UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., ET AL,

Plaintiffs-Intervenors,

-against-

THE CITY OF NEW YORK, ET AL,

Defendants.
----------X

Civ. Action No. 07-CV-2067 (NGG)(RLM)

ECF Case

Served June 25, 2008

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS-INTERVENORS' MOTION FOR THE CERTIFICATION OF A CLASS AND IN SUPPORT OF PLAINTIFFS-INTERVENORS' MOTION TO AMEND AND SUPPLEMENT THE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs-Intervenors submit this reply memorandum of law in further support of their motion for the certification of a class pursuant to Fed. R. Civ. P. 23(a), 23(b)(2) and 23(b)(3) and in support of their motion to amend/supplement the complaint pursuant to Rule 15. We address here the points raised by Defendants and the United States with respect to the Rule 23(a) requirements of commonality, typicality and adequacy, as well as the requirements of Rules 23(b)(2) and (b)(3). We also address the reasons the Court should grant Plaintiffs-Intervenors' request for leave to amend/supplement the complaint in order to conform it to the evidence adduced in the case. Filed simultaneously herewith is the Affidavit of Marcus Haywood, dated June 25, 2008; a Notice of Motion to Amend/Supplement the Complaint; and the Declaration of Darius Charney, dated June 25, 2008, with an attached proposed first amended complaint.

POINT I.
UNLAWFUL EMPLOYMENT PRACTICES UNCOVERED DURING THE COURSE OF DISCOVERY ARE PROPERLY ADJUDICATED IN THIS CASE

As an initial matter, Plaintiffs-Intervenors wish to clarify the nature and scope of the employment practices being challenged. At the time that Plaintiffs-Intervenors filed their motion to intervene in this matter, it was believed that the four (4) unlawful employment practices being challenged by the United States were the root of the disparate impact against black firefighter applicants as well as the tools with which Defendants intentionally maintained the racial status quo within the FDNY. Through discovery, however, Plaintiffs-Intervenors have uncovered additional discriminatory conduct that formed a part of Defendants' screening and selection processes. That discriminatory conduct is properly adjudicated in this case.

A. The Employment Practices Being Challenged

The City and the United States urge the Court only to consider challenges to the four employment practices that are named in the United States' May 21, 2007 complaint:

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

(2) the 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) the use of Written Exam 2043 with a cutoff scores of 70 as a pass/fail screening device; and

(4) the 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.

In addition to these unlawful practices, however, Plaintiffs-Intervenors have uncovered evidence that other employment practices – specifically, other aspects of Defendants' firefighter

screening and selection process – not only contribute to the adverse impact against blacks but also appear to have been intentionally instituted, maintained or implemented in order to preserve the racial status quo in the FDNY. These practices are:

(1) the minimum education requirement for appointment to firefighter – 30 college credits;

(2) the mandatory driver's license requirement;

(3) the requirement that appointees possess a certified first responder with defibrillation ("CFR-D") license; and

(4) the FDNY's use of a discretionary Candidate Investigation Division ("CID") and Personnel Review Board ("PRB") to review candidates' "background and character" and to weed out certain "flagged" candidates, a process riddled with arbitrariness and favoritism that inures to the detriment of black applicants.

Plaintiffs-Intervenors objected to these practices in their filings with the United States Equal Employment Opportunity Commission ("EEOC"). See Ex. 1 and Ex. 3 to the Affidavit of Paul Washington, dated April 20, 2008 (hereinafter "Washington Aff.") (Dkt 125-2, 125-4). The EEOC charge filed by Plaintiff-Intervenor the Vulcan Society in August, 2002 challenged not only the design, administration, scoring and use of Written Exam 7029 but also the FDNY's recruitment efforts; the requirement that applicants obtain certified first responder with defibrillation ("CFR-D") licenses, 30 college credits and a driver's license prior to appointment; and the subjective, arbitrary and discriminatory background and character investigation process. See Ex. 1 to Washington Aff. at 2-3 (Dkt. 125-2). Likewise, the EEOC charges filed by individual Plaintiffs-Intervenors Roger Gregg, Marcus Haywood and Candido Nuñez in February 2005 challenged not only the written test but also the FDNY's recruitment efforts, the

30 college credit requirement, the CFR-D requirement and the driver's license requirement. See Ex. 3 to Washington Aff. at 7 (Dkt. 125-4).

At the outset of this litigation, Plaintiffs-Intervenors could not, consistently with Federal Rule of Civil Procedure 11(b), have alleged a prima facie case of discrimination regarding these screening and selection devices. In fact, while Plaintiffs-Intervenors were generally aware that the FDNY's character and background investigation process was discriminatory towards black firefighter applicants, the existence and inner workings of the Personnel Review Board ("PRB") and the related Candidate Investigation Division ("CID") – the two groups within the FDNY responsible for the investigations – were entirely unknown to Plaintiffs-Intervenors prior to discovery. It is now known, however, that these employment practices contributed to the adverse impact against black firefighter applicants, that they have not been shown to be job related, and that they were thus unlawfully used as hurdles to obtaining an entry-level firefighter position.

