for the purpose of assessing compliance with the Consent Decree – indeed, while increased community confidence and public support is an overarching goal of the Consent Decree, the Consent Decree itself does not impose specific requirements on the Department in this respect.[8] *Accord Sealy*, 789 F.2d at 585 ("A consent decree is not to be liberally construed. … It is to be interpreted strictly in accordance with its own language and not in accordance with its purposes."). This assessment was, rather, to evaluate "what measures SPD has taken towards reestablishing community trust and engagement since the Consent Decree."

This review comprised two separate surveys. One was a quantitative survey of community perceptions, performed by the consulting firm Anzalone Lizst Grove, measured the overall public confidence of Seattle residents in SPD and its officers; this report was filed on October 1, 2015. The second comprised a qualitative assessment of SPD's efforts to build public confidence within

[8] In the Third Year Monitoring Plan (Dkt. # 195, p. 31) the Monitor cites paragraphs 3-12 and 130-137 as being the "implicated consent decree provisions." Paragraphs 2-12 relate to the role of the Community Police Commission; they do not impose separate requirements on the Seattle Police Department. Paragraphs 130-137 relate to Crisis Intervention (separately assessed); it is not clear to the Department why they are linked to here.

the community, based on monitoring team interviews with community members and SPD personnel. This report was filed January 27, 2016.

The Monitoring Team found that

> SPD has not only fully embraced a community-oriented approach to policing, but has demonstrated, particularly through Chief O'Toole and her command staff, a willingness to engage and join with the community in an effort that is impressive in focus …. [W]e note approvingly that the Chief is driving the SPD to conduct policing in partnership with many of the communities it serves. These efforts are receiving national attention and praise.

Dkt. #263, p. 2. The Monitor specifically noted (1) "solid and coordinated efforts to make officers more visible" through initiatives such as micro-community policing plans, neighborhood response teams, liaisons connected with specific communities, and other specialized programs; (2) increased rates of approval – and declined rates of disapproval – across all demographic groups surveyed; and (3) increased homicide clearance rates (a measure of community's trust as measured by community cooperation with law enforcement).

Thus, although this assessment does not factor into any determination of whether the Department is in "full and effective compliance" under either a Section IV.E.1 or Section IV.E.2 analysis, it does establish that separate and apart from its legal obligations under the Consent Decree, the Department is meeting as well the broader purpose and "spirit" of the Consent Decree as a whole.

5. THE MONITOR'S FOURTH SYSTEMIC ASSESSMENT, FILED JANUARY 2016, DOES NOT IMPLICATE COMMITMENTS OF THE SEATTLE POLICE DEPARTMENT BUT, RATHER, OFFERS THE MONITOR'S TECHNICAL ASSISTANCE WITH RESPECT TO ANY MODIFICATIONS TO THE OFFICE OF PROFESSIONAL ACCOUNTABILITY AND/OR INDEPENDENT OVERSIGHT OF THE DEPARTMENT.

The Monitor was clear that the Fourth Systemic Assessment, concerning the Office of Professional Accountability, was likewise not one required under the Consent Decree:

> The Department of Justice's 2011 investigation of SPD found that the investigations of OPA itself conducted generally were thorough, well-organized, well documented, and thoughtful." … The Consent Decree sought to ensure that OPA's good investigative practices would continue in two targeted ways: (1) by requiring SPD to revise two discrete policies, namely, on when and how employees must report misconduct and on what retaliation is; and (2) by requiring SPD to complete its Training and Operations Manual ("OPA Manual"), which would "formalize OPA's procedures, best practices, and training requirements." … In short, the City's requirements in this area under the Consent Decree were to complete those two policies and the OPA Manual, both of which in fact were approved by the Court in July 2014. Revisions to these policies and the OPA Manual were submitted to the Court on January 14, 2016.

Dkt. # 259, p. 1-2. The Department was accordingly, in "full and effective compliance" with its requirements under the Consent Decree as of July 2014. Indeed, as the Monitor explained:

> In contrast to nearly all other assessments … the purpose of this assessment is not to assess compliance with specific requirements under the Consent Decree, nor to declare that the SPD it in initial or full and effective compliance with the Consent Decree.
>
> The purpose of this assessment, rather, is to provide the Parties, the Court and the Monitoring Team itself vital information to complete two important tasks: (a) to revise the OPA manual with evidence-based data, informed by real-world experience, actual SPD trends, and objective facts observed across cases by neutral reviewers, not hypotheticals or unsubstantiated claims; and (b) to advise the Court, armed with such data, about how to "create a better framework of independent review of the various policies, organizations and systems that will monitor the performance of the Seattle Police Department."

Id., p. 2.

Pause should be taken at this point to be very clear on the framework by which this issue came before the Court, and the Monitor's authority under the Consent Decree with respect to advising on the same. Again, there is no obligation under the Consent Decree for the City to undertake any changes its structures for external accountability; the Monitor himself is clear on that point ("the purpose of this assessment is not to assess compliance with specific requirements under the Consent Decree."). *Id*.

The Consent Decree references back to the Memorandum of Understanding that the City of Seattle and the Department of Justice entered into as an agreement parallel to but separate from the Settlement Agreement. Under the terms the MOU, the City established a Community Police Commission that was to be assigned certain tasks – one of which was a review of the City's police accountability structure. Specifically, the MOU provides at paragraph 15:

> The Commission will review Seattle's current three-prong civilian oversight structure to determine if there are changes it would recommend for improving SPD accountability and transparency… Though the DOJ found that the overall system is sound, the Commission may consider alternative civilian oversight models and whether clarifications or changes in roles and responsibilities for the OPA Director, the OPA Auditor, and/or the OPA Review Board would improve the confidence of the community and officers in the system.

https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/spd_mou_7-27-12.pdf.[9]

The Consent Decree provides the Monitor a limited role to advise on topics contained in the MOU. *See* Dkt. #3, paragraphs 169, 172-73:

[9] The MOU is, by its terms, enforceable only by the parties, and presumptively expired on its terms no later than August 27, 2016 (four years after the effective date of the Consent Decree). *See* MOU, paragraph 34 ("The Parties anticipate that the City will have reached compliance with the MOU within three years of its Effective Date. Any action for enforcement of this MOU must be commenced within four years of the Effective Date. The Parties may jointly agree to terminate the MOU prior to this date, provided the City has been in compliance with the MOU for two years.

> The Parties will jointly select a Monitor who will oversee the implementation of the Settlement Agreement and *advise* on the MOU. The duties and responsibilities of the Monitor regarding the MOU are set forth in the MOU.

(Emphasis supplied.) The MOU, however, provides no role for the Monitor. Any advisory role of the Monitor in this regard, accordingly, can only fall within the Monitor's purview to provide, upon request, technical assistance as provided in paragraph 173(c) of the Consent Decree:

> SPD may request technical assistance from the Monitor as needed. The Monitor may provide the requested technical assistance as long as the requested assistance will not conflict with the Monitor's duties under the Settlement Agreement and falls within the Monitor's budget. SPD has the discretion to decide whether or not to utilize the Monitor's advice.

The Department understands that the City has requested technical assistance from the Monitor with respect to establishing new structures of independent police oversight. The Department further reads paragraph 219 to provide for Court review to ensure any such structures are consistent with the terms of the Consent Decree. To be clear: the Department supports a strong, robust, wholly independent oversight system. But it should also be clear that this area, in which the Monitor is providing technical assistance subject to the provisions of paragraph 173(c), must be considered separately from whether the Department has met its obligations with respect to the Office of Professional Accountability – obligations that, as the Monitor acknowledged, were limited and which the Department met as of the July 2014 filing of the required policies and OPA Manual.

Simply put, while the City may continue to avail itself of the Monitor's technical assistance in this area – a consideration as to which the Department has no opinion – and while the Court certainly has jurisdiction to review legislation to ensure it is consistent with paragraph 219 of the Consent Decree, the Monitor cannot cite to this continuing process as a barrier to finding the Department in full and effective compliance with its obligations without inserting into the Consent Decree terms and conditions that simply are not there. *Accord Sealy*, 789 F.2d at 585 ("A consent decree is not to be liberally construed. … It is to be interpreted strictly in accordance with its own language and not in accordance with its purposes."); *Armour*, 402 U.S. at 681-82 ("[T]he scope of a consent decree must be discerned within its four corners and not by what might satisfy the purposes of one of the parties to it.").

6. AS DETERMINED BY THE MONITOR'S FIFTH SYSTEMIC ASSESSMENT, FILED FEBRUARY 2016, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO CRISIS INTERVENTION.

The MOU between the Parties required, in addition to the Community Police Commission, that the Department expand and formalize its coordination with local mental health providers through the establishment of a Crisis Intervention Committee, to serve, *inter alia*, as a problem-solving forum for interagency issues around mental health treatment, to evaluate and advise on SPD crisis intervention policies and training, and for driving best practices. *See* MOU, paragraphs 23-25.

