IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)) Plaintiff,) and)) THE VULCAN SOCIETY, INC. et al.,)) Plaintiffs-Intervenors,) v.)) CITY OF NEW YORK, NEW YORK et al.,)) Defendants.) ______________________)	Civ. Action No. 07-CV-2067 (NGG)(RLM) Served May 23, 2008

PLAINTIFF UNITED STATES' RESPONSE TO
PLAINTIFFS-INTERVENORS' MOTION FOR CERTIFICATION OF A CLASS

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Plaintiff,)
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Plaintiffs-Intervenors,)
v.)
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CITY OF NEW YORK, NEW YORK et al.,)
)
Defendants.)
)

PLAINTIFF UNITED STATES' RESPONSE TO
PLAINTIFFS-INTERVENORS' MOTION FOR CERTIFICATION OF A CLASS

I. INTRODUCTION

Plaintiff United States of America (the "United States") respectfully submits this memorandum in response to the Motion for the Certification of a Class filed by Plaintiffs-Intervenors, the Vulcan Society, Inc. (the "Vulcans") and individual intervenors Roger Gregg, Marcus Haywood and Candido Nuñez. The United States does not oppose certification of an appropriate class for purposes of the liability phase of this case.[1] The United States does oppose

[1] Because the Court has bifurcated proceedings in this case into liability and relief phases, the United States assumes that Plaintiffs-Intervenors seek class certification only for purposes of the liability phase. See, e.g., Latino Officers Ass'n City of New York v. City of New York, 209 F.R.D. 79, 81, 90 n.87 (E.D.N.Y. 2002) (certifying class only for liability phase). Therefore, this memorandum does not address issues that may arise in the relief phase, such as whether there is a conflict between the Vulcans, whose members are incumbent firefighters, and class members who may be entitled to retroactive seniority. See, e.g., General Telephone Co. of the Northwest v. EEOC, 446 U.S. 318, 331 (1980) (same plaintiff could not represent both employees and applicants who might be awarded retroactive seniority); Boyce v. Honeywell, Inc., 191 F.R.D. 676-77 (M.D. Fla. 2000) (denying certification of class including supervisors because class representatives were non supervisory employees seeking jobs held by supervisory class members); Wagner v. Taylor, 836 F.2d 578, 595 (D.C. Cir. 1978) (same).

Plaintiffs-Intervenors' request for certification of a class consisting of:

> all black firefighters or firefighter applicants who have been or continue to be subject to race discrimination in the unlawful screening and selection criteria and devices used by defendants in connection with open competitive firefighter examinations 7029, 2043 and 6019, as well as future black applicants for entry-level firefighter positions who will be discriminated against by similar selection processes absent an Order of this Court.

Plaintiffs-Intervenors' Memorandum of Law ("Mem.," Doc. No. 121), p. 2. As explained below, the proposed class includes individuals who are not victims of the practices that Plaintiffs-Intervenors' Complaint ("Pl.-Int. Compl.," Doc. No. 48) alleges are discriminatory. Plaintiffs-Intervenors repeatedly have represented that their complaint challenges only the four employment practices challenged by the United States. The United States and the Court have relied upon those representations. The parties could not possibly complete discovery by the October 31, 2008 deadline, and the United States would be prejudiced if Plaintiffs-Intervenors were allowed now to significantly expand their claims and change the nature of the issues in this case. Therefore, the United States respectfully requests that the Court certify only a class of black applicants harmed by the four practices challenged in the Plaintiffs-Intervenors' and the United States' respective complaints, as set forth in Section II.A., below. The United States further requests that the Court divide the class into four subclasses, each corresponding to one of the challenged practices. In addition, the United States requests that the Court allow the individual intervenors to represent only the one subclass of which they are members.[2]

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[2] Plaintiffs-Intervenors' Complaint reflects that only the three individual intervenors brought claims on behalf of a class. See Pl.-Int. Compl., case caption and ¶¶ 10, 13. That apparently was the Court's understanding when it granted the motion to intervene. See Memorandum and Order ("Mem. Order," Doc. No. 47), p. 2. It now appears that the Vulcans also seek to represent a class. Declaration of Richard A. Levy ("Levy Decl.", Doc. No. 12), p. 6 ¶ 15; see also Mem., p. 24 ("The Vulcan Society is . . . well-qualified as a representative of the black applicants for the firefighter position."). Assuming the Court finds that the Vulcans are an

II. BACKGROUND

A. The United States Challenges Four Distinct Employment Practices.

The United States filed the Complaint initiating this lawsuit on May 21, 2007, alleging that defendant City of New York (the "City") has violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), by using four employment practices that have resulted in an unlawful disparate impact upon black and Hispanic applicants for the entry-level firefighter position in the City's Fire Department (the "FDNY"). Specifically, the United States challenges the City's:

(1) use of Written Exam 7029 as a pass/fail screening device with a cutoff score of 84.705;[3]

(2) rank-order processing and selection of candidates from the Exam 7029 eligibility list based on a combination of their scores on Written Exam 7029 and the physical performance test the City used for Exams 7029 and 2043 (the "PPT");

(3) use of Written Exam 2043 with a cutoff score of 70 as a pass/fail screening device; and

(4) rank-order processing and selection of candidates from the Exam 2043 eligibility list based on a combination of their scores on Written Exam 2043 and the PPT.

Because Plaintiffs-Intervenors (and the City) at times characterize these practices imprecisely, it is important to recognize that the challenged practices are four distinct employment practices.

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appropriate representative, there will be at least one named plaintiff-intervenor representing each of the subclasses.

[3] The City calls its open competitive firefighter selection processes "Examinations," although each consists of several components, including a written examination and a physical test. To avoid confusion, the United States refers to the last three open competitive firefighter selection processes as "Exam 7029," "Exam 2043," and "Exam 6019," and refers to their written examination components as "Written Exam 7029," "Written Exam 2043" and "Written Exam 6019," respectively.