As proposed class representatives, Plaintiffs-Intervenors have an obligation to challenge conduct for which there is now evidence of discrimination. Simultaneous with the filing of this memorandum, Plaintiffs-Intervenors have filed a motion for leave to amend/supplement their complaint and a proposed amended complaint that conforms the pleadings to the evidence obtained in discovery. The proposed amended complaint expressly alleges discrimination based on the unlawful employment practices identified above and also alleges discrimination in Defendants' use of Exam 6019, which was administered after the instant complaint was filed.[1]

[1] In July 2007, the United States and the City agreed in advance of their initial conference with Magistrate Judge Mann that the last day to amend the pleadings would be September 24, 2007 absent a showing of good cause. (Dkt. 21-2). While counsel to Plaintiffs-Intervenors were appraised of this agreement, the Intervenors were not granted leave to intervene until September 5, 2007 (Dkt. 47) and did not receive Defendants initial disclosures and first production of documents until mid-October 2007. Thus it was not until after the United States and City's deadline for amending the pleadings that Plaintiffs-Intervenors

The motion to amend/supplement the pleadings (Plaintiffs-Intervenors' first such motion) should be granted under the liberal standard established by Rule 15(a)(2) and interpreted by this Circuit. See, e.g., Wight v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir. 2000); Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 18 (2d Cir. 1997); U.S. on behalf of Mar. Admin. v. Cont'l Ill. Nat'l Bank & Trust Co., 889 F.2d 1248, 1254 (2d Cir. 1989); Luparello v. Inc. Vill. of Garden City, 290 F. Supp. 2d 341, 344 (E.D.N.Y. 2003). Courts in this Circuit routinely allow amendment of a complaint to conform to the evidence obtained in discovery, even at the pre-trial stage. See, e.g., U.S. v. Mazzeo, 2001 U.S. Dist. LEXIS 1698 (E.D.N.Y. Jan. 10, 2001); Regent Insur. Co. v. Storm King Contracting, Inc., 2008 U.S. Dist. LEXIS 16513, *40-45 (S.D.N.Y. Feb. 26, 2008); Mellon Bank, F.S.B. v. Alexander Wescott & Co., Inc., 1999 U.S. Dist. LEXIS 10822, *14 (S.D.N.Y. July 15, 1999).

B. The Challenged Practices Were Part of The EEOC Charges, And Have Been The Subject of Discovery In This Case

Neither the City nor the United States can claim surprise or prejudice with respect to Plaintiffs-Intervenors' challenge to the 30 college credit, driver's license and CFR-D requirements (collectively, the "minimum requirements") because both have been aware of these claims since the time of the Plaintiffs-Intervenors 2002 and 2005 EEOC charges of discrimination.[2] In fact, Defendants do not object to the inclusion of claims related to the minimum requirements. See Defendants' Memorandum of Law in Opposition to Plaintiffs-

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would have been in a position to conform their pleadings to the proof. In addition, because production of evidence from Defendants has been so remarkably slow and inconsistent – Defendants produced new documents as late as Friday, June 20, 2008, and additional data that has been requested has yet to be produced – a motion to amend and supplement the pleadings at this time is warranted. Therefore, even if Plaintiffs-Intervenors are held to the good cause standard set forth in the agreement that was entered before they were parties in this lawsuit, they have more than amply satisfied the standard.

[2] Likewise, there is no claim that Plaintiffs-Intervenors failed to exhaust administrative remedies under Title VII, since each of the additional, related claims is included in one or both of the EEOC charges that formed the basis of this action.

Intervenors' Motion for Class Certification ("Def. Mem.") at 8. Defendants' understanding of the broad scope of Plaintiffs-Intervenors' allegations is clear from their characterization of this action. Defendants state:

> Plaintiffs-Intervenors ("Intervenors") allege that written examinations 7029 and 2043 and the requirements that appointees possess thirty college credits, a driver's license and a first responder with defibrillation ("CFR-D") certificate have a disparate impact on black applicants.

Def. Mem. at 3.

Rather, Defendants take issue with Plaintiffs-Intervenors' challenge to the discrimination in the CID/PRB process, arguing that it was not included in either the 2002 or 2005 EEOC charges. It is clear, however, that use of the CID and PRB is precisely the type of conduct that "would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Butts v. City of New York Dep't of Hous. Pres. & Dev., 990 F.2d 1397, 1402 (2d Cir. 1993), quoting Smith v. Am. President Lines, Ltd., 571 F.2d 102, 107 n.10 (2d Cir. 1978); see also White v. Home Depot, 2008 WL 189865 (E.D.N.Y. Jan. 17, 2008). In this case, the CID and PRB are an integral part of Defendants' screening and selection system, and there is a reasonable relation between a challenge to the CID/PRB and the allegation in the 2002 EEOC charge that

> The interview/background check perpetuated a policy and practice of indulging white people with blemishes or problems in their records and being overly strict with Black and African Americans. It has been a policy and practice to unjustly rely on arrest records without convictions as a barrier for appointment of Black and African Americans to the department, to the detriment of Black and African American applicants as compared with white applicants.

Ex. 1 to Washington Aff. at 3-4 (Dkt. 125-2). Although Plaintiffs-Intervenors did not know the precise nature of this highly secretive selection procedure until it was revealed in deposition testimony, the CID and PRB were undoubtedly challenged a part of the original EEOC charge.

Moreover, discovery on all of these additional, related claims has been taking place concurrently with discovery on the adverse impact and job-relatedness/business necessity of the written examinations. Both parties have been well aware from early in discovery that Plaintiffs-Intervenors were propounding document requests and interrogatories related to these practices and were exploring their development and use during depositions. See, e.g., Ex. 11 to Washington Aff. (Dkt. 125-11) and Ex. B to the Affidavit of Joel P. Wiesen, Ph.D., dated April 9, 2009, ("Wiesen Aff.") (Dkt. 123-3). Yet Defendants have never objected to discovery demands or deposition questions aimed at gathering information about these practices on the ground that such practices were not the subject of this action.