Under the Third Year Monitoring Plan, the Department was required to provide, by May 1, 2015, an assessment of its Crisis Response Team (CRT) and its Crisis Intervention Program. Dkt. # 195. In that report, which was provided on May 1, 2015, to both the Department of Justice and the Monitoring Team, the Department reported the following:

- Department-wide crisis intervention certified (CI Certified) deployment at 35% of all sworn officers overall and approximately 40% of patrol (well above accepted levels in literature and practice of 10% of a department overall to 25% of patrol);
- A Crisis Response Team caseload of approximately 700 cases a year;
- Preliminary results of a survey conducted by Seattle University researchers showing strong support within SPD for Crisis Intervention Training (CIT) across the Department;
- A reduction from initial DOJ Findings Letter estimates concerning the use of force incidents involving persons impaired by drugs/alcohol or in behavioral health crisis.

In addition, the Department previewed the upcoming release of the Mental Health Contact Form – a template contained within the Records Management System that would allow for greater ability to track and record fielded data relating to crisis contacts in the field. The Department also highlighted specific goals for the upcoming year: (1) to develop more robust systems for delivering consistently high quality crisis intervention training that is applicable and timely; (2) to work in close cooperation with the CIC to develop procedures that will address the five program components that make up the analytical strategy laid out in the new crisis intervention policy; and (3) to work with the CIC and service providers in the community to identify ways to integrate lessons learned and feedback received, address breakdowns in communication, and enhance and streamline the process from initial contact through disposition, including, to the extent practicable, outcomes from referrals to providers and other services.

In the Monitor's assessment, filed in February 2016, the Monitor praised SPD's work in this regard. Specifically, based on a review of 2,516 Mental Health Contact Templates recorded between June 1, 2015 and August 31, 2015, the Monitor found: finding specifically:

- The Department is on track "for around 10,000 crisis contacts per year. That number demonstrate the enormous workload that crisis calls create for the SPD."
- SPD is dispatching their now large and trained cadre of CI-Certified officers to crisis events in the great majority of instances.
- Initial data indicates that officers use force against individuals in crisis less than two percent of the time and, when they do use force, 80 percent of the time they use the lowest level of force (and not once used the highest level of force), even in high risk situations.
- Over the past two years, all officers have received some level of crisis intervention training, which has been approved by the Department of Justice, the Monitor, and the Federal Court.
- A sufficient number of officers appear to be stationed throughout the City, and on all watches, to provide coverage for crisis incidents.

- SPD has institutionalized attention to crisis intervention work by establishing and funding the CIT Program, implementing training and data collection processes, and continuing to take the lead in maintaining the CIC.
- SPD is making strong efforts to guide people in crisis into the social service system, as opposed to arresting and jailing them.

Dkt. #272, pp. 1-2. ***The Monitor thus found SPD to be in "initial compliance" (i.e., "where it needs to be" relative to "carrying out in practice" Court-approved policies and training relating to crisis intervention, thus for practical purposes in "full and effective compliance" per paragraph 184 of the Consent Decree.*** The Department's work likewise received praise from the Department of Justice. (https://www.justice.gov/usao-wdwa/pr/federal-monitor-finds-seattle-police-department-initial-compliance-use-force.)

The Fourth Year Monitoring Plan included no requirement of SPD with respect to continued reporting with respect to its Crisis Intervention Program. Independently, however, the Department has institutionalized its own commitment to regular, robust reporting. In August 2016, accordingly, the Department released its second annual Crisis Intervention Report, covering the time period May 15, 2015 to May 14, 2016. In that report (http://spdblotter.seattle.gov/wp-content/uploads/2016/08/2015_Crisis_Intervention_Report.pdf) the Department reported:

- Implementation of its new data collection template, allowing for more accruable, robust, and consistent reporting of crisis contacts.
- Partnership with Code for America, a technology non-profit, to develop a tool that allows for greater individualized responses to persons in crisis.
- Advanced training to bot CIT-certified and non-certified officers in a wide range of topic areas related to crisis events, including specialized training in advanced topics and integrated, scenario-based training that provides officers the opportunity to reinforce these skills in practice.
- Fifty-eight percent of patrol officers now CIT-certified, allowing a CIT-certified officer to be on-scene at nearly 75% of the approximately 9,300 unique crisis incidents documented over the year covered.

In addition, the Department reported that it was able to divert more than one-third of subjects into medical care, either through emergency or voluntary detention; only 8% were arrested. Of the approximately 9,300 crisis responses reported, less than 2% involved any use of reportable force, and of these, less than half of one percent (0.4%) involved greater than a low level, Type I use of force.

The Department is preparing to release its Third Annual Crisis Intervention Report, in which the Department describes continuing training on specialized areas of Crisis Intervention, including Alzheimers/Dementia; a continued increase in the numbers of CIT-certified officers across all precincts; and sustained low rates of use of force in crisis incidents.

7. AS DETERMINED BY THE MONITOR'S SIXTH SYSTEMIC ASSESSMENT, FILED DECEMBER 2016, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO SUPERVISION.

Requirements directed towards supervision are contained in paragraphs 153-156 of the Consent Decree, with incorporation of some elements subsumed other topical areas and assessments. Specifically, these paragraphs of the Consent Decree require:

> The City will provide and SPD will employ an adequate number of qualified field/first-line supervisors (typically sergeants) to assure that the provisions of this Agreement are implemented. SPD will employ sufficient first-line supervisors to assure that first-line supervisors are able to: 1) response to the scene of uses of force as required by this Agreement; 2) investigate each use of force (except those investigated by FIT) in the manner required by this Agreement; 3) ensure documentation of uses of force as required by this Agreement; and 4) provide supervision and direction as needed to officers employing force.
>
> As a general rule, all operational field officers (including patrol officers) should be assigned to a single, consistent, clearly identified first-line supervisor. First-line supervisors should normally be assigned to work the same days and hours as the officers they are assigned to supervise.
>
> SPD and the City will ensure that personnel assigned to a planned assignment of acting sergeant for longer than 60 days will be provided adequate training to fulfill the supervisor obligations under this Agreement, either prior to serving as acting sergeant, or as soon as practicable[.]
>
> Precinct commanders and watch lieutenants will continue to closely and effectively supervise the first-line supervisors and officers under their command, particularly whether commanders and supervisors identify and effectively respond to uses of force.

Dkt. #3, paragraph 153-156. As to these requirements, the Monitor reported, *inter alia*:

> As to the first measure (adequacy of supervision), on the whole, the Monitor notes that since implementation of the Consent Decree, reform has occurred, and continues to occur, with respect to SPD's supervision efforts. From the Monitoring Team's extensive interview of sergeants, lieutenants, and captains conducted as part of this assessment, it appears that the chain of command, through officer reports, is receiving timely notices of uses of force and tracking officers' use of force through a variety of systems, including Force Review Board findings, IAPro/Blue Team, the Performance Appraisal System, and the Early Intervention System. …
>
> As to the second measure (unity of command), it appears that officers are consistently assigned to a single, clearly-identified supervisor, with each squad generally assigned to the same daily work schedule. All interviewed sergeants reported working the same days

> and hours as the officers they supervise, and 97% of surveyed line officers indicated having the same schedule as their sergeant. ***Indeed, SPD has exceeded the terms of the Consent Decree in this area, which only requires unity of command "as a general rule."*** This reflects a further positive development and supports initial compliance.
>
> As to the third measure (sergeant training), the Monito reviewed the SPD's sergeant training materials from 2015 and 2016. These materials thoughtfully capture SPD's goals to prepare their sergeants for effective supervision and leadership. …
>
> As to the fourth measure (span of control), sergeant to officer ratios, which are now at 1:6 on average across SPD precincts, have been trending downwards. This ratio reflects a further positive development and supports initial compliance.

Dkt. # 351, pp. 1-2 (emphasis supplied). The Monitor thus stated:

> Weighing the progress of the SPD to date and the current quality and extent of supervision within the Department, the Monitor finds the Department in initial compliance with paragraphs 153 through 156 of the Consent Decree, subject to two important conditions.[10] Additionally, the Monitoring Team offers some technical assistance and will continue to review policy and procedure changes, also as a matter of technical assistance.

Id., p. 2. ***In other words, the Monitor expressly found that the Department is "where it needs to be" with respect to "carrying out in practice" its obligations under the Consent Decree (i.e., in "full and effective compliance" with these terms per paragraph 184) but for (1) the outcome of its re-assessment of Type II review of force and (2) the upcoming stops and detentions assessment.***

To the extent that there remains any confusion as to whether the Monitor's term "initial compliance," as applied to specific terms assessed, should be construed as somehow a measure of performance less than what the Consent Decree defines as "full and effective compliance," such argument cannot logically survive the Monitor's explanation here for three simple reasons, and any such confusion should now be put to rest.

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[10] See Dkt. #352, p. 2:

> First, the Monitor previously found deficiencies in supervisory review of Type II force cases based on a 2014 sample. A follow-up assessment is currently underway to determine if the quality and rigor of Type II investigations and reviews by supervisors have improved over the past two years. Accordingly, initial compliance on supervision issues is contingent upon continued improvement with respect to supervisory review and investigation of Type II force.
>
> Second, the Monitor is evaluating information about SPD's search and seizure activity, both qualitatively and quantitatively, for an upcoming assessment on Terry stops and bias-free policing. Part of that inquiry will explore whether supervisors are sufficiently reviewing documentation of such Terry stops and appropriately flagging those stops that have incomplete documentation or for which officers articulated inadequate reasonable suspicion to make the stop. The outcome of that assessment, therefore, will also provide important information about supervisory activity.