Section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k), sets forth the burdens of proof in a Title VII disparate impact case. First, to establish a prima facie case, the plaintiff must demonstrate that a "particular employment practice" has caused a disparate impact on the basis of race or national origin. 42 U.S.C. § 2000e-2(k)(1)(A)(i); Gulino v. New York State Educ. Dept., 460 F.3d 361, 382 (2d Cir. 2006). The burden then shifts to the employer to demonstrate that the practice is "job related for the position in question and consistent with business necessity." Id. If the employer succeeds in proving job-relatedness and business necessity, the plaintiff may prevail by demonstrating that an alternative employment practice that would serve the employer's legitimate needs has less disparate impact than the challenged practice. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); Gulino, 460 F.3d at 382. Thus, Title VII requires that a plaintiff making a disparate impact claim identify a "particular employment practice" that is being challenged. 42 U.S.C. §2000e-2(k)(1)(A)(i). The identification of the particular practice is critical because it is that practice that the employer must prove is job related and consistent with business necessity.

Thus, it is important to recognize that the United States has not alleged that "Exam 7029" and "Exam 2043" are unlawful. Each of these open competitive selection processes consists of several distinct practices. The United States has alleged that two particular employment practices that the City used as part of Exam 7029 are unlawful. In addition, the United States has alleged that two particular practices that the City used as part of Exam 2043 are unlawful.

It also is important to recognize that, while each of the four challenged employment practices involves the use of a written examination, the United States has not alleged that "Written Exam 7029" and "Written Exam 2043" are unlawful. Until the employer uses the results of an examination to make an employment decision, the examination cannot cause a

disparate impact within the meaning of Section 703(k) of Title VII. It is the employer's use of a written examination in a particular way that may cause a disparate impact. If it does, it is the use of the written examination in that particular way that the employer must prove is job related and consistent with business necessity. As an illustration, one employer may use a written examination on a pass/fail basis with a cutoff score of 60. A second employer may use the same examination with a cutoff score of 90. A third employer may use the same written examination to hire in rank-order based on a combination of applicants' scores on the written examination and a physical test. Each of the employers would be using the same written examination, but each would be using a different employment practice. One of the practices (e.g., pass/fail use of the written examination with a cutoff of 90) may result in disparate impact, while another (e.g., pass/fail use with a cutoff of 60) may not. Moreover, one of the practices may be job related and consistent with business necessity, while another may not. For example, pass/fail use of an examination with a cutoff score of 60 may be job related and consistent with business necessity (because the employer can prove that a score of 60 corresponds to the minimum level of ability necessary to perform the job), but pass/fail use of the examination with a cutoff score of 90 may not. See, e.g., Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm'n of the City of New York, 630 F.2d 79, 105 (2d Cir. 1980) (Title VII is violated if use of a cutoff score unrelated to job performance produces disparate impact); Lanning v. SEPTA, 181 F.3d 478, 489 (3d Cir. 1999) (standard for business necessity is whether cutoff score "reflects the minimum qualifications necessary to perform [the job] successfully"). With that understanding, it is clear that the practices challenged by the United States are four distinct "particular employment practices."

B. Plaintiffs-Intervenors Filed Charges of Discrimination Challenging Only Practices the City Used as Part of Exams 7029 and 2043.

The Vulcans and the individual intervenors filed the charges of discrimination that led to the Department of Justice investigation underlying this lawsuit. Specifically, on August 9, 2002, the Vulcans, an organization of black firefighters, filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that practices the City used as part of Exam 7029 discriminated against blacks. Affidavit of Paul Washington (Doc. No. 125, "Washington Aff."), ¶¶ 3.c., 7 and Ex. 1 (Doc. No. 125-2). On February 23, 2005, after the City had begun using the Exam 2043 eligibility list, the individual intervenors, each of whom had taken and passed Written Exam 2043 and been placed on the Exam 2043 eligibility list, filed EEOC charges. Washington Aff., ¶ 8 and Ex. 3 (Doc. No. 125-4). Their charges alleged, among other things, that the City's rank-order processing and selection of candidates who passed the written examination and the PPT discriminated against blacks. Id.

C. Plaintiffs-Intervenors' Complaint Challenges Only the Four Employment Practices Challenged by the United States.

On July 17, 2007, Plaintiffs-Intervenors filed their motion to intervene (Doc. No. 19). Prior to that date, the United States had advised their counsel of the Court's admonition that this case should not "get mired in a set of ancillary claims," Ex. A, p. 7, and had expressed the United States' own concerns in that regard. Counsel for Plaintiffs-Intervenors assured the United States that their claims would consist of the same disparate impact claims brought by the United States, and that they would add only disparate treatment claims that paralleled the disparate impact claims. Plaintiffs-Intervenors later made the same representations to the Court in seeking to intervene. Thus, according to Plaintiffs-Intervenors, they were "taking the pleadings as they

f[ound] them" and were "simply seeking to raise one additional question for the Judge: Did the . . . Defendants' knowledge of ongoing disparate impact, their perpetuation of the examinations that caused the discriminatory impact, and their repeated failures to respond to requests for relief . . . constitute disparate treatment?" Proposed Plaintiffs-Intervenors' Reply Memorandum (Doc. No. 39), p. 6. In its September 5, 2007 Memorandum and Order granting the motion to intervene, the Court expressly relied upon that representation. Mem. Order, p. 19. Again relying on Plaintiffs-Intervenors' express representations, the Court stated further:

> In this case, the United States, the Vulcans, and the Individuals plead a single set of operative facts underlying conduct by the City. Indeed, the proposed intervenors are attempting to show that the City had direct knowledge, for years, of the written examinations' disparate impact on black applicants for the position of entry-level firefighter and continued to use the same allegedly discriminatory examinations with intentional or reckless disregard as to the impact on Black applicants.