Plaintiffs-Intervenors made the scope of their claims even clearer in their responses to interrogatories propounded by Defendants some months ago:

> **INTERROGATORY #1:**
>
> Identify each and every screening and selection criterion that Plaintiff contends is not job related or otherwise fails to meet the requirements of Title VII and has an adverse impact on black applicants for the position of firefighter as alleged in paragraph 2 of the Complaint.
>
> **RESPONSE #1:**
>
> Plaintiff contends that the following selection and screening criteria used by the New York City Fire Department ("FDNY") are not job related and otherwise fail to meet the requirements of Title VII and have had an adverse impact on black applicants for the position of firefighter:
>
> a) all written open competitive firefighter exams ever given by the FDNY, up to the present time;

> b) the requirements that firefighter applicants obtain college credits and a driver's license;
>
> c) the requirements that each firefighter applicant complete a certified first responder with defibrillator ("CFR-D") course at her or her own expense before the end of his or her probationary period as a firefighter;
>
> d) manner of administering, timing, scoring and all other related issues regarding physical performance tests for firefighter applicants on Exam 7029 and all prior firefighter exams;
>
> e) the maximum age eligibility cut-off for firefighter applicants;
>
> f) application of the residency credit to certain firefighter applicants;
>
> g) all criteria used by the FDNY's Personnel Review Board and Candidate Investigation Unit to disqualify or refuse appointment to otherwise qualified applicants for the position of firefighter.

Both Defendants and the United States received this interrogatory response on April 8, 2007, and neither responded in a way to suggest that they were either surprised by or objected to the nature and scope of Plaintiffs-Intervenors' contentions. All parties were therefore on notice of the likelihood that these selection procedures would become the subject of a direct challenge. Importantly, each of the employment practices Plaintiffs-Intervenors are challenging is an intrinsic element of Defendants' unlawful firefighter selection process which has injured each member of the proposed class.

As has been the case throughout this litigation, Plaintiffs-Intervenors will continue to conduct discovery regarding not only the four employment practices challenged by the United States but also Defendants' discriminatory use of education, driver's license, CFR-D and "background and character" requirements. Only brief additional reporting will be necessary from the parties' experts. The adverse impact of the college credit requirement has already been addressed in the report of Dr. Wiesen dated November 23, 2008 (Ex. A to Wiesen Aff.) (Dkt.

123-2). The report includes evidence that indicates that the college credit requirement has an adverse impact on blacks in that it is likely to selectively deter applications from potential black candidates. While Defendants attempt to poke holes in the adverse impact analysis of the college credit requirement (Def. Mem. at 9), the data used by Dr. Wiesen is entirely appropriate. See Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971) (relying on U.S. census data in analyzing the likelihood that whites and blacks in the relevant labor pool will hold high school degrees); see also Bazemore v. Friday, 478 U.S. 385, 400-1 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty" and may rely on statistical analysis that "includes less than 'all measurable variables'").[3]

With respect to the adverse impact of the driver's license and CFR-D requirements, Plaintiffs-Intervenors have as recently as this week been in communication with the City Law Department regarding data known to be in Defendants' possession that would quantify this impact. Adverse impact resulting from those requirements should be relatively simple to calculate once the appropriate data is in hand. All that is necessary is a comparison of the rates at which blacks and whites fail to meet the entrance requirement. Since the very ambitious discovery schedule in this matter has never previously been delayed as a result of Plaintiffs-Intervenors' additional claims, there is no reason to believe that a delay will be caused in the future.

[3] To respond to Defendants' specific criticisms, at almost all institutions of higher education, thirty college credits equal one year of college, the vast majority of firefighter applicants are men from New York City and adjacent counties and, with respect to age, the census information is probably entirely accurate since college credits need not be obtained until the time of appointment and firefighter applicants, who must be between the ages of 18 and 29, may remain on an eligibility list waiting for appointment for as long as five (5) years, i.e., until the age of 34.

C. The Challenge to Exam 6019 Should Be Included In This Action And Those Injured by Exam 6019 Are Proper Members of the Proposed Class

Exam 6019 is simply the latest in a long series of exams and related selection procedures adversely affecting black applicants. To require plaintiffs in employment discrimination cases to commence a new action each time another step in a continuing selection process occurs would be monumentally wasteful in terms of the resources of both the parties and the courts. Furthermore, it would unnecessarily prolong the injury to black applicants who took Exam 6019. Prior case law from this Circuit supports Plaintiffs-Intervenors' right to amend the complaint to include a challenge to Exam 6019. In Vulcan Society of Westchester County, Inc. v. Fire Department of the City of White Plains, 82 F.R.D. 379 (S.D.N.Y. 1979), a class action challenging disparate impact discrimination in hiring through the use of discriminatory civil service exams, the Court permitted the plaintiffs to amend their complaint to add an additional Title VII claim regarding a firefighter exam given after the filing of the lawsuit. The Court reasoned that since plaintiffs alleged a pattern and practice of discriminatory hiring through testing, and because the new exam was simply the latest in a series of discriminatory exams, the new claim arose from the same transaction, occurrence or series of transactions and had questions of law and fact common to all of the claims already in the case. Vulcan, 82 F.R.D. at 387.