First, it defies logic that the Department can exceed terms of the Consent Decree, yet still fall short of "full and effective compliance" as to those terms.

Second, insofar as the Monitor expressly conditions the finding of "initial compliance" on the outcome of two upcoming assessments in other areas, such conditions evidence that, if the Monitor had intended "initial compliance" to suggest progress that yet falls short of "full and effective" compliance, the Monitor need not have reserved the finding of "initial compliance" pending the upcoming assessments given his finding of absolute compliance as to certain terms (*i.e.*, unity of command).

Finally, the Monitor having expressly couched suggestions offered and continuing interest in policy and training issues as "technical assistance," by the express terms of the Monitor's role under the Consent Decree such technical assistance can have no bearing on whether or not the Department is in "full and effective compliance" with the assessed terms.

> SPD may request technical assistance from the Monitor as needed. The Monitor may provide the requested technical assistance as long as the requested assistance will not conflict with the Monitor's duties under the Settlement Agreement and falls within the Monitor's budget. ***SPD has the discretion to decide whether or not to utilize the Monitor's advice.***

Dkt. #3, paragraph 50 (emphasis supplied). To be clear: the Department welcomes the Monitor's technical assistance, whether requested or simply offered. ***As a matter of law, however, such technical assistance can have no bearing on whether or not the Department is in "full and effective compliance" with its requirements under the Consent Decree.***

8. <u>AS DETERMINED BY THE MONITOR'S SEVENTH SYSTEMIC ASSESSMENT, FILED JANUARY 2017, UPON RE-ASSESSMENT THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO CHAIN OF COMMAND TYPE II FORCE INVESTIGATION AND REVIEW.</u>

The Monitor described the Seventh Systemic Assessment as follows:

> The First Systemic Assessment found that – for cases that occurred between July 1, 2014 through December 31, 2014 – "[s]ergeant investigations of Type II force are not where they need to be" and that "[l]ieutenants and captains are likewise not yet identifying and addressing deficiencies in sergeant investigations of Type II force." Thus, although SPD was in initial compliance with respect to the reporting of all force incidents and the investigation and initial review of officer-involved shootings, Type III, and Type I force, it had not yet complied with the Consent Decree's requirements regarding the investigation and review of Type II force.
>
> The purpose of this Assessment was to re-evaluate more recent Type II force cases to determine whether the Department is in compliance with the Consent Decree's provisions,

and the Department's policies, regarding the investigation and chain of command review of Type II force.

Dkt. #360, p. 5. Although the Monitor equivocated to some degree, ultimately the Monitor found the Department to now be in "initial compliance" with these relevant provisions of the Consent Decree, recognizing the SPD's commitment to strengthening systems to a degree beyond what the Consent Decree requires to be a decisive factor:

> In general, the Monitoring Team does not find the SPD has reached initial compliance until there is a solid record of uniform and consistent compliance to support an inference that if that level of compliance continues to be met, it is more likely than not that the court will ultimately find full and effective compliance at a later time. Under that definition, SPD falls a bit short. What distinguishes the case at hand nonetheless are the proactive steps to bring in administrative lieutenants to improve and hopefully cure deficiencies in the precinct level investigations. It was not a Consent Decree requirement but rather a voluntary step evidence SPD's commitment to full, fair and complete investigations. It is that kind of proactivity that will ultimately moot the Consent Decree in whole or in part. In recognition of that, we accordingly find that the SPD is in initial compliance with Paragraphs 103-111 of the Consent Decree.

Id., p. 7. On one hand, it should not go unnoted that the Monitor's proposed definition – and standard of care to the extent one is articulated – is not one that finds basis in the Consent Decree's language (and, one might reasonably argue, falls well short of the *Daubert* standard).[11] That concern, however, is essentially moot in light of the Monitor's ultimate, and operative, finding – that the Department is in "initial compliance" (*i.e.*, "carrying out in practice" its requirements under the Consent Decree, and thus in "full and effective compliance" as defined in paragraph 184) with the specific paragraphs cited *and* in terms of the parties' goal to cement in place a continuing commitment to reform beyond the express requirements of the Consent Decree.

9. AS DETERMINED BY THE MONITOR'S EIGHTH SYSTEMIC ASSESSMENT, FILED MARCH 2017, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO ITS EARLY INTERVENTION SYSTEM.

In concept, Early Intervention Systems (EIS) are designed to leverage data-based metrics to identify officers exhibiting potentially problematic behaviors, providing police supervisors an opportunity to intervene through mentoring, counseling, additional training, or other non-

[11] Again, factors to be considered under *Daubert* include (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *See Daubert I*, 509 U.S. at 592-94. Where the Monitor's now-proposed definition is wholly ambiguous and subjective as to the standard of care in multiple respects – requiring a "solid" record of "uniform" and "consistent" compliance (terms the in the Monitor's First Systemic Assessment the Monitor expressly stated could not be defined (see discussion on p. 5, Section A.1, above)) – the Departments submits that additional qualifications of establishing evidence sufficient to support an "inference" that it is "more likely than not" that the Court will "ultimately" find full and effective compliance "at a later time" can only be understood as a standard of care that is, at best, a moving target (and thus, per se, contrary to *Daubert*).

disciplinary measures at a point before the officer is involved in a significant adverse event. The Seattle Police Department's EIS is intended to promote chain of command accountability for employee performance while also providing supervisors a foundation to foster and recognize the success and professional growth of their employees. It is premised on the theory that by providing greater, and timelier, visibility into an employee's activities, EIS will facilitate effective supervision by creating clearer mechanisms for supervisors to identify potential performance issues and address any underlying causes before an employee's actions might jeopardize his or her career or lead to officer or Department liability. At the same time, EIS should also allow supervisors to identify employees who are performing their duties exceptionally well, proactively, and equally deserving of recognition.

The Consent Decree between the City of Seattle and the Department of Justice contains seven paragraphs relating to EIS:

> The City's EIS system will continue to be used for risk management purposes and not for disciplinary purposes. SPD will monitor the EIS to ensure it is meeting its objective of providing SPD with notice before behaviors become problematic.
>
> SPD will review and adjust, where appropriate, the threshold levels for each of the current EIS indicator criteria, and the EIS indicators. The Monitor will review and approve the revised EIS threshold levels and indicators.
>
> SPD will revise its EIS policy to include a mechanism for review of an officer whose activity has already triggered a threshold for one of the EIS indicator criteria, so that the threshold level is lower if EIS is triggered again, where appropriate. For example, if an officer has participated in a certain number of uses of force in a six-month period, SPD will design a protocol for lowering the threshold for subsequent review.
>
> SPD will collect and maintain information related to supervisor, precinct, squat and unit trends, consistent with the provisions of this section.
>
> SPD will collect, maintain, and retrieve information related to the following precinct-level activity:
>
> a) uses of force;
> b) OPA complaints and their dispositions;
> c) number of individual officers who have triggered EIS reviews; and
> d) supervisor reviews with officers.
>
> Supervisors should periodically review EIS activity of officers in their chain of command.
>
> SPD will revise its EIS policy and procedure, as necessary, so that interventions assist officers in avoiding potentially troubling behavior. Specifically, SPD policies and procedures will ensure that (1) the intervention strategy is implemented in a timely manner; (2) data regarding the implementation of the intervention is tracked in EIS; and (3) if necessary, the employee's supervisor reviews the progress of the intervention strategy.

See Dkt. #3, paragraphs 157-163. Implemented in May 2015, SPD's EIS, set forth in Manual Section 3.070, addresses these obligations as follows:

> Information relating to uses of force, OPA complaints and dispositions, and other indicator criteria (vehicle collisions, EEO complaints, vehicle pursuits, K9 applications) are maintained in and which provides supervisors dashboard access into where their employees stand with respect to various triggers (red, green, yellow). Supervisors are expected to monitor this dashboard to maintain general awareness of their employees' standing with respect to EIS criterial. In addition, the EIS Coordinator, a Sergeant in the Human Resources Section, is responsible for monitoring, among other factors, precinct-level activities relating to use of force, the numbers of employees who have triggered EIS assessments, and identifying individual employees who have met the criterial for an EIS assessment.
>
> If an employee's EIS activity reached a threshold level, the EIS Coordinator will route an EIS Assessment through IAPro to the employee's chain of command. The Assessment is a supervisor's opportunity, with involvement and cooperation from the employee, to explore the underlying incidents and, if appropriate, devise proactive strategies to address any performance concerns that may be identified. If deemed necessary, the supervisor will document recommended strategies, whether coaching, counseling, or training, in a Performance Mentoring Plan that is submitted to the chain of command. A Performance Mentoring Plan will provide the employee with specific recommendations and guidance to address any identified issues. The Performance Mentoring Plan will be reviewed and approved by the chain of command, the Performance Review Committee, and the appropriate Bureau Chief. Biweekly status reports are required to gauge the effectiveness of the Performance Mentoring Plan.
>
> The Performance Review Committee (PRC) serves as oversight of the EIS to ensure that it operates fairly, transparently, and efficiently. The PRC is responsible for reviewing all Assessments, Mentoring Plans, and Status Reports. The PRC looks for consistency among chains of command and is responsible for ensuring that supervisors of all ranks and positions are meeting their responsibilities under the EIS policy and Department expectations of supervisors. The PRC will recommend to the Chief modifications to EIS threshold criteria as appropriate or that additional criteria be added. Possible criteria, as gleaned from the practices of other agencies, may include commendations, missed court appearances, or officer activity relative to squad (allowing for peer-based comparisons).