Id., p. 17 (emphasis added). Indeed, the "operative facts" alleged in Plaintiffs-Intervenors' Complaint are largely a verbatim recitation of the allegations in the United States' Complaint. Compare Complaint (Doc. No. 1), ¶¶ 9-27, with Pl.-Int. Compl., ¶¶ 36-55. Thus, contrary to their current assertions, see Levy Decl., p. 3 ¶ 5, the complaint that this Court allowed Plaintiffs-Intervenors to file challenged only the four practices that are challenged by the United States.

D. Plaintiffs-Intervenors Now Attempt to Significantly Alter the Nature of this Case by Asserting Numerous Additional Claims.

In their memorandum in support of their motion for class certification, Plaintiffs-Intervenors now claim that many additional practices used by the City as part of Exams 7029 and 2043 are unlawful, although none of these additional practices are mentioned in Plaintiffs-Intervenors' Complaint. Specifically, Plaintiffs-Intervenors now assert that the following practices violate Title VII (as well as other federal, state and local laws): (1) the background

investigations; (2) the Personnel Review Board ("PRB") process; (3) the "educational requirement;" (4) the driver's license requirement; (5) the "lax enforcement" of the standard for eligibility for the five-point residency credit; (6) the discontinuance of the Fire Cadet Program; and (7) the requirement that new firefighters pay the cost of certified first responder with defibrillation ("CFR-D") certification.[4] Mem., pp. 6-7. According to Plaintiffs-Intervenors, they challenge each of these practices "as both causes of disparate impact and as evidence of disparate treatment." Id., p. 7.

Plaintiffs-Intervenors' Memorandum of Law in support of their motion for class certification itself illustrates the extent to which they are attempting to expand the scope and change the nature of this lawsuit. As stated previously, in moving to intervene, Plaintiffs-Intervenors represented that their complaint raised only "one additional question" – i.e., whether the City maintained the four practices challenged with discriminatory intent. In contrast, in support of their motion for class certification, Plaintiffs-Intervenors list a litany of questions raised by the additional claims they now seek to bring, including:

> whether the "college credit requirement" had an adverse impact on black applicants;
>
> whether the "college credit requirement" was job related;
>
> whether the discontinuance of the Fire Cadet Program was motivated by discrimination;
>
> whether the "lax enforcement of the residency bonus credit" was discriminatory;
>
> whether the expense of the driver's license requirement deterred potential black applicants;

[4] It should be noted that the EEOC did not find reasonable cause to believe that any of the additional practices violated Title VII. See Washington Aff., Exs. 2 and 4 (Doc. No. 125-3 and 125-5). Plaintiffs-Intervenors did not receive a right-to-sue letter with respect to them.

> whether the CFR-D requirement deterred potential black applicants; and
>
> whether the PRB's "blatant favoritism . . . toward friends and family members of incumbent firefighters . . . in a workforce that is 97% white" was motivated by discrimination, "including nepotism and favoritism toward white applicants."

Mem., p. 20.

In a further attempt to expand the scope of this lawsuit, Plaintiffs-Intervenors include within the definition of the proposed class black firefighters and applicants who purportedly have been discriminated against by the City's use of "unlawful screening and selection criteria and devices" in connection with Exam 6019, the City's new open competitive firefighter selection process. Id., p. 2. Plaintiffs-Intervenors assert that they will, at some unspecified time in the future, seek permission to supplement their Complaint to add such claims. Levy Decl. (Doc. No. 124), p. 4 ¶ 9. However, they do not state that they have fulfilled Title VII's procedural prerequisites with respect to claims relating to Exam 6019. To the knowledge of counsel for the United States, Plaintiffs-Intervenors have not (1) filed with the EEOC a charge of discrimination regarding Exam 6019 and (2) received a right-to-sue letter, as is required before making a claim under Title VII. See 42 U.S.C. §2000e-5(e)(1) and (f)(1).

It should be noted that many of the practices used by the City as part of Exam 6019 were not used for Exams 7029 and 2043 (and vice versa). While Plaintiffs-Intervenors do not make clear what particular practices used as part of Exam 6019 they seek to challenge, it appears that the practices include the City's pass/fail use of Written Exam 6019 and the City's rank-order processing and selection of candidates from the Exam 6019 eligibility list. As Plaintiffs-Intervenors acknowledge, both those practices are different than the practices the City used for Exams 7029 and 2043. See Mem., p. 15.

Written Exam 6019 was developed in 2006-2007 and first administered in January 2007. Unlike Written Exams 7029 and 2043, which were developed in-house by the City's Department of Citywide Administrative Services ("DCAS"), Written Exam 6019 was developed by two outside experts – Catherine Cline, Ph.D., and Phillip Bobko, Ph.D. See Ex. B (Transcript of Rule 30(b)(6) Deposition), pp. 169-170, 179-180, 184. Written Exams 7029 and 2043 measured only cognitive abilities. Ex. C; Ex. B, p. 192. However, for Exam 6019, Drs. Cline and Bobko conducted a new job analysis and concluded, based on the information they obtained from FDNY firefighters, that numerous non-cognitive abilities/attributes (such as Adaptability, Tenacity, Integrity, Work Standards, Resilience, Coordination, and Establishing and Maintaining Interpersonal Relationships) are important to performance of the entry-level firefighter job and can be measured with a written examination. Ex. B, pp. 179-180, 205; Ex. D, pp. 1, 9-10 and Table 5. Therefore, they designed Written Exam 6019 to measure many of those non-cognitive abilities. See Ex. E, p. 3. While Written Exam 6019 also measures some cognitive abilities, the cognitive abilities measured by Written Exam 6019 do not completely overlap with the cognitive abilities purportedly measured by Written Exams 7029 and 2043. Ex. E, p. 3; Ex. C; Ex. F. In addition, Written Exam 6019 measures cognitive and non-cognitive abilities in a compensatory manner. In other words, the City has not imposed a pass/fail cutoff score on the cognitive portion of Written Exam 6019.[5] Ex. G, pp. 201-204; Ex. H. In contrast, the City used Written Exams 7029 and 2043 alone as pass/fail screening devices, eliminating candidates from