The City urges that Exam 6019 cannot be a subject of this litigation because it was not expressly challenged in an EEOC charge of discrimination. But while the EEOC charges filed by Plaintiffs-Intervenors in 2002 and 2005 did not refer to Exam 6019 by name, the charges did challenge the screening and selection procedures that Exam 6019 continues to employ. In the Second Circuit, courts may excuse the failure of a plaintiff to file an EEOC charge when the new allegations are "reasonably related" to the facts alleged in the EEOC charge. See Butts, 990 F.2d at 1402-03. The "reasonably related" exception applies in situations where the complaint

"alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge." Id. at 1402-03. In a continuing violation case, a discriminatory event that is part of the alleged continuous course of discriminatory conduct is "a fortiori reasonably related" to the earlier events which were the subject of the EEOC charge. Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994).

Here, Plaintiffs-Intervenors are challenging a continuous pattern and practice of using discriminatory written cognitive tests and minimum requirements to make hiring decisions. The written cognitive portion of Exam 6019, and the subsequent rank-ordering of candidates, are simply further incidents of discrimination carried out in the same manner as the discrimination Plaintiffs-Intervenors have alleged with respect to Exams 7029 and 2043. The same is true for the CFR-D and driver's license minimum requirements for Exam 6019. While the United States points out some differences in the methods of testing and scoring used on Exam 6019, as compared to Exams 7029 and 2043, see U.S. Mem. at 9-11, the manner of discrimination – i.e., the continued use of a written cognitive ability test and other minimum requirements that are not job related and have an adverse impact on black applicants – is the same across all three examinations.

Plaintiffs-Intervenors also cannot be accused of undue delay in adding claims challenging Exam 6019 because they first learned of the scores on Exam 6019 and the composition of the eligibility list in November 2007, after they intervened in this lawsuit. Moreover, the inclusion of Exam 6019 would cause minimal prejudice to the United States or the City and little or no delay in the prosecution of this lawsuit since there has already been extensive, and nearly complete, discovery regarding Exam 6019, including whether it would constitute an "alternative" to Exams 7029 or 2043 that was available at the time that those examinations were developed

and used. Plaintiffs-Intervenors' expert Dr. Joel Wiesen, has already found that Exam 6019 had an adverse impact on black applicants. See Wiesen Aff. at ¶ 19 (Dkt. 123). Defendants will have ample opportunity to respond to this limited issue prior to the close of discovery on October 31, 2008.

It should also be noted that because an additional filing with the EEOC is not required to bring suit under 42 U.S.C. §§ 1981 and 1983, Plaintiffs-Intervenors' 6019-related claims under § 1981 and § 1983 are cognizable regardless of the relation of the EEOC charges to Exam 6019. Accordingly, the Court should certify a class including those injured by Exam 6019 based on Title VII, § 1981, § 1983 and State and City law claims.

POINT II.
THE PROPOSED CLASS MEETS ALL THE REQUIREMENTS OF RULE 23 AND SHOULD BE CERTIFIED

While Defendants seem to suggest that Plaintiffs-Intervenors are required to prove the merits of their case at this stage in the action, such a burden has not been placed on plaintiffs by Second Circuit courts.

A. The Standard For Determining Whether a Rule 23 Requirement Is Met

The Second Circuit in In re Initial Public Offering Securities Litigation, 471 F.3d 24 (2d Cir. 2006) held that District Courts must satisfy themselves that each Rule 23 requirement is met. However, while the class certification analysis may necessitate limited fact finding, the Court must not go beyond the boundaries of Rule 23 when considering class certification. See In re IPO, 471 F.3d at 41. An illustrative post-IPO case is Hnot v. Willis Group Holdings, Ltd., 228 F.R.D. 476 (S.D.N.Y. 2005), aff'd 241 F.R.D. 204 (S.D.N.Y. 2007). With respect to "commonality," the language of Rule 23(a)(2) requires the Court to ascertain whether there exist questions of law or fact in common to the class, not to answer those questions. Hnot, 241 F.R.D. at 210; see also In re World Com., Inc. Sec. Litig., 219 F.R.D. 267, 279 (S.D.N.Y. 2003) ("at

class certification, the court determines whether the requirements of Rule 23 are met, not whether the claims are adequately pleaded or who will prevail on the merits"). Thus statistical evidence alone is a sufficient basis for determining that class certification in a pattern and practice discrimination case is appropriate. There is no authority that "stand[s] for the proposition that the Court should, or is even authorized to, determine which of the parties' expert reports is more persuasive" in assessing the requirement of "commonality." Hnot, 241 F.R.D. at 210. Defendants' arguments regarding the persuasiveness of Plaintiffs-Intervenors' statistics are not only incorrect, but would more properly be addressed in a summary judgment motion or in a closing argument at trial.

As to typicality, plaintiffs need only show 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." Hnot, 228 F.R.D. at 485, quoting Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 155 (2d Cir. 2001). Specifically, "[t]he typicality requirement can be met if plaintiffs' evidence shows that an employer discriminated in the same general fashion against employees and other class members through the agency of the same key actors." Id. at 485 (emphasis added). While the defendants in Hnot sought more factual evidence that the representatives were typical of other class members who may have had different positions in the company or worked in different offices, the court did not hold plaintiffs to that level of scrutiny. Instead, it stated that "plaintiffs can satisfy typicality even if there are factual differences between the named representatives and some of the class members, so long as the disputed issue of law or fact occupy essentially the same degree of centrality between the named representatives and the class." Id. (internal citations omitted).