Before discussing the findings in the Monitor's Eighth Systemic Assessment, filed March 23, 2017, it is worth returning to the distinction in the Consent Decree between (1) compliance as established by way of "compliance reviews and audits" under Section IV.E.1, which predicates compliance on a showing that the Department is "carrying out in practice" the policies and training as approved by the Court and (2) compliance by way of "outcome assessments" under Section IV.E.2, which predicates compliance on a showing "that the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of the use

of excessive force exists[.]" *Compare* paragraphs 184, 187. In other words, paragraph 184 is process-based, whereas paragraph 187 is outcome-based.

This distinction becomes important in contextualizing the Monitor's findings. In terms of outcomes, there is no question that, during the time EIS has been in place, the incidence of "adverse events" has declined dramatically. Benchmarked against the DOJ's initial findings, for example, the overall frequency of use of force is dramatically reduced (as the Monitor found in in the Ninth Systemic Assessment, force incidents are down 55% with respect to intermediate or higher use of force) even as productivity remains high, and out-of-policy cases are remarkably few. Community support is high (as the Monitor noted in the Third Systemic Assessment). To the extent that lawsuits brought by members of the public serve as a proxy for measuring performance, number of filings against the Department over the past three years – already low relative to similarly situated cities – are even lower. ***Accordingly, if the success of EIS is to be measured by the non-occurrence of adverse events that, had they occurred, might have been foreseeable based on the past behavior of an involved officer, then there can be no argument that EIS as presently constructed has been anything other than a resounding success.***[12] Thus, if the assessment is outcome based, as opposed to process based, there can be no question but that the Department is resoundingly in full and effective compliance.

The Monitor did not approach this inquiry in terms of outcome, however, but rather in terms of process – *i.e.*, was SPD methodically carrying out in practice the policies and training that the Monitoring Team had required with respect to EIS. In that regard, the Monitor found the Department to be in "initial compliance" with paragraphs 157 through 163 of the Consent Decree, although he expressed dissatisfaction with certain elements of the process, specifically:

- The Monitor disagreed with certain assessments as to whether an officer was in need of intervention.

- The Monitor indicated a need for the chain of command to develop a "better understanding going forward of how to use an EIS system to gain a deeper understanding of officers' needs, and how to assess, support, and guide them.

- The Monitor expressed concern that there was insufficient detail in supervisors' assessments to allow for a full and thorough review by the Performance Review Committee.[13]

(In a follow-up to this memo, the Department will respond in more detail to these criticisms, noting (1) the growing body of literature that rejects the efficacy of systems such as that SPD was directed to implement here (a study by the Inspector General for the Los Angeles Police Department, for example found that a system similar to Seattle's routinely flags officers who appear to pose no

[12] On the other hand, if a reduction in "adverse events" can be attributed more generally to enhanced policies and training and increased supervision and support, then separating out the EIS process from other consent-decree driven achievements becomes difficult if not impossible.

[13] It should be noted that at no time did any member of the Monitoring Team or DOJ attend, or request to attend, a PRC meeting, neither, accordingly, has basis to speak to the PRC's review.

concerns but fails to catch many who do (http://www.latimes.com/local/la-me-lapd-problem-officers-20140826-story.html) – a finding that mirrors peer-reviewed, published empirical studies of similar systems in other agencies); (2) SPD's ability, through its Data Analytics Platform, to now bring together data points from all aspects of an officer's professional life, enabling workload-normalized and peer group-appropriate comparisons for the identification of abnormal or irregular behaviors (a level of sophistication not contemplated by the Consent Decree); (3) SPD's participation (along with Deputy Monitor Matthew Barge) on a national advisory committee sponsored by the University of Chicago Crime Lab that brings together law enforcement executives, academics, medical professionals, and others to conceive and design a new model of for evidence-based early intervention based on machine learning and validated factors; and (4) SPD's active engagement with other researchers around the country who are similarly seeking to formulate a new vision for EIS.

For purposes of this section, however, one thing should be clear: separate and apart from easily being able to demonstrate a decline in "adverse events" since 2012 (whether due to EIS or a conglomeration of other processes), the Monitor's process-driven criticisms cannot be a barrier to finding the Department in full and effective compliance (per paragraph 184 of the Consent Decree) for two reasons. First, the Monitor himself couches his "critiques" in the form of technical assistance ("Critiques offered in this assessment thus should be viewed as technical assistance," Dkt. #374, p. 3) – guidance that, under paragraph 173, SPD has discretion to accept. Second, the Consent Decree is clear that the City is not prohibited from implementing alternative, more effective strategies to meet the terms of the Settlement Agreement (as it is doing). *See* Dkt. #3, paragraph 170:

> The Parties recognize that there may be alternative ways to implement the terms of this Agreement. The City is free to choose implementation strategies it deems appropriate so long as they are not in conflict with the Settlement Agreement terms. The Monitor may provide advice to the Parties regarding her or his views on the most effective strategy, but is not authorized to require implementation in a manner that requires more or different actions on the part of the City than is mandated by the terms of the Settlement Agreement.

Simply put, the Monitor having found the Department to be in "initial compliance" (*i.e.*, "full and effective compliance" per paragraph 184 of the Consent Decree), the Monitor's wholly subjective opinion as to what more the Department should do to further bolster the paper trail proving its adherence to policies around a system the Department is actively working, both internally and with external partners, to strengthen cannot be a barrier to compliance.[14]

10. AS DETERMINED BY THE MONITOR'S NINTH SYSTEMIC ASSESSMENT, FILED APRIL 2017, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO USE OF FORCE.

[14] The Department notes that the Monitor expressly draws a distinction here between "initial compliance" and "full and effective compliance," seemingly suggesting again that "initial compliance" – which he previously defined synonymous to the Consent Decree's definition of "full and effective compliance" in paragraph 184 – somehow indicates a lesser level of achievement. The Department has made its point on this issue.

In the Ninth Systemic Assessment – which the Monitor described as "fundamental and expansive" – the Monitor explained the purpose of the Assessment.

> In terms of creating policy and training, the Monitor has previously praised the Department's efforts and compliance with requirements to create new policies and training. SPD's use of force policies are clear, simple, balanced, and well-reasoned – perhaps, with their emphasis on de-escalation, among the best in the country. The Monitor has previously cited the training provided to officers on use of force as similarly excellent and exemplary.
>
> The purpose of this report is to evaluate whether the SPD has achieved initial compliance with the provisions of the Consent Decree between the United States and City of Seattle that address officer use of force. It focuses on whether the performance and conduct of officers in the field – over time and across incidents – can establish that SPD, after having "trained all relevant personnel as necessary to fulfill their responsibilities pursuant to the requirement[s]" on force and creating force policies, is "carrying out [that training and policy] in practice."

Dkt. #383, p. 1 (with citation to paragraph 184). Otherwise described, the purpose of the Assessment was also to evaluate

> the performance of SPD's officers across force incidents to consider whether SPD's officers are, in fact, affirmatively complying with the requirements of SPD policy, the Consent Decree, and the laws of the United States and State of Washington.

Id., p. 23 (*accord* paragraph 187). The assessment, accordingly, "weave[d] together" what were originally envisioned as three independent, stand-alone assessments relating to officer activity, a quantitative evaluation of aggregate data on use of force, and a qualitative assessment of force incidents. *Id*., p. 24. It was, in other words, intended to address compliance both through the process-based approach of Section IV.E.1 and the outcome-based approach of Section IV.E.2.

With that context provided, the Monitor's 102-page assessment detailed the following findings:

- Overall use of force rates are down – both over the 28-month study period and compared to the DOJ's investigation period. This included a sixty-percent reduction in the number of moderate to higher-level use of force incidents (Type II and Type III) relative to the DOJ's findings. The Monitor specifically noted that of the 2,385 force incidents, only 39 (1.6%) involved Type III use of force. *Id*., p. 2.

- **"Of the nearly 750,000 unique incidents to which officers responded or on-viewed during this review period, less than 0.00003% involved a greater than moderate (Type II) level of force.** By extension, an exceedingly small fraction of SPD interactions involved force that was deemed inconsistent with policy." *Id*., p. 9 (emphasis in original).

- Use of less-lethal instruments has dramatically declined, with only 23 incidents involving a use of a baton (a concern highlighted in the DOJ's 2011 Findings Letter) and 42 incidents involving the use of a Taser over the 28-month study period. *Id*., p. 3.

- When force is used, the vast majority is low-level, Type I use of force, a large proportion of which are instances of complaints of pain associated with handcuffing. *Id*., p. 4.

- The typical SPD officers uses force very infrequently; the Monitor found an average of 3.3 uses of force per officer over the course of the 28-month evaluation period. *Id*., p. 4.

- While in "crude" census-population-based terms the Monitoring Team found some racial disparity in the population of subjects of force incidents relative to Seattle's demographic makeup, no statistically significant disparities were observed with respect to the type or severity of force used. *Id*., p. 5.

- While recognizing there is currently no reliable way to definitively capture incidents where force might have been used, but where officers were able to de-escalate to the point where no force was necessary, the Monitor found "highly encouraging quantitative and reliable anecdotal evidence of increased use of de-escalation. *Id*., p. 6.