[5] A "compensatory" manner of using tests is one that allows an applicant's higher level of performance on one test or test component to compensate for his/her lower level of performance on another. Thus, for example, a compensatory scoring method might involve scoring an examination by averaging the applicant's score on a cognitive component with his/her score on a non-cognitive component and applying a cutoff only to the combined/average score.

consideration for hire based solely on their cognitive examination scores. Ex. I, p. 3; Ex. J, p. 3.

The City also has adopted a new method of ranking candidates who pass the written examination. For Exam 6019, the City is ranking candidates based on their scores on the new written examination, rather than ranking them based on a combination of written examination and PPT scores, as the City had done for Exams 7029 and 2043.[6] Ex. B, p. 114, 199-200; Ex. K, p. 2; Ex. I, p. 2; Ex. J, p. 3. Thus, the practices challenged in the complaints of the United States and Plaintiffs-Intervenors are markedly different than those the City is using for Exam 6019.[7]

III. APPLICABLE LAW

A. Requirements for Class Certification.

The requirements for a class action are set forth in Rule 23 of the Federal Rules of Civil

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[6] It should be noted that, for Exam 6019, the City also has begun using a new physical test, the Candidate Physical Ability Test ("CPAT") for the first time, Ex. B, p. 216; Ex. K, p. 2, and has changed some of its other practices. For example, for Exams 7029 and 2043, a candidate could fulfill the "educational requirement" (or, more properly, the "Education and Experience Requirement") with 60 college credits (30 for Exam 2043) or with a high school diploma or GED and two years of honorable military service. See Ex. B, pp. 201-202; Ex. I, p. 1; Ex. J, p. 2. In contrast, for Exam 6019, an applicant can fulfill the requirement with only 15 college credits and also can fulfill the requirement with 6 months of satisfactory paid work experience. Ex. K, p. 2. In addition, for Exam 7029, candidates originally had to have obtained CFR-D certification to be qualified for hire. Ex. I, p. 2. For Exam 6019, CFR-D certification is not required until the end of a new firefighter's probationary period, and new firefighters can pay the cost of the training with small deductions from their paychecks once they have completed probation. Ex. K, p. 3.

[7] This does not necessarily mean that all the new practices comply with Title VII. For example, rank-order processing/selection based on Written Exam 6019 scores alone may result in more disparate impact upon black and Hispanic candidates and be less job related than would rank-order processing based on a combination of scores on Written Exam 6019 and an appropriately scored physical test. On the other hand, the City's pass/fail use of Written Exam 6019 may result in less disparate impact upon blacks and Hispanics and may be more job related because, as stated above, Written Exam 6019 was designed to measure more of the abilities important for performance of the firefighter job, and to do so in a compensatory manner. For present purposes, the important point is simply that the practices the City is using for Exam 6019 are substantially different than those it used for Exam 7029 and 2043.

Procedure. Pursuant to Rule 23(a):

> [o]ne or more members of a class may sue . . . as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims . . . of the representative parties are typical of the claims . . . of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Thus, certification of a class is appropriate only if the party moving for certification establishes "numerosity," "commonality," "typicality" and "adequacy." In addition, the party seeking certification must establish that the requirements of Rule 23(b)(1), (b)(2) or (b)(3) are satisfied. Plaintiffs-Intervenors seek class certification pursuant to Rule 23(b)(2) and (3). Mem., p. 2. Under Rule 23(b)(2), a plaintiff class action may be maintained if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Under Rule 23(b)(3), a class action may be maintained if "the questions of law or fact common to the class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Finally, Rule 23(c)(5) provides that, "a class may be divided into subclasses that are each treated as a class." Fed. R. Civ. P. 23(c)(5). Thus, courts have certified subclasses corresponding to specific employment practices when more than one practice is challenged in an employment discrimination lawsuit. See, e.g., Allen v. City of Chicago, 2001 WL 1548966 (N.D. Ill. 2001) (in Title VII disparate impact case, court certified two subclasses, each composed of individuals harmed by one challenged practice).[8]

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[8] If, for purposes of the liability phase, the Court certifies four subclasses corresponding to the four practices challenged in this lawsuit, the numerosity, commonality and adequacy requirements of Rule 23(a), as well as the requirements of Rule 23(b)(2), will be met with respect

"Typicality refers to the nature of the class representatives' claims." Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 99 (S.D.N.Y. 1981). The typicality requirement is satisfied if the moving party proves that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Marisol A. v. Guiliani, 126 F.3d 372, 376 (2d Cir. 1997); see also Dura-Bilt Corp., 89 F.R.D. at 99. Thus, to satisfy Rule 23(a)(3), "the class representatives [should] have 'incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'" Gulino v. Board of Educ. of City School Dist. of City of New York, 201 F.R.D. 326, 332 (S.D.N.Y. 2001) (quoting In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 510 (S.D.N.Y.1996)).