As always, "when a court is in doubt as to whether or not to certify a class action, the court should err in favor of allowing the class to go forward." In re Belch Sec. Litig.,187 F.R.D. 97, 102 (S.D.N.Y. 1999); See also Lundquist v. Sec. Pacific Auto. Fin. Serv. Corp., 993 F.2d 11 (2d Cir. 1993). The "law in the Second Circuit favors the liberal construction of Rule 23 and courts may exercise broad discretion when they determine whether to certify a class . . . Moreover, courts should resolve all doubts about whether a class should be created in favor of certification." Thompson v. Linvatec Corp., 2007 WL 1526418, at *4 (N.D.N.Y. May 22, 2007) (internal citations omitted). The Second Circuit has stressed that courts of appeal are noticeably less deferential to the district court when that court has denied class status than when it has certified a class. See Lundquist, 993 F.2d at 14.

B. The Proposed Class Satisfies the Commonality Requirement[4]

Defendants urge that the class definition proposed by Plaintiffs-Intervenors is overbroad. However, the scope of the proposed class is supported by the law of this Circuit.

1. Those Injured by Exam 7029 Are Proper Class Members

Defendants, relying on the assumption that their motion to partially dismiss Plaintiffs-Intervenors' claims will succeed, assert that Exam 7029 must be eliminated from the class definition due to a defect in the timeliness of Plaintiffs-Intervenors' EEOC charge. Def. Mem. at 6. For all of the reasons stated in Plaintiffs-Intervenors' memorandum in opposition to Defendants' motion to dismiss, those claims are timely and the individuals injured by Exam 7029 are appropriate and necessary members of the proposed class.

[4] Neither Defendants nor the United States dispute that the proposed class meets the numerosity requirement of Rule 23(a)(1).

2. Class Representatives Need Not Have Been Harmed By Each Practice Being Challenged

Where claims of discrimination arise from a common course of events involving a number of related discriminatory decisions or acts, proper class representatives need not have been injured by each discriminatory practice in order to represent a class of those harmed by the overarching discriminatory conduct. See Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997). "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994), citing In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 166-67 (2d Cir. 1987). "Because the [commonality] requirement may be satisfied by a single common issue, it is easily met." Id.; see also Mack v. Suffolk County, 191 F.R.D. 16, 22 (D. Mass 2000) ("[a] single common or legal issue can suffice."); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 599 (2d Cir. 1986) (finding that commonality was established where plaintiffs alleged existence of a "discriminatory system" at workplace); Gulino v. Bd. of Educ. of the City School Dist. of the City of New York, 201 F.R.D. 326, 331 (S.D.N.Y 2001) (finding the commonality requirement satisfied where the question at the heart of the lawsuit was "whether defendants' use of [certain tests] to demote and penalize public school teachers has a disparate impact on African-Americans and Latino teachers and is not justified by any legitimate business interests, and whether defendants' use of these tests violates Title VII of the Civil Rights Act of 1964"). As the Gulino Court noted, "[c]lass members need not allege the same injury to show commonality . . . [a]s long as there are legal issues common to class members' claims – such as defendants' misuse of tests creating a disparate impact on teachers of color – certification is appropriate." Id.; see also Wright v. Stern, 2003 WL 21543539, at *4 (S.D.N.Y. July 9, 2003).

Here, members of the proposed class were injured by one or more elements of a multi-faceted discriminatory screening and selection system that included unlawful written examinations, unlawful minimum requirements for appointment and an unlawful, discretionary review board system that favored friends and relatives of incumbent firefighters. The fact that one class member may have been injured because of one selection device and another class member injured by another selection device is of no moment. Both were allegedly harmed by the discriminatory selection procedures used by the FDNY that, both intentionally and by producing an adverse impact, discriminated against blacks. See also Connecticut v. Teal, 457 U.S. 440 (1982) (allowing challenges by those harmed by the individual steps of a screening process, without more). The challenged practice – discriminatory hiring – is the same for all class members, as is the challenged position – entry-level firefighter. Defendants' assertion that each discriminatee must be rejected at the exact same time for the exact same reason in order to be a member of the class is simply not what Rule 23(b)(2) requires.

3. Future Firefighter Applicants Are Proper Class Members

Defendants argue that future firefighter applicants cannot be included as members of the class. See Def. Mem. at 11. But Courts in this Circuit have routinely certified classes to represent past, current, and *future* job applicants in 42 U.S.C § 2000e, § 1981 and § 1983 claims for injunctive relief. The Second Circuit Court of Appeals has consistently upheld classes including future or potential applicants. See, e.g, Rossini, 798 F.2d at 595 (certifying a class of women in a Title VII suit "who are, have been, or will be . . . employed by defendant . . . and who have been, are, continue to be, or would be affected by the discriminatory practices"); Warren v. Xerox Corp., 2004 WL 1562884, *18 (E.D.N.Y. Jan. 26, 2004) (certifying a class of "all black Xerox sales representatives who (within the applicable statutes of limitation) have been, continue to be, or may in the future be, affected by defendant's alleged pattern and practice

of racial discrimination in assignments of sales territories, promotions, and compensation"); Latino Officers Ass'n v. City of New York, 209 F.R.D. 79, 81 & 90 n. 87 (S.D.N.Y. 2002) (certifying a class including "all Latino and African-American individuals who have been, are, or will be employed by the NYPD [and] . . . who have been or will be subjected to discrimination on the basis of race, color, or national origin . . .." and noting that because the same legal theories were available to present and future claimants, and the equitable relief would be the same for present and future claimants, the presence of both present and future claimants in a class was proper).[5] The questions of law and the remedies involved in this case are common to both present and future applicants, and case law makes clear that future applicants are proper members of the proposed class.[6] Indeed, if this Court were to award injunctive relief in this case, it would seem necessary for future applicants – the prospective beneficiaries of the relief – to be included as class members.