- Force has decreased without any increase in officer injuries or without any increase in crime.

- Officer use of force is typically and sufficiently consistent with law and SPD policy. Specifically, over the 28-month study period, the Monitor found that officers used force that was consistent with SPD policy more than 99% of the time. Likewise, the Monitor found that officers were appropriately de-escalating incidents in 99% of those instances where it was safe and feasible to do so. *Id*., p. 6.

Thus, the Monitor found resounding evidence that SPD officers were, in fact, "carrying out in practice" the policies and training implemented over the life of the Consent Decree (*i.e*., "full and effective compliance" as defined in paragraph 184). The Assessments speaks for itself in terms of its significance:

> The City of Seattle reaching initial compliance with the core provisions of the Consent Decree relating to use of force is a testament to the hard work, dedication, commitment, and performance of many over an extended period of time. Chief Kathleen O'Toole, and her command staff, have worked tirelessly since she became chief in June 2014 to implement comprehensively the force-related provisions of the Consent Decree. Her constant promotion of the new use of force policies as good for the men and the women of the police department and the Seattle community has done much to cultivate buy-in and ongoing application by the rank and file. …
>
> However, the credit for this major milestone goes first and foremost to the men and women of the Seattle Police Department***. This assessment is fundamentally an analysis of their performance over time. Their ability to meaningfully and effectively implement the use of force policies and apply the related use of force training on the streets of Seattle – while facing the unpredictable challenges that are part and parcel of law enforcement – is worthy of substantial praise. …*** As this report elsewhere makes clear, police officers in Seattle are frequently tasked with addressing individuals and situations that the rest of the

> social service fabric as failed, left out, or left behind. Their ability to innovate, change approaches, and change the course of the Department while addressing these fundamental duties is commended.

Dkt. #383, p. 10 (emphasis supplied). Simply put, the Monitor continued, "[t]he significance and importance of this [assessment] cannot be understated." *Id*., p. 2.

11. <u>BECAUSE THE POLICIES AND TRAINING ON WHICH USE OF FORCE COMPLIANCE WAS ASSESSED ESTABLISH A SUBSTANTIALLY HIGHER STANDARD OF CARE THAN IS REQUIRED UNDER A FOURTH AMENDMENT ANALYSIS ALONE, THE MONITOR'S FINDING THAT SPD OFFICERS ARE "CARRYING OUT IN PRACTICE" THE REQUIREMENTS OF SPD POLICY AND TRAINING NECESSARILY REQUIRES A FINDING THAT THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" WITH THE CONSENT DECREE IN FULL, AS CONTEMPLATED UNDER PARAGRAPH 187 OF THE CONSENT DECREE.</u>

As noted earlier, the purpose of the assessment was twofold: (1) to determine whether, consistent with "full and effective compliance" as defined in paragraph 184, SPD officers were carrying out in training the robust policies and training around use of force; and (2) to determine whether, as a result, "the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of excessive force exists," consistent with "full and effective compliance" as defined in paragraph 187.[15] The Department having been found in compliance, as defined in paragraph 184, with respect to use of force, the Department is also – by logical and practical necessity – in full and effective compliance as defined in paragraph 187.

Paragraph 187 addresses the use of force in purely Constitutional terms. *Graham v. Connor*, 490 U.S. 386, 395 (1989) sets forth the exclusive standard for analyzing claims of excessive use of force. The inquiry under *Graham* is "whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397. The Court considers (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is

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[15] Again, as paragraph 186 makes clear:

> The goal of the Parties in entering into the Settlement Agreement is to ensure that SPD's use of force is consistent with the requirements of the United States Constitution and 42 U.S.C. §14141. … [I]f the City is able to establish, through outcome measures, that the purposes of the Settlement Agreement have been met, the decree may terminate even if the City is not in full and effective compliance with the specific process terms.

In other words, even had the Department not established compliance by way of the process based approach as to all core topical areas of the Consent Decree, an outcome-based finding that SPD's use of force was systemically Constitutional is in and of itself sufficient basis to terminate the Consent Decree. However, because the Department *was* assessed, and found, over a material period of time and sufficient number of incidents, to be in "where it needs to be" to demonstrate that it is "carrying out in practice" the policies and training implemented under the Consent Decree (i.e., in "full and effective compliance" with those terms as defined in paragraph 184, the City has well exceeded the lesser requirement of paragraph 187 for termination of the Consent Decree in full.

actively resisting arrest or attempting to evade arrest by flight. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

As the United States Supreme Court recently restated, *Graham* is "*the* framework" for analyzing the use of force. *County of Los Angeles v. Mendez*, Slip Op. --- U.S. ---, (May 30, 2017) ("[*Graham*] sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment.").

Department policy incorporates the Constitutional standard set forth in *Graham*, but contains additional requirements that set a far higher bar for officer performance than does the Fourth Amendment. These policies are set forth in SPD Manual Title 8 (https://www.seattle.gov/police-manual/title-8). Policy sections 8.000 through 8.200 set forth the conditions under which force is authorized, when force is prohibited, and affirmative obligations to de-escalate prior to using force, when reasonably safe and feasible to do so, and to assess and modulate force as resistance changes. While recognizing that officers are often forced to make split-second decisions, in circumstances that are tense, uncertain, and rapidly evolving, this policy allows officers to use only the force that is not just objectively reasonable, but also necessary, and proportionate to effectively bring an incident or a person under control. While thematically intertwined with the consideration of reasonableness, these additional considerations of "necessity" and "proportionality" – defined separately from "reasonableness" in SPD policy – are not included in the *Graham* analysis.

Section 8.300 addresses the use and deployment of force tools that are authorized by the Department, such as less-lethal munitions, canine deployment, firearms, OC spray, and vehicle-related force tactics. These option-specific policies far exceed, in specificity, what is required under a *Graham* analysis.

The affirmative obligation to de-escalate is at the core of Department use of force policies and training, and provides another clear example as to how the Department holds officers, under policy, to a higher standard than *Graham*. SPD's de-escalation policy requires that, when safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution. When time and circumstances reasonably permit, officers shall consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply. An officer's awareness of these possibilities, when time and circumstances reasonably permit, shall then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution. Mitigating the immediacy of a threat where safe and feasible to do so gives officers time to utilize extra resources and increases time available to call more officers or specialty units.

De-escalation can be considered along a spectrum of response that includes what the Ninth Circuit has previously termed the "provocation rule," by which the Ninth Circuit allowed for an excessive force claim in situations where, regardless of whether the force itself was reasonable under *Graham*, officers contributed to the need to use force by "intentionally or recklessly provoking a confrontation." *Billington v. Smith*, 292 F.3d 1189 (9th Cir. 2002). (Provocation, accordingly, is that at the extreme of Department policy would consider a failure to de-escalate, insofar as it effectively causes the need for a use of force.) In *Mendez*, the Supreme Court rejected the

provocation rule as a component of an excessive force claim, making clear that even such action recklessly taken could not give rise to an excessive force claim where the force itself was objectively reasonable under the circumstances that resulted from the provocation:

> By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. That is precisely how the rule operated in this case. The District Court found (and the Ninth Circuit did not dispute) that the use of force by the deputies was reasonable under *Graham*. However, respondents were still able to recover damages because the deputies committed a separate constitutional violation (the warrantless entry into the shack) that in some sense set the table for the use of force. That is wrong.

Mendez, Slip Op., p. 8.

Both with respect to force, force tools, and de-escalation, SPD policy incorporates both federal and state constitutional thresholds, *but holds officers to a higher level of specific performance and scrutiny consistent with community expectations*. By default, accordingly, a finding that force is out of policy does *not* equate to a finding that the force violated the Constitution, but a finding that the force was in policy *does* mean it was also likely lawful under the Constitution. Using the *higher* standard of SPD policy as the benchmark for assessing compliance under paragraph 184, the Monitor made clear that, in the exceedingly small fraction of overall incidents where officers are using force, officers are doing so in a manner that is reasonable, necessary, and proportional under the circumstances, and are complying with their policy obligation to de-escalate where safe and feasible to do so, in over 99% of instances. ***Because the analysis required under policy is more comprehensive and expansive than that required under the Fourth Amendment, the Monitor's finding of compliance with respect to policy necessarily means that SPD is demonstrating, and has been over a material period of time and across a sufficient number of incidents, at a <u>minimum</u> performance level of 99%, that "the standard and established practice of SPD officers is to use force within constitutional limits and that no pattern or practice of excessive force exists," consistent with "full and effective compliance" as defined in paragraph 187.***

<u>This finding, alone, supports termination of the Consent Decree in full</u>.

12. <u>AS DETERMINED BY THE MONITOR'S TENTH SYSTEMIC ASSESSMENT, FILED JUNE 2017, THE DEPARTMENT IS IN "FULL AND EFFECTIVE COMPLIANCE" AS DEFINED IN PARAGRAPH 184 OF THE CONSENT DECREE WITH RESPECT TO STOPS AND DETENTIONS.</u>

In its 2011 Findings Letter, the Department of Justice expressly noted that it did not find a pattern or practice of bias by Seattle police officers with respect to investigatory stops and detentions, but cautioned that gaps in data collection made it difficult to address community concerns in that respect. Through subsequent policy revisions, SPD affirmatively sought to remedy this gap by requiring officers to record, at a minimum, (1) the original and subsequent objective facts for the stop or detention; (2) the reason for and disposition of the stop (including whether an arrest resulted); (3) whether a frisk or search was conducted and the results of the frisk or search; (4) demographic information pertaining to the subject, including perceived race, perceived age, and

perceived gender; and (5) any complications or delays that contributed to an inability to provide this information.