Although courts frequently have found class certification appropriate in employment discrimination cases, they have refused to certify classes that would include members whose claims were not the same as the putative class representatives, finding that the typicality (and/or commonality) requirement of Rule 23(a) was not met. For example, in Marable v. District Hosp. Partners, L.P., 2006 WL 2547992, at *5-6 (D.D.C. 2006), the court refused to certify a class

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to each of the subclasses. Therefore, the United States does not further discuss those requirements in this memorandum. However, as discussed infra, the claims of the individual intervenors are not typical of those of members of three of the four subclasses suggested, infra, proposed by the United States. The United States therefore will discuss the typicality requirement in greater detail above. It should be noted that, in some cases, courts have blurred the distinction between the commonality, typicality and adequacy requirements. See 7A C. Wright & A. Miller, Federal Practice & Procedure § 1764, pp. 2-3 (3d Ed. 2008). For example, the courts have found the question whether the interests of class members are in conflict with those of the class representatives, see n.1, supra, relevant to both the typicality and the adequacy requirements. To the extent that this Court may determine that the assertions made in this memorandum regarding the typicality requirement more properly address commonality or adequacy, it is the United States' position that Plaintiffs-Intervenors have failed to establish those requirements with respect to the individual intervenors as well.

consisting of former nursing assistants and external applicants who had failed the same battery of tests but went through separate hiring procedures. The court found that the claims of the class representative, all of whom were former nursing assistants, were not typical of the claims of external applicants. The court suggested that subclasses might be an appropriate resolution, but found that a subclass of former nursing assistants would fail the numerosity requirement, and a subclass of external applicants could not be certified because none of the named representatives was an external applicant. Id., at *6-*7. Similarly, in Rosario v. Cook County, 101 F.R.D. 659 (N.D. Ill. 1983), the court refused to certify a class consisting of actual applicants and deterred applicants for promotion because all of the class representatives were actual applicants and their claims were not typical of those of individuals who had been deterred from applying. Other cases, including cases cited by Plaintiffs-Intervenors, provide examples of classes defined to mirror the particular practices challenged. See, e.g., Lewis v. City of Chicago, 2005 WL 693618, at *1, *5 (N.D. Ill. 2005) (class consisting of firefighter applicants who scored between 65 and 88 on 1995 firefighter test); Bradley v. City of Lynn, 443 F. Supp. 2d 145, 148 (D. Mass. 2006) (class of blacks and Hispanics "who took the [written] civil service examination for the position of fire fighter . . . in the years 2002 and 2004"); Gulino, 201 F.R.D. at 328, 330 (in case in which challenged practice as requirement that teachers pass either NTCB or LAST, court certified class of "[a]ll African-American and Latino individuals employed as New York City public school teachers . . . on or after June 29, 1995, who failed to achieve a qualifying score on either the NTCB or the LAST, and as a result either lost or were denied a permanent teaching appointment"); Lanning v. SEPTA, 176 F.R.D. 132 (E.D. Pa. 1997) (class consisting of individuals who challenged running component of employer's physical test).

B. Standard for Leave to Supplement or Amend Complaint.

As stated previously, the class proposed by Plaintiffs-Intervenors includes individuals purportedly harmed by practices the City used as part of Exams 7029 and 2043 other than the four challenged in their complaint. Thus, Plaintiffs-Intervenors in essence are attempting to use their motion for class certification as a means of amending their complaint. Moreover, in support of their request that the Court certify a class including individuals purportedly harmed by practices the City is using as part of Exam 6019, Plaintiffs-Intervenors state that they intend to file a motion to amend their complaint to add claims challenging such practices. Clearly, if Plaintiffs-Intervenors are not granted leave to modify their complaint to challenge additional practices, the Court should not certify the class Plaintiffs-Intervenors request because it would include individuals not harmed by the practices they have alleged to be discriminatory.

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, after a responsive pleading has been filed, a plaintiff "may amend its [complaint] only with the opposing party's written consent or the court's leave." Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). Pursuant to Rule 15(d), "the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."[9] Fed. R. Civ. P. 15(d). In the Second Circuit, the standard for leave to supplement a pleading pursuant to Rule 15(d) is generally the same as that for leave to amend pursuant to Rule 15(a). Novak v. National

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[9] Because the City had not yet scored Written Exam 6019 or established the Exam 6019 eligibility list as of the date of Plaintiffs-Intervenors' Complaint, see Ex. B, pp. 114-118, a motion seeking to add claims regarding Exam 6019 should be brought pursuant to Rule 15(d). See Katzman v. Sessions, 156 F.R.D. 35, 38-39 (E.D.N.Y. 1994) (citing 6 C. Wright & A. Miller, Federal Practice & Procedure § 1473, p. 5 (2d Ed. 1990)).

Broadcasting Co., 724 F. Supp. 141, 145 (S.D.N.Y. 1984). The decision to grant or deny leave to supplement or amend is within the discretion of the court, and leave may be "denied because of undue delay, bad faith, futility, or prejudice to the nonmoving party." Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir.1995), quoted in Benjamin v. Brookhaven Science Associates, LLC, 387 F. Supp. 2d 146, 158 (E.D.N.Y. 2005); see also Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir.1993) (leave to amend may be denied if amendment is futile).

An amendment to a complaint is futile "if the proposed amended complaint would be subject to 'immediate dismissal' for failure to state a claim or on some other ground." Randolph-Rand Corp. of New York v. Tidy Handbags, Inc., 2001 WL 1286989, at *5 (S.D.N.Y. 2001) (quoting Jones v. New York Div. of Military & Naval Affairs, 166 F.3d 45, 55 (2d Cir.1999)). See also Katzman, 156 F.R.D. at 38 (citing numerous cases). Thus, it is appropriate to deny a motion to amend or supplement a complaint if the plaintiff has failed to exhaust administrative remedies. See Szabo v. Reilly, 1994 WL 38684, at *2 (S.D.N.Y. 1994) (denying amendment where administrative remedies were not exhausted).