[5] Other federal circuit courts of appeal also routinely certify classes including potential employees or future job applicants. See, e.g., Paige v. State of California, 102 F.3d 1035, 1037 (9th Cir. 1996) (in a disparate impact and disparate treatment case regarding a promotional exam, the certified class included "all past, present and future non-white sworn employees in the California Highway Patrol who have been, are, or will be discriminated against with regard to the terms and conditions of their employment because of their race . . ."); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 865, 878 (11th Cir. 1986) (upholding a class including "[a]ll females who . . . will in the future seek permanent employment as an over-the-road truck driver with the defendant . . . and who have been, would have been, or will be refused such employment"); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1558 (11th Cir. 1986) (allowing future claimants in a class designation for a disparate treatment claim); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254 (3d Cir. 1975) (certifying a class that included "all present and future female technical employees" because if "affirmative relief is necessary to completely dissipate the effects of the Company's discriminatory policies...the inclusion of future employees in the class may be useful").

[6] The City bases its argument on Williams v. Wallace Silversmiths, Inc., 75 F.R.D. 633 (D.Conn. 1976), in which the Court declined to certify a class including deterred applicants because plaintiffs' claims were "too general." Id. at 635. Williams is neither controlling nor applicable here, where Plaintiffs-Intervenors have identified specific hiring practices that have a discriminatory impact on black applicants, including the design, administration, scoring and use of the challenged written exams, as well as the college credit, driver's license and CFR-D requirements and the unlawful use of the PRB.

4. Non-Applicants Are Proper Class Members

The Supreme Court and the Second Circuit have also affirmed class certifications including non-applicants. In the seminal Supreme Court decision in Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324 (1977), plaintiff raised a Title VII challenge to an alleged discriminatory seniority system. The Supreme Court stated that "[t]he denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination." Id. at 367. In Grant v. Bethlehem Steel Corp., 1978 U.S. Dist. LEXIS 6994 (S.D.N.Y. Dec. 27, 1978), rev'd on other grounds, 635 F.2d 1007 (2d Cir. 1980), the District Court certified a class including non-applicants where plaintiffs had established a prima facie case of disparate impact and disparate treatment under Title VII. The Court stated that "the non-applicant may, in lieu of an application, show that he was within the class of victims who were the subject of unlawful discrimination and that an application would be fruitless, since it would be denied." Id. at 1016.

Inclusion of non-applicants is particularly critical here, where potential black applicants were deterred from applying by both (1) the perception of the FDNY as unlikely (or unwilling) to hire them, and (2) minimum job requirements that are unrelated to the job and are far less likely to be possessed, or obtainable, by black members of the labor pool. In this case, non-applicants may have a different route to proving damages should Defendants be found liable of discrimination, but there is no difference between them and actual test-takers at the liability stage. Moreover, the Second Circuit has held generally that "[i]t is often proper . . . for a district court to view a class action liberally in the early stages of litigation," since the class can always be altered or amended before final judgment. Woe v. Cuomo, 729 F.2d 96, 107 (2d Cir. 1984); Rule 23.

C. The Proposed Class Satisfies the Typicality Requirement

The nature of the class representatives' claims are typical of those of the proposed class because they "arise[] from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Marisol A, 126 F.3d at 376.

1. The Minimum Requirements Claims Are Typical of the Class

While Defendants concede that the college credit, driver's license and CFR-D claims are encompassed in Plaintiffs-Intervenors' charges, they assert that Plaintiffs-Intervenors have failed to show that these practices resulted in adverse impact, and have therefore failed to show that they are typical of practices affecting the class. See Def. Mem. at 9. However, as discussed above, Dr. Wiesen's analysis with respect to the adverse impact of the college credit requirement is precisely the type of proof that is appropriate here. See Griggs, 401 U.S. at 428; Bazemore, 478 U.S. at 400. The City has provided no contrary information, in the form of an expert report or an exhibit to its brief in opposition to this motion, that would go to show that likely black applicants for firefighter are not discouraged from applying or prevented from being appointed by the college credit requirement.[7] Nor have Defendants provided any information with respect to the impact of the driver's license requirement or the CFR-D requirement. Furthermore, throughout the course of discovery so far, Defendants have produced no information that would indicate that either the college credit requirement, the driver's license requirement or the CFR-D requirement are valid predictors of job performance or are a business necessity. As recently as

[7] Moreover, over the course of an 18-month audit of the FDNY's recruitment and hiring practices, the New York City Equal Employment Practices Commission repeatedly asked Defendants to study the potential adverse impact of the college credit requirement. See Washington Aff. at ¶ 11 (Dkt. 125), Ex. 9 to Washington Aff. (Dkt. 125-9). Defendants refused to conduct any such analysis. See Washington Aff. at ¶ 12 (Dkt. 125), Ex. 10 to Washington Aff. (Dkt. 125-10). Thus, there is no evidence from Defendants that would undermine the conclusions of Plaintiffs-Intervenors' expert.

this week, Plaintiffs-Intervenors have attempted to obtain from the City the data necessary to run an analysis of the impact these requirements have on applicants.