In 2015, in conjunction with developing the Data Analytics Platform, SPD introduced a new computerized template that allows it to capture, as part of its Records Management System, these and additional fielded and narrative data around *Terry* stops, including further metrics that capture the officer's status (on duty or off duty, CIT-certified, years of service), the date, time, and location of the stop, and the duration of the stop. (As the Monitor has stated, "[this] template is a strong data collection instrument, on par with the one used in New York City and stronger than that recently mandated in California). Dkt. #394, p. 3.

On June 18, 2017 – fifteen months after it was originally scheduled to be filed – the Monitor filed the tenth, and final, of the outcome assessments that had been scheduled under the Third Year Monitoring Plan. The Monitor described the purpose of this Assessment as follows:

> This report addresses two basic issues, captured in the Consent Decree and SPD policy: (1) the appropriateness (or constitutionality under the Fourth Amendment) of stops and frisks; and (2) disparity with respect to stop activity (or constitutionality under the Fourteenth Amendment). It both analyzes aggregate statistics across all SPD stops over a substantial time period and reports on an in-depth analysis of nearly 1,500 stops that evaluated whether the stops complied with law and SPD policy.

Dkt. #394, p. 3.

The Monitor's findings with respect to these findings can be broadly summarized as follows:

- **The vast majority of stops were adequately justified.** SPD officers have reasonable, articulable suspicion that the involved subject had been, was, or would soon be engaged in criminal activity – which is the required legal standard for initiating a so-called *Terry* stop – in 99 percent of stops.

- **The vast majority (97 percent) of frisks were adequately justified.** In 97 percent of frisks conducted during *Terry* stops, officers had appropriate and separate grounds for conducting a minimally-invasive search for a weapon during a Terry stop and were not automatically conducting a frisk of subjects simply because they were stopped.

- **Most stops were appropriately limited to a reasonable scope and reasonable duration, as required under law and SPD policy.** Race did not impact the odds of being subjected to a stop of an unreasonable scope or unreasonable duration.

- **Few additional policy issues with respect to initiating or conducting the stops were identified.**

- **Race did not impact the odds of being subjected to a stop of an unreasonable scope or unreasonable duration.**

- **<u>Black subjects were more likely to be the recipient of a legally-justified frisk than were White subjects or subjects of other races – but Black subjects are actually less subject to unjustified frisks than Whites</u>.**

Dkt. #3, pp. 5-6 (emphases in original).

While the Monitor did find certain disparities in the data relative to a demographic breakdown of Seattle's census-based population, based on a statistical review of 13,124 administrative records[16] of the Monitor explained:

> There has been a robust discussion in legal decisions and in academic and social science literature about the merits and disadvantages of a host of statistical approaches for identifying and testing disparities in stop data. Rather than wade into the debate about what type of statistical analysis is best or most accurate, or what "benchmark" is most appropriate or analytically powerful, our analysis here attempts to proceed through a wide array of the most generally accepted approaches and benchmarks. Although it is theoretically possible that none of these benchmarks could [produce] a definitive result, even when the results are taken together, it is the Monitoring Team's hope that, by relying on a multitude of approaches advanced by various researchers that all tell parts of but not the whole story, a clearer view of SDP's stops patterns with respect to race might emerge.
>
> One major class of tests involved an overall, population-based analysis. Those analyses ask whether the population of stopped subjects is consistent with the overall Seattle population, and with smaller population units based on geography, in terms of race. However, they do not take into account that disparities in terms of race might be a natural byproduct of the police basing stops on other factors not related to race. For instance, one explanation for why individuals of some races may be stopped, in aggregate, at a disproportionate rate would be related to crime. If more individuals of a given race happen to engage in more crime (for a variety of reasons), or crime tends to happen more frequently in neighborhoods with a higher composition of that given race, the racial disparity might originate with good-faith, race-neutral efforts by the police to curtail crime. Relatedly, the police may be more or less active in particular neighborhoods with discrete demographic breakdowns, due to crime, calls for service, or community concerns. Various socioeconomic factors may also explain the disparity.

Id., pp. 8-9. Thus, in discussing certain disparities noted, the Monitor also acknowledged:

> Seattle is neither unique or alone in these challenges. Likewise, the Seattle Police department is not unique or alone when it comes to the broader criminal justice system.

[16] As the Monitor observed, unlike many jurisdictions, the Seattle Police Department does not use "stop and frisk" as a deployment tactic. While some may look at officer stops as a proxy for proactivity, the Department does not view the number of stops as indicative of a goal by which to measure proactive policing. Without question, investigative stops, when supported by reasonable suspicion, are a useful tool to address potential criminal activity encountered by police officers, but increasing or even maintaining the level of stops year to year is not a goal for the department. Other tactics, such as premise checks, persistent offender arrests, and simply maintaining a uniformed police presence in heightened emphasis areas, may be considered to be as effective, if not more so, than stop and frisk models that have been of questionable value, even where supported by reasonable suspicion, elsewhere.

> Thus, although it does not excuse or mitigate the profound, long-term effects of disproportionate enforcement, Seattle and its police department share with the rest of the country and its judicial system a set of historical, cultural, social, socioeconomic, educational, and other experiences and realities when it comes to race. In some ways, it would be quite surprising if SPD did not reflect larger realities related to race that are centuries in the making.
>
> The specific challenge for Seattle will be for its communities, elected leaders, and political system to address – in a meaningful, nuanced, and systemic way – mechanisms for more evenly distributing the burdens and weight of certain law enforcement practices while ensuring, in the meantime, that the burdens and weight of crime are not increased or more unevenly distributed as a result.

Id., p. 13. Thus, the Monitor concluded,

> As Seattle continues to be an ever more forward-looking model of contemporary policing, the Monitor hopes that this assessment, even as it commends the Department for its initial compliance with the specific issues and provisions of the Consent Decree relating to stops, sets an agenda for a discourse that might ensure that the benefits and burdens of safe, effective enforcement are broadly shared.

Id., p. 14. Through steps more thoroughly discussed in Section II of this memorandum, the Department fully embraces its role in this dialogue. For purposes of this Section, the Department notes the Monitor's finding that:

> **[B]ecause SPD's officers have the appropriate legal and policy justification for stops and frisks in a vast majority of instances, the Department is in initial compliance with Consent Decree paragraphs 138 through 144 addressing stops and detentions.** Informed both by prior monitoring of bias-free policing training and the fact that most SPD stops appears to not be subjecting people of some races to more legally impermissible stops, at least with respect to the Fourth Amendment, **the Monitor finds that SPD is in initial compliance with paragraphs 145 through 152 addressing the creation of the bias-free policing policy, officer training, and supervisory responsibilities.**

Id., p. 7 (emphasis in original). In other words, returning to his earlier definition, the Monitor determined that the Department is "where it needs to be" with respect to "carrying out in practice" over "a material time period and across incidents" the Court-approved policies and training required with respect to each of its obligations under these paragraphs of the Consent Decree.

These paragraphs comprising the remainder of the Department's requirements, there can be no argument but that the Department is in full and effective compliance with the Consent Decree in full.

UNDER PARAGRAPH 99 OF THE CONSENT DECREE, SPD IS MEETING ITS OBLIGATION TO DEMONSTRATE SUSTAINED COMPLIANCE THROUGH ANNUAL, SYSTEMIC REPORTS CONCERNING OFFICER USE OF FORCE.

Paragraph 223 of the Consent Decree provides:

> To ensure that the requirements of the Settlement Agreement are properly and timely implemented, the Court will retain jurisdiction of this action for all purposes, including but not limited to any disputed changes to policies, procedures, training, and practices, until such time as the City has achieved full and effective compliance with the Settlement Agreement and has maintained compliance for no less than two years. At all times, the City and SPD will bear the burden of demonstrating substantial compliance with the Consent Decree. When the United States and the Monitor agree that the City has maintained substantial compliance, the City will be relieved of that portion of the Settlement Agreement.