To determine whether prejudice would result from an amendment or supplementation, the Court should consider whether "the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the [party] from bringing a timely action in another jurisdiction." Katzman, 156 F.R.D. at 38 (quoting Block v. First Blood Assoc., 988 F.2d 344, 350 (2d Cir. 1993)). Leave to amend or supplement may be denied when the new claims would require substantial additional discovery and resolution of the original action would be delayed or when the amendment would change the litigation strategy. See Carter v. Artuz, 1998 WL

782022, at *4 (S.D.N.Y. 1998) (denying leave to introduce "unrelated claims, concerning events that occurred in different years" where supplementation would delay resolution of original action); Scottish Air Int'l v. British Caledonian Group, PLC, 152 F.R.D. 18, 28 (S.D.N.Y. 1993) (denying leave where supplemental pleadings would require "separate and considerable discovery"); Cuccolo v. Lipsyk, Goodkin & Co., 1994 WL 381596, at *1 (S.D.N.Y. 1994) (proper to deny leave when amendment would broaden claims significantly, require additional discovery, and change litigation strategy).

IV. DISCUSSION

A. The Court Should Not Certify a Class Including Persons Who Purportedly Were Harmed by a Practice Other than One of the Four Challenged by Plaintiffs-Intervenors in Their Complaint.

1. The Court should not certify a class that includes individuals purportedly discriminated against by practices used by the City as part of Exam 6019.

As explained previously, Plaintiffs-Intervenors' proposed class would include black applicants affected by the employment practices used by the City as part of its new open competitive firefighter selection process, Exam 6019. Plaintiffs-Intervenors acknowledge that their Complaint does not challenge such practices. See Levy Decl. (Doc. No. 124), ¶ 9. It would be premature to certify a class including blacks harmed by practices not yet challenged.

Moreover, if and when Plaintiffs-Intervenors seek leave to supplement their Complaint, the Court should exercise its discretion to deny the motion.[10] See Zahra, 48 F.3d at 685 (court

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[10] Because, to date, Plaintiffs-Intervenors have not sought leave to supplement their Complaint or specified the claims relating to Exam 6019 they seek to add, the United States can only outline briefly the reasons the Court should not allow Plaintiffs-Intervenors to introduce such claims. If and when Plaintiffs-Intervenors move for leave to supplement their Complaint to add specific claims relating to Exam 6019, the United States will respond in detail at that time.

has discretion to grant or deny); Benjamin, 387 F. Supp. 2d at 158. As stated previously, leave to amend or supplement may be denied because of undue delay, bad faith, futility, or prejudice to the nonmoving party. Id. Adding claims regarding practices the City is using as part of Exam 6019: (1) would be futile because such claims would be subject to dismissal; and (2) would result in substantial prejudice to the United States.

Claims regarding the practices that the City is using as part of Exam 6019 would be subject to dismissal because Plaintiffs-Intervenors have not filed a timely charge of discrimination and received a notice of right-to-sue relating to such claims. See Szabo, 1994 WL 38684, at *2; Criales v. American Airlines, Inc., 105 F.3d 93, 95 (2d Cir. 1997) (timely charge and right-to-sue are prerequisites to Title VII lawsuit); 42 U.S.C. §§ 2000e-5(e)(1) (timely charge) and (f)(1) (right-to-sue). Those statutory prerequisites "may be waived in cases where a plaintiff has in some extraordinary way," such as by the misconduct of the defendant, "been prevented from asserting [its] rights, or when the EEOC has incorrectly refused to issue a right-to-sue letter." Crisci-Balestra v. Civil Serv. Employees Ass'n, 2008 WL 413812, at *3-4 (E.D.N.Y. 2008) (quotations omitted).[11] Plaintiffs-Intervenors filed charges with the EEOC in 2002 and 2005. There is nothing preventing them from filing a charge challenging the City's new practices.

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[11] In granting Plaintiffs-Intervenors' motion to intervene, the Court waived the requirement of a right-to-sue letter because Plaintiffs-Intervenors had a statutory right to intervene to the extent that their allegations were the same as those of the United States. Mem. Order, p. 14 n.2. Only the right-to-sue notice was lacking: Plaintiffs-Intervenors had filed EEOC charges challenging practices the City used as part of Exams 7029 and 2043, and the EEOC had issued determinations and attempted to conciliate those allegations. In contrast, the EEOC has had no opportunity to investigate or attempt to conciliate Plaintiffs-Intervenors' allegations with respect to Exam 6019, and Plaintiffs-Intervenors do not have a statutory right to expand this case by adding such allegations.

Even more significantly, allowing Plaintiffs-Intervenors to insert into this lawsuit new claims regarding new practices would substantially prejudice the United States and the individuals for whom the United States seeks relief.[12] It would be impossible for the parties to complete discovery by October 31, 2008, the deadline set by the Court. Six months ago, on November 23, 2007, the United States and Plaintiffs-Intervenors produced the reports of their respective experts on the issue of disparate impact. Five months ago, on December 18 and 20, 2007, the City deposed the United States' and Plaintiffs-Intervenors' disparate impact experts. Four months ago, on January 21, 2008, the City produced the report of its experts with respect to the issues of disparate impact and job relatedness/business necessity. To date, none of the expert reports have stated opinions about Exam 6019, whether the practices the City is using as part of Exam 6019 have resulted in disparate impact, or whether such practices are job related and consistent with business necessity. Adding claims relating to Exam 6019 now would require additional expert reports and depositions and delay – by several months at least – the resolution of the claims originally brought by the United States.