2. The Ultimate Qualification of the Class Representatives for the Job of Firefighter Need Not Be Proven At This Stage

Defendants next argue that individual Plaintiff-Intervenor Roger Gregg is an improper class representative because he has failed to affirmatively prove that he meets all of the medical and psychological requirements for appointment to a firefighter position. See Def. Mem. at 23-4. However, the City puts the cart before the horse. Defendants have cited no factual basis for the assertion that Gregg is not qualified for the position of firefighter, nor does any such evidence exist. While In re IPO permits the district court to inquire somewhat into the merits of a plaintiff's underlying claims to ensure that all elements of Rule 23 are met, a named plaintiff does not need to show to a certainty that his claim is meritorious in order to establish adequacy under Rule 23(a)(4). Gregg need not meet the standard of proof that would be required at the time of a summary judgment motion or in a remedy phase of the case. Rather he must present only prima facie evidence of his qualification for the position. In this case, he has clearly done so. Gregg took and passed both the written and physical portions of Exam 2043, but scored too low on the list to be selected for the job. Gregg's performance on the physical test, and the fact that he has had no reason to see a doctor for any injury or illness – mental or physical – for many years, is sufficient prima facie evidence that he is physically and psychologically fit and qualified to be a firefighter.

The City cites General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 156 (1982) for the proposition that an unqualified job candidate cannot serve as a class representative because he does not suffer an injury as a result of the alleged discriminatory hiring practice. However, the language that the City takes from Falcon is actually a quote from an

earlier Supreme Court case, East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977), which ruled that the named plaintiffs in a Title VII class action were not eligible to serve as class representatives because, at the time of class certification, it was *already* clear that they were not qualified for the job. There, the determination that they were not qualified for the job was made based on a full trial record. In contrast, here Gregg's medical qualifications have never been determined because his low rank on the eligibility list prevented him from ever reaching the medical exam stage of the FDNY's hiring process. That his medical fitness has not been proven one way or the other is no basis for finding that he is not qualified to represent the class.

D. The Proposed Class Representatives Satisfy the Adequacy Requirement

1. The Vulcans Are Appropriate Class Representatives

Defendants argue that the Vulcan Society is not a proper class representative both because it is not a member of the class and because its interests are not the same as those of the class. Neither argument holds water. First, the Vulcan Society need not be a member of the class in order to represent it. Case law cited by the City supports the notion that where a membership organization exists to represent the class, as the Vulcan Society does, it may be a proper class representative. In Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 n. 13 (2d Cir. 1968), the Second Circuit noted that the "reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its raison d'etre is to represent the interests of that class." See also Civic Ass'n of the Deaf of N.Y.C., Inc. v. Giuliani, 915 F.Supp. 622, 633 (S.D.N.Y. 1996) (finding that both the association and individual plaintiffs, who represent or are themselves hearing-impaired individuals, satisfy the typicality requirement for class representation). In

People United for Children, Inc. v. City of New York, 214 F.R.D. 252, 263 (S.D.N.Y. 2003), the Court held that:

> Here, although not all of the members of People United may be named as individual plaintiffs in the instant action, the primary goal of the organization appears to be consistent with the objectives of the proposed class . . . As such, the association plaintiff appears to sufficiently represent the interests of the proposed class. Accordingly, at this stage of the litigation, the Court grants class representative status to People United.

citing E. Paralyzed Veterans Ass'n, Inc. v. Veterans' Adm., 762 F.Supp. 539, 547 (S.D.N.Y. 1991) (organization certified as class representative).

As the Affidavit of Paul Washington, a former president of the Vulcan Society, explains, the Vulcans do not only provide services to current black firefighters in the FDNY. Rather, the Vulcans spend significant resources in terms of time and money to assist and support black applicants or would-be applicants for firefighter positions. See Washington Aff. (Dkt. 125). The Vulcans play an active role in recruitment and training of potential applicants, id. at ¶ 3(c), and have spent considerable time and money engaging in both litigation and administrative proceedings to protect the interests of both current black firefighters and those who would seek to become firefighters. Id. at ¶¶ 5, 7-9. The Vulcans have also met with City officials and community leaders numerous times to advocate on behalf of the proposed class members. Id. at ¶¶ 18-20, 24-28. These activities in support of the members of the proposed class are central to the Vulcans' organizational mission, and they are undertaken not only to benefit applicants but also to benefit their members, the 3% black firefighters who are isolated within an almost universally white department. These incumbent firefighters, Vulcans members, seek an increase in the numbers of blacks at all ranks within the department and in all the firehouses across the City to further their own security, comfort and sense of fairness in their place of employment.

Thus, the goals of the Vulcan Society's membership are entirely consistent with the goals of the members of the proposed class.

The City fails to provide any explanation of how the interests of the Vulcan Society and the interests of the class might conflict. Both the Vulcan Society and the members of the class want the Defendants to stop discouraging blacks from applying for firefighter positions and to hire qualified black applicants based on criteria that are fair and valid. In the view of both the Vulcan Society and the individuals it represents, reasonably proportionate numbers of qualified black firefighters is an important goal.