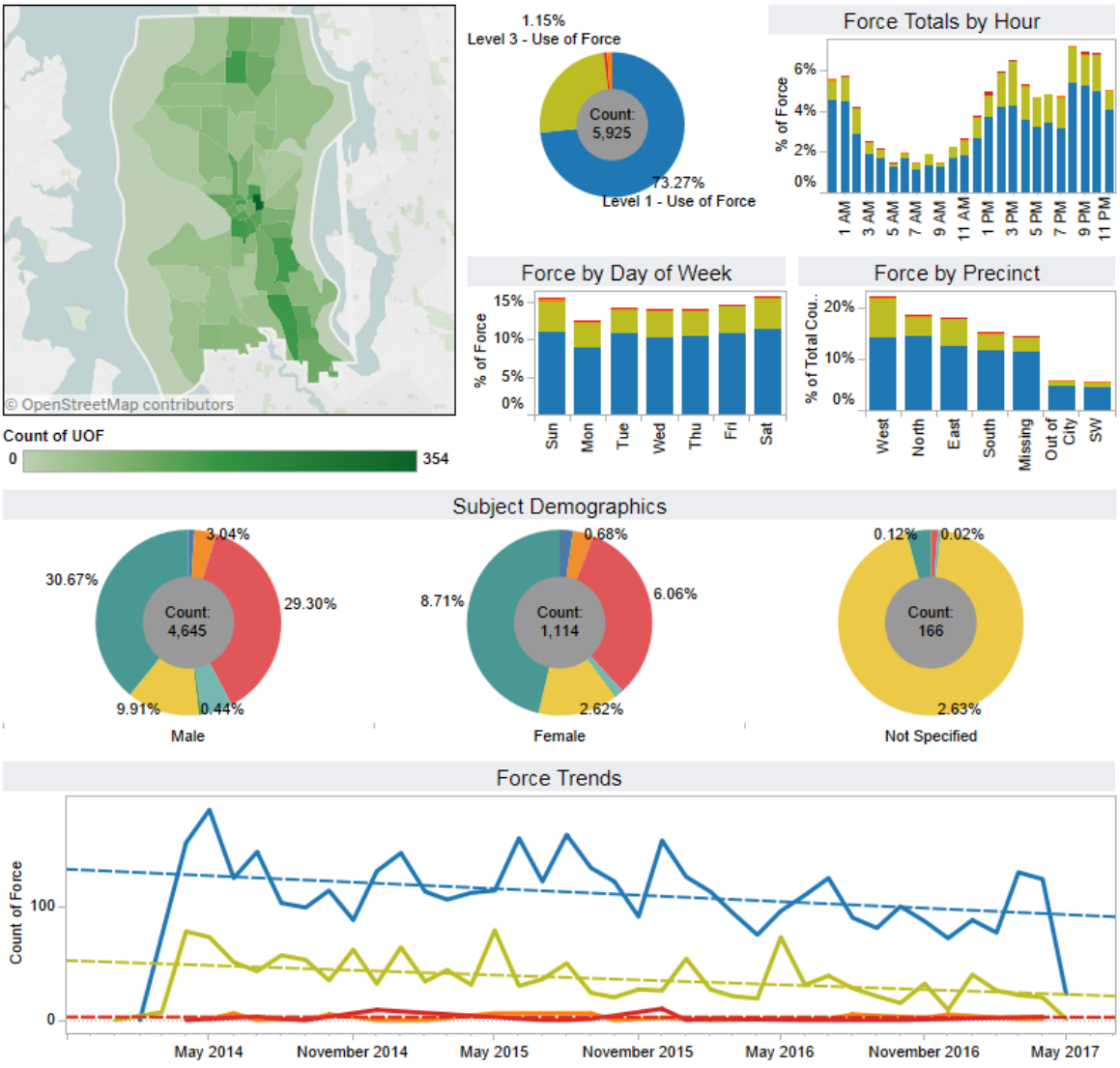
Paragraph 99 of the Consent Decree requires:

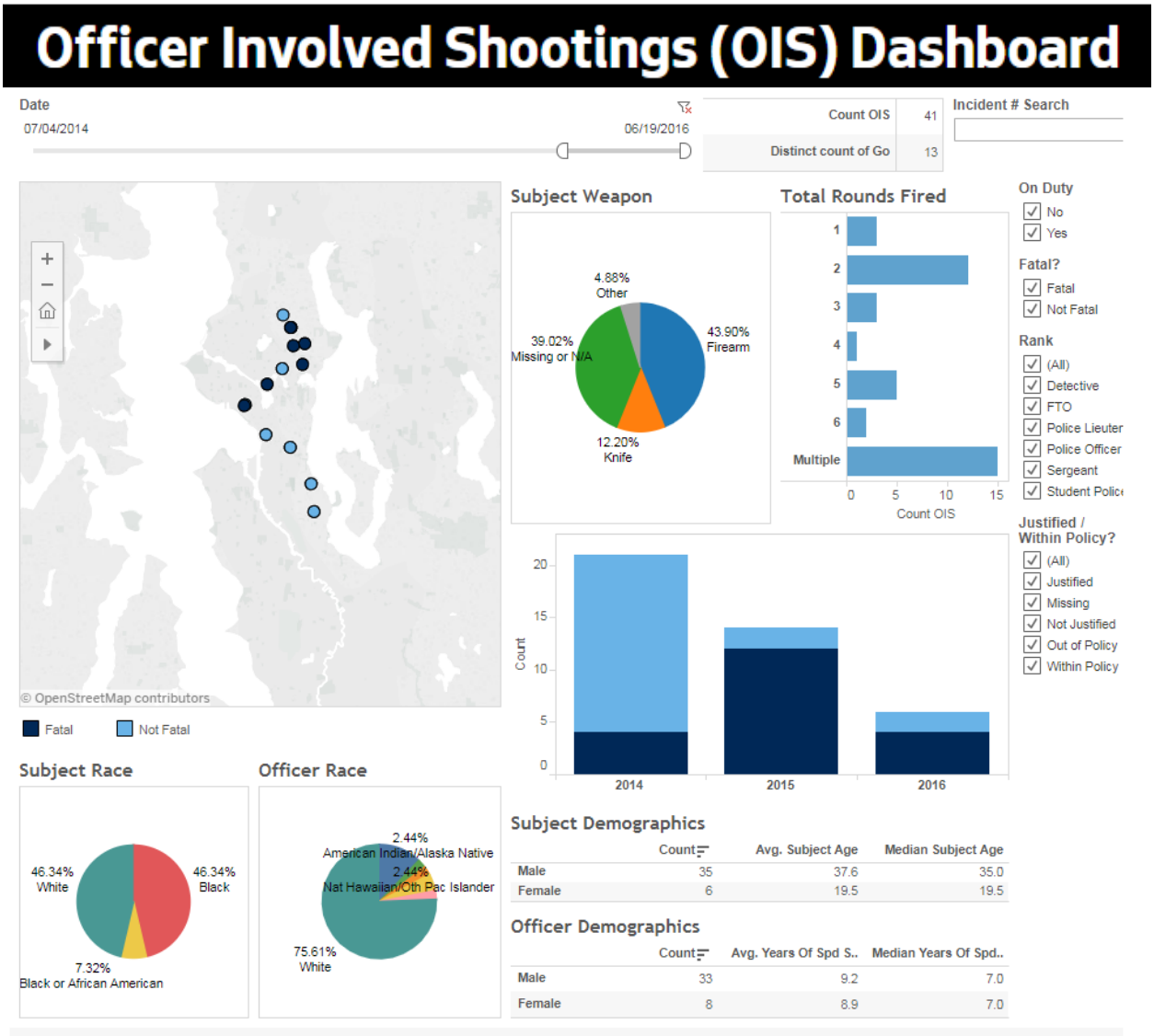
> SPD will continue to analyze the force data captured in officers' force reports and supervisors' investigative reports on an annual basis to determine significant trends, to identify and correct deficiencies revealed by the analysis, and to document its findings in an annual public report.

The Department has met, has exceeded in some instances, and has implemented systems to ensure continuing compliance with this requirement. On January 31, 2017, SPD released its first Use of Force Annual Report, reporting and analyzing use of force data collected between July 1, 2015 and August 31, 2016. That report covers not only quantitative statistics, but includes a descriptive statement of force investigation and review, providing an overview of each Force Investigation Team response and the work of the Force Review Unit and Force Review Board. (See http://www.seattle.gov/Documents/Departments/Police/Publications/Use%20of%20Force%20Annual%20Report%20-%20Final.pdf.) This Report followed the Department's 2015 Crisis Intervention Annual Report (which itself is not required under the Consent Decree), covering the time period May 15, 2015 to May 14, 2016, and includes data regarding use of force in incidents involving a person in a behavioral health crisis. The Department's 2016 Crisis Intervention Annual report, covering the time period May 15, 2016 to May 14, 2017, will be released on August 15th.