Moreover, denying Plaintiffs-Intervenors leave to supplement their Complaint would not preclude them from later challenging practices the City is using for Exam 6019. See Espinal v. Coughlin III, 2000 WL 1469733 (S.D.N.Y. 2000) (denying leave to file supplemental complaint where plaintiff was free to file new lawsuit); Taylor v. MaComber, 1999 WL 349696, at *1-2 (S.D.N.Y. 1999) (denying leave to amend and suggesting plaintiff could file a new action). As explained previously, those practices are substantially different than the ones challenged in this

[12] It should be noted that the United States seeks relief for Hispanic, as well as black, applicants who took Written Exam 7029 or 2043. Plaintiffs-Intervenors seek to represent only blacks who purportedly have been harmed by practices being used as part of Exam 6019.

case. Moreover, as stated previously, when Plaintiffs-Intervenors filed their complaint, the City had not scored Written Exam 6019 and the Exam 6019 eligibility list had not been established. Thus, there is no reason a separate lawsuit regarding Exam 6019 could not be brought after the necessary procedural prerequisites have been fulfilled. See, e.g., Curtis v. Citibank, 226 F.3d 133, 139-40 (2d Cir. 2000) (res judicata no bar to litigation of events arising after complaint); Computer Assoc. Int'l v. Altai, 126 F.3d 365, 370 (2d Cir. 1997) (claim arising after complaint not barred unless plaintiff asserted it in amended pleading); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1464 (2d Cir. 1996).

2. The Court should not certify a class that includes applicants for Exam 7029 or 2043 purportedly harmed by a practice other then one of the four challenged by Plaintiffs-Intervenors in their complaint.

The Court should not certify a class that includes black applicants purportedly harmed by practices not challenged in Plaintiffs-Intervenors' Complaint. As set forth above, Plaintiffs-Intervenors' repeatedly represented that their complaint challenged only the same practices challenged by the United States. Thus, the Court should certify a class that mirrors the four practices challenged by the United States. At the outset of this case, this Court stated, "other claims . . . which may be serious claims . . . may not be considered in this case though if they are not made promptly." Ex. A, pp. 7-8. A motion for class certification filed seven months after the Plaintiffs-Intervenors' Complaint is not an appropriate vehicle for amending a complaint to add new claims.

Moreover, if Plaintiffs-Intervenors were now to follow the appropriate procedure and file a motion for leave to amend their complaint to add new claims regarding Exams 7029 and 2043, the Court should deny the motion. First, as stated previously, the United States and the Court

relied upon the representations that Plaintiffs-Intervenors made about the limited scope of their complaint when they moved to intervene. Moreover, Plaintiffs-Intervenors have not identified evidence establishing that the additional practices they seek to challenge have caused a disparate impact upon black applicants. Thus, either: (1) their new claims would be futile;[13] or (2) the expert discovery schedule would have to be extended, delaying resolution of the United States' claims and substantially prejudicing the United States and the victims for whom it seeks relief.

The report of Dr. Wiesen, Plaintiffs-Intervenors' disparate impact expert, contains no analysis of the driver's license requirement, the "lax enforcement" of the eligibility standard for residency credit, the discontinuance of the Fire Cadet Program, or the requirement that new firefighters pay the cost of CFR-D certification. See Att. A to Affidavit of Joel P. Wiesen, Ph.D. ("Wiesen Report," Doc. No. 123-2). Moreover, although the report does discuss the "educational requirement" the City used for Exam 2043 (but not Exam 7029) and the PRB for Exam 7029 (but not Exam 2043), the report does not establish that either resulted in a disparate impact upon black applicants. First, as Dr. Wiesen admits, the "requirement" of 30 college credits was not "absolute." Id., p. 60 n.34. Applicants with a high school diploma or GED and two years of honorable military service were not required to have any college credits. Ex. J, p. 2. In addition, applicants without military experience were only required to have 30 college credits by the time of appointment. Id. Thus, they typically had several years after applying to meet the requirement. Dr. Wiesen did not conduct an analysis of how many black and white applicants on

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[13] It should be noted that, if Plaintiffs-Intervenors were allowed to amend their complaint to challenge new practices, the City likely would respond with a motion to dismiss some or all of the new claims as untimely. Because these claims were not raised in Plaintiffs-Intervenors' Complaint, the City has not addressed them in its current motion for partial dismissal.

the Exam 2043 eligibility list had 30 college credits or two years of military experience by the time their number on the list was reached for appointment. In fact, he did no analysis of the educational level of FDNY applicants.[14] Similarly, the Wiesen Report does not support a finding that the "closed-door review" by the PRB, Wiesen Aff. (Doc. No. 123), ¶ 5, for Exam 7029 resulted in a disparate impact upon black candidates. To establish that the PRB review caused a disparate impact, the proper comparison would be between the rates at which blacks <u>who were referred to the PRB</u> and whites <u>who were referred to the PRB</u> were rejected by the PRB. Dr. Wiesen admits that he made no such comparison. Wiesen Report, p. 36.[15]

Thus, Plaintiffs-Intervenors have identified no evidence establishing that the additional practices they seek to challenge resulted in a disparate impact. Allowing them to attempt to develop such evidence, including expert testimony, would severely disrupt the discovery schedule, greatly increase the complexity of this case, and lengthen the liability phase trial. Clearly, resolution of the claims originally brought by the United States would be delayed.

3. <u>The Court should certify four subclasses, each corresponding to one of the four practices challenged by Plaintiffs-Intervenors.</u>

As explained above, Plaintiffs-Intervenors (and the United States) have challenged four distinct employment practices: (1) use of Written Exam 7029 with a cutoff score of 84.705; (2) rank-order processing/selection from the Exam 7029 eligibility list; (3) pass/ fail use of

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[14] The only "education" analysis reported by Dr. Wiesen used census data to compare the percentages of blacks and whites <u>in the population in a geographic area in and around New York</u> who have completed at least one year of college. Wiesen Report, pp. 60-61.