In addition, as one of the original 21 jurisdictions participating in the Police Data Initiative, launched in response to recommendations from President Obama's Task Force on 21st Century Policing (and now managed by the Police Foundation in Washington, D.C.), the Department committed to publishing its use of force data, including data concerning officer-involved shootings, to help communities gain greater visibility into key information on police/civilian interactions. Fulfilling and building upon that commitment, the Department has both released to the City's open data portal, data.seattle.gov, the use of force data described in Section I of this report, and has added to its newly-redesigned website interactive dashboards through which the public can explore for itself officers' use of force, parsed across demographic and geographic fields. Screenshots of both the Use of Force dashboard, and the Officer Involved Shooting dashboard, for the time period covered in the Department's Use of Force Report, are shown below by way of example:

Use of Force Dashboard





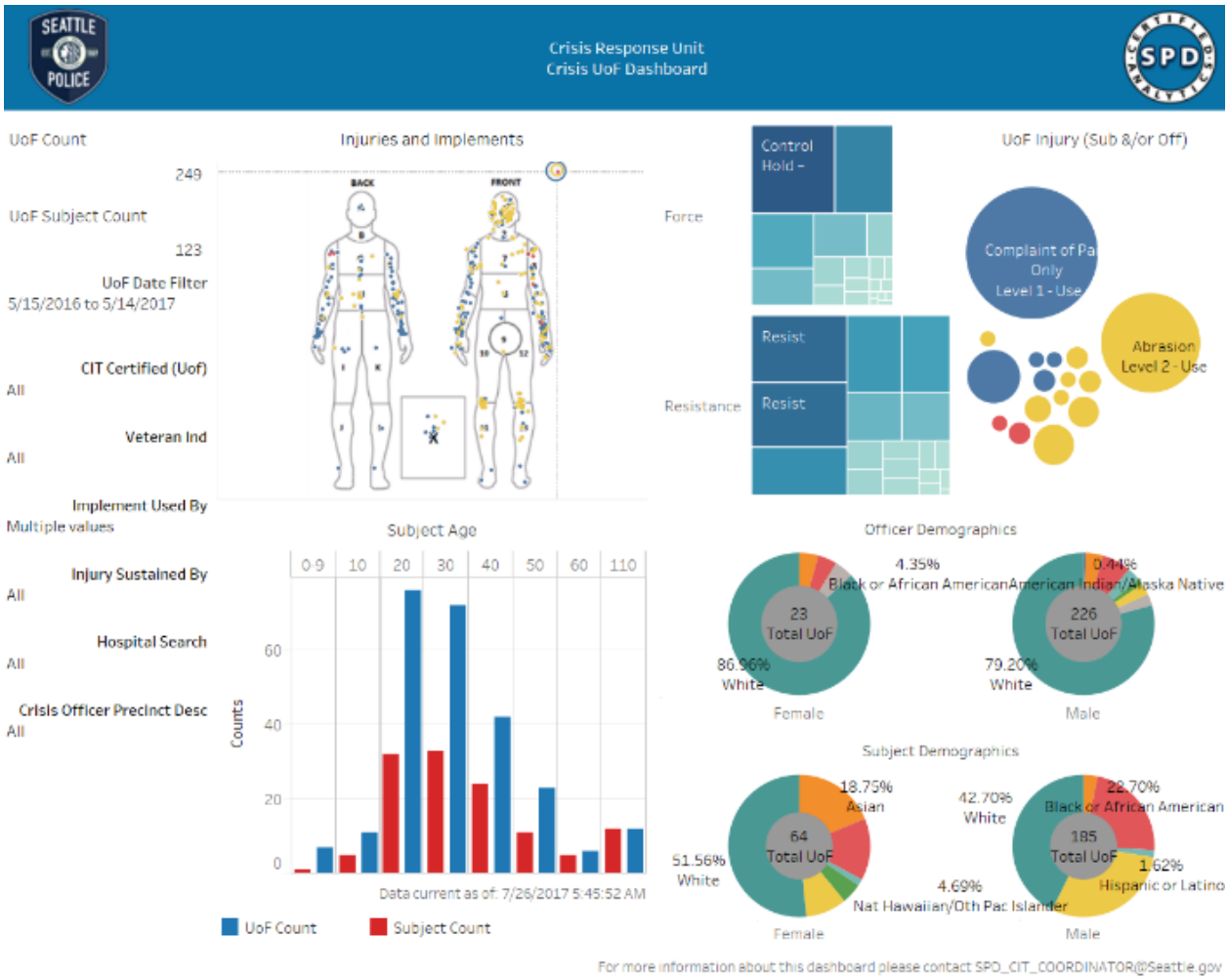
These dashboards, which can be navigated queried through point-and-click, are publicly accessible at https://www.seattle.gov/police/information-and-data/use-of-force-data/use-of-force-dashboard and https://www.seattle.gov/police/information-and-data/use-of-force-data/officer-involved-shootings-dashboard.

Separate and apart from its commitment to proactive release of data in user-friendly form, the Department's new Data Analytics Platform ("DAP") has fundamentally changed how the Department is able to aggregate and present information. A complex of data processing software, data warehousing and ad-hoc querying resources (dashboards), the DAP provides near real time analytics of both operational and officer performance data. This general operational awareness enables a more engaged approach to management and strategy that is the foundation of an agile policing.

The systems necessary to receive calls, dispatch resources, manage cases, document use of force and the myriad other functions of a modern police agency were developed, largely, as stand alone,

modular platforms. The DAP sources information from nearly 20 independent source systems to render a centralized, 360-degree view of the operation. The analytics complied from these data is available in near real time and allows the end user (*i.e.* command staff / civilian management) to engage a dynamic exploration of their area of management.

The DAP not only makes possible an operational awareness at the most granular unit of management within the organization but also a broad, strategic overview of specific areas of interest to department leadership. Data about Use of Force (UOF), compliance with policy regarding review and investigation, and the representation of trends and patterns within narrow areas of operational focus (*i.e.* Crisis and UOF) is available with point-click functionality. The screenshot below, for example, shows how data regarding use of force in crisis incidents can be easily aggregated, parsed, and analyzed against a number of metrics to provide for more holistic, yet granular, inquiries.



The power and sophistication of the DAP means, fundamentally, that insight into the Department's activities across the core topical areas of the Consent Decree, can be provided with near immediacy.

Thus, while the Department will continue to put forth annual reports detailing not just its use of force, as required by paragraph 99, but also – exceeding the requirements of the Consent Decree with respect to on-going reporting – its crisis intervention data and its stops and detentions, should there be any question concerning SPD's performance in these areas, the inquiry is one that can be easily addressed through this technology and the underlying reports.

CONCLUSION

"Reform" is not an end-goal; it is an on-going, cyclical process of continuing awareness, critical self-assessment, and the evolution of policy, training, and practice as informed by internal reviews, research in the social science of policing generally, and accordant advancements in best practices nationally and in common law jurisdictions around the globe. As we continue to demonstrate, the Department has committed not just to assuring continuing reform in the topical areas covered under the Consent Decree, but to institutionalizing an organizational culture of reform throughout all of its operations. As a result of this commitment, over the past three years the Department has not only satisfied in full each of its obligations under the Consent Decree; it has catapulted into a position of leading the national charge around increasingly complex areas of present-day policing, whether use of force, early intervention, crisis intervention, or myriad other issues at the intersection of policing and public health.

The Department recognizes that there will always be skepticism around its progress. The Department is further acutely aware that as much acclaim as it has received, the Department must continue to work hard to maintain the trust of this community. Through a commitment to open data and a schedule of regular reporting, the Department affirms its commitment to maintain a level of transparency that is second to none. Recognizing that continuing reform must be internally driven to sustain momentum, we are proud of the expanded model you have set up for internal governance, structured to assure that the Department's commitment to and accountability for a sustained culture of reform remain firmly cemented in practice, long after your tenure and court oversight conclude.

The Department has worked tirelessly over the past five years to bring this Department into full and effective compliance. With structures and systems now in place to assure that compliance is lasting, we believe we deserve a finding (1) that the Department is, indeed, in full and effective compliance with the Consent Decree – regardless of whether analyzed under Section IV.E.1 or Section IV.E.2, and (2) that the Department is demonstrating that it is sustaining substantial compliance with the Consent Decree through paragraph 99 and the mechanisms described above.

ATTACHMENT A: SCHEDULE AND FINDINGS OF OUTCOME ASSESSMENTS

Systemic Assessment	Original Deadline	Date Filed	Material Time Period Assessed	Paragraphs Assessed	SPD is "where it needs to be" per ¶184
Use of Force (Quantitative)	November 13, 2015	April 6, 2017	July 1, 2014 – October 31, 2016	69-90; 153	Yes
Officer Use of Force (Qualitative)	November 13, 2015	April 6, 2017	July 1, 2014 – October 31, 2016	69-90; 127-130	Yes
Reporting Force, Type II/III	July 13, 2015	September 24, 2015	July 1, 2014-December 31, 2014	91-97; 103	Yes
Reporting Force, Type I	July 13, 2015	September 24, 2015	July 1, 2014-December 31, 2014	100-102	Yes
FIT Investigations	July 13, 2015	September 24, 2015	July 1, 2014-December 31, 2014	95; 102; 112-118	Yes
Chain of Command Investigations, Type II	July 13, 2015	September 24, 2015	July 1, 2014-December 31, 2014	97-98; 104-111; 156	No
FRB	September 18, 2015	November 24, 2015	June 2, 2015 – August 25, 2015	119-125	Yes
OPA Investigations	September 27, 2015	December 31, 2016	August 1, 2014 – April 30, 2015	164-168	Not required for Compliance.
Crisis Intervention	February 1, 2016	February 16, 2016	June 1, 2015 – August 31, 2015 (2,516 templates)	131-133	Yes
Stops Assessment	March 14, 2016	June 18, 2017	July 1, 2015 – January 30, 2017	138-152	Yes
EIS	February 19, 2016	March 23, 2017	October 2015 – June 2016	157-163	Yes
Supervision	October 2, 2015	December 31, 2016	Effective Date (August 27, 2012) forward	104, 107-111, 108, 113, 117, 144, 151-156	Yes (subject to reassessment on Type II)
Public Confidence/Community Perception	June 19, 2015	October 1, 2015; January 27, 2016	2013-2015	130-137; 3-12	Not required for Compliance.
Chain of Command Investigations, Type II (Re-Assessment)	October 18, 2016 (per Fourth YMP)	January 27, 2017	January 1, 2016 – March 31, 206	97-98; 104-111; 156	Yes