[15] The only analysis related to the PRB reported by Dr. Wiesen compared the percentages of all black and white candidates certified to the FDNY from the Exam 7029 eligibility list who were rejected by the PRB (either the first or last time they were certified). <u>Id.</u>, pp. 35-36.

Written Exam 2043 with a cutoff score of 70; and (4) rank-order processing/selection from the Exam 2043 eligibility list. The Court should certify a class including only black applicants harmed by those practices.[16] Because, as discussed below, the claims of class members harmed by one practice are not typical of the claims of class members harmed by the other practices, the Court should certify four subclasses corresponding to the four challenged practices.

The United States, of course, believes that the Court will find all four challenged practices unlawful. Nonetheless, as explained in Section II.A., the United States and Plaintiffs-Intervenors could prevail with respect to some, but not all, of the challenged practices. For example, the Court could find that the City's pass/fail use of Written Exam 2043 with a cutoff of 70 was job related and consistent with business necessity, but its pass/fail use of Written Exam 7029 with a cutoff of 84.705 was not. Applicants who failed Written Exam 2043 (by scoring below 70) would not have the same incentive as applicants who failed Written Exam 7029 to prove that candidates who scored between 70 and 84.705 had the abilities needed to perform the firefighter job. Similarly, the Court could find that rank-order processing/selection of candidates from the Exam 7029 eligibility list was job related and consistent with business necessity, but find that pass/fail use of Written Exam 7029 with a cutoff of 84.705 was not because the latter practice eliminated many candidates who had the cognitive skills needed to perform the job and who may have excelled on the physical test. See United States v. State of Delaware, 2004 WL

[16] Class members should not be limited to those who prove that they would have been hired but for the challenged practices. Once the United States and Plaintiffs-Intervenors establish that the challenged practices constitute a pattern or practice of discrimination, the burden will shift to the City to prove, in the remedies phase of this case, that particular individuals would not have been hired for lawful reasons. See International B'hd of Teamsters v. United States, 431 U.S. 324, 361-362 (1977). In addition, it should be noted that black applicants harmed by the practices include individuals whose hiring was delayed as well as those who were never hired.

609331, *12 n.33 (D. Del 2004) ("unnecessarily high cutoff score may well eliminate applicants who would be better overall performers on account of their strengths in other job-relevant areas"). Thus, a class member who passed Written Exam 7029 and was ranked based on a combination of his written examination and PPT scores would not have the same incentive as one who failed Written Exam 7029 to argue that the cutoff of 84.705 was too high because it eliminated candidates without giving them a chance to take the PPT. In short, Plaintiffs-Intervenors' assertions that "all members of the proposed class have claims arising out of the same actions," and "there is no conflict between those class members who failed the examinations and those who passed but were ranked low," Mem., pp. 2, 23-24, are incorrect. Different subsets of class members were harmed by distinct practices, and the same arguments that may establish the City's liability with respect to one subset may not apply to the claims of members of another. Thus, the Court should certify a class of black applicants harmed by the four practices challenged in this lawsuit, divided into four subclasses: (1) applicants who failed Written Exam 7029; (2) applicants who passed Written Exam 7029 and were ranked on the Exam 7029 eligibility list; (3) applicants who failed Written Exam 2043; and (4) applicants who passed Written Exam 2043 and were ranked on the Exam 2043 eligibility list.

B. The Individual Intervenors Cannot Represent Class Members Who (1) Failed Written Exam 7029, (2) Passed Written Exam 7029 and Were Placed on the Exam 7029 Eligibility List, or (3) Failed Written Exam 2043.[17]

Rule 23(a) provides that, if the requirements of the rule are met, "[o]ne or more members

[17] If the Court were to certify a class including individuals harmed by practices other than the four challenged by Plaintiffs-Intervenors and the United States, the individual intervenors also could not represent those individuals. Plaintiffs-Intervenors have not alleged that the individual intervenors were victims of any of the additional practices that Plaintiffs-Intervenors now seek to challenge.

of a class can sue or be sued as representative parties on behalf of all members." Mr. Gregg, Mr. Haywood and Mr. Nuñez, all of whom passed Written Exam 2043, are members only of the subclass consisting of applicants who passed Written Exam 2043 and were ranked on the Exam 2043 eligibility list. They can represent only that subclass.

Moreover, once the four challenged practices are clearly defined and the distinctions between them are understood, it is clear that the individual intervenors would not meet the typicality requirement of Rule 23(a) with respect to the other three subclasses.[18] As explained above, the interests of the individual intervenors do not necessarily coincide with, and may be in conflict with, the interests of members of the other three subclasses. Thus, the Court should allow the individual intervenors to represent only the subclass of applicants who passed Written Exam 2043 and were ranked on the Exam 2043 eligibility list.

V. CONCLUSION

For the foregoing reasons, the Court should refuse to certify the class proposed by Plaintiffs-Intervenors. Instead, the Court should certify a class mirroring the four practices challenged by both Plaintiffs-Intervenors and the United States in their respective complaints. Specifically, the Court should certify a class of black applicants who were harmed by the four practices challenged in this lawsuit and divide the class into four subclasses consisting of: (1) applicants who failed Written Exam 7029; (2) applicants who passed Written Exam 7029 and were ranked on the Exam 7029 eligibility list; (3) applicants who failed Written Exam 2043; and (4) applicants who passed Written Exam 2043 and were ranked on the Exam 2043 eligibility list. The Court should permit the individual intervenors to represent only the fourth subclass.

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[18] For the same reason, they may not meet the adequacy requirement. See n.8, supra.

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Respectfully submitted,

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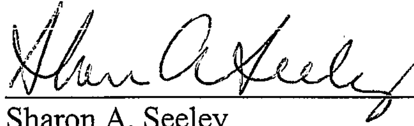

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