2. There Is No Inherent Conflict Between Those Who Passed the Exams And Those Who Failed

While the City suggests that there is some potential conflict between the members of the proposed class, they provide no compelling example of such a conflict. There are no known or anticipated conflicts or antagonistic interests among the members of the putative class. The interest of each class member is, or was, to gain the opportunity to compete for appointment on the basis of an exam that measures actual aptitudes required for the position in a way that does not discriminate on the basis of race. Moreover, there is no conflict between those class members who failed the examinations (or failed to meet one of the other appointment requirements) and those who passed but were ranked lower on the eligibility lists because their legal claims are the same, even though the amount of relief they are entitled to in the damages phase of the litigation may differ. As discussed below, differences in entitlement to relief does not defeat class certification.

The fact that Candido Nuñez was appointed as a firefighter does not bar him from representing members of the class. Nuñez waited more than five (5) years from the time he took Exam 2043 until the time he was appointed. This allows him to adequately represent, *inter alia*,

members of the proposed class who, like him, were eventually appointed but who were injured by unlawful delays in their appointment. See Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1148 (2d Cir. 1991) (concluding that the bunching of the white candidates' scores at the top and black candidates' scores at the bottom of a rank-ordered examination violated Title VII). The delay in appointing Nuñez resulted from the same discriminatory screening and selection practices that resulted in other class members being delayed or denied appointment or being deterred from even applying.

3. There Is No Requirement In Any Rule or Case That Each Named Class Representative Submit an Affidavit

While the City makes much of the fact that only Roger Gregg submitted an affidavit to accompany Plaintiffs-Intervenors' moving papers, there is nothing in Rule 23 that requires all proposed class representatives to submit affidavits. Roger Gregg's affidavit was submitted simply to supply useful information to the Court and not because he is any more involved or interested in the litigation than his fellow proposed class representatives. Marcus Haywood, who Defendants assert has walked away from this litigation, has submitted an affidavit in support of Plaintiffs-Intervenors' motion for class certification and has responded (albeit late) to the discovery requests propounded by Defendants.

These individual Plaintiffs, along with the Vulcan Society, have been deeply involved in these issues since even before the filing of their EEOC charges in 2005. They have kept in touch with counsel, often checking in by phone simply to ask whether anything is new in the case, have responded to discovery requests, and have attended strategy meetings. Most importantly, it was their complaints that initiated this litigation and they are the ones whose personal experiences relate so closely to those of the proposed class members that they seek to represent.

E. The Class Clearly Meets the Requirements of Rule 23(b)(2) & (3), And There Is No Need To Subdivide The Class At This Time

None of the points raised by Defendants or the United States would make class certification inappropriate under Rule 23(b)(2) or (3). Rule 23(b)(2) is satisfied if "the party opposing the class 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." Rule 23(b)(3) is satisfied if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

By acting or refusing to act on grounds that apply generally to the class, the Defendants themselves have created a proper Rule 23(b)(2) class for injunctive relief. While subclasses may ultimately be useful when the parties are calculating damages, there is no need for subclasses at the liability phase of this action. The injunctive relief being sought here benefits everyone in the class that is encompassed by the FDNY's actions, i.e. all those within the class under Rule 23(b)(2). If the Rule 23(b)(2) class succeeds on the merits of the case, and if a Rule 23(b)(3) class is necessary for determining monetary damages, that would be the appropriate time to sub-divide the class. At that time, class members would need to receive notice of the action and would have the opportunity to opt out.

POINT III.
THERE IS NO MERIT TO THE ARGUMENT THAT THE CLASS IS "UNNECESSARY" DUE TO THE UNITED STATES' INVOLVEMENT IN THE CASE

There is simply no authority – nor does the City cite any – that supports the suggestion that because the United States has brought a pattern and practice claim against Defendants, the Plaintiffs-Intervenors' class should not be certified. It has long been recognized that "the private

right of action is an essential means of obtaining judicial enforcement of Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). "Suits brought by private employees are the cutting edge of the Title VII sword which Congress has fashioned to fight a major enemy to continuing progress, strength, and solidarity in our nation, discrimination in employment," and "[c]lass actions . . . are powerful stimuli to enforce Title VII." Wetzel v. Liberty Mut. Sav. Co., 508 F.2d 239, 254 (3d. Cir. 1975). The fact that the EEOC and the Department of Justice also have enforcement authority under Title VII does not diminish the importance of the private class action to effective enforcement of Title VII. See General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) ("the EEOC's civil suit [is] intended to supplement, not replace, the private action").

The statutory right of private complainants to intervene in these actions under 42 U.S.C. § 2000e-(5)(f)(1) reflects Congress's understanding of the essential role to be played in litigation by the parties who filed the original charges of discrimination. The statute's guarantee that original filers may intervene in actions brought by the United States strongly suggests that the Courts should not deny class representative status to those original charging parties simply because the Department of Justice is also involved in the litigation. Moreover, while the United States and Plaintiffs-Intervenors share common claims on adverse impact, Plaintiffs-Intervenors have also raised separate and distinct claims in this action – including their claim that the latest exam, Exam 6019, continued to have an adverse impact on blacks.

It is not the case, as Defendants disingenuously suggest, that Plaintiffs-Intervenors' only purpose for class certification is to achieve monetary damages for the class. Rather, Plaintiffs-Intervenors seek – and expect – to be able to broaden the injunctive relief that would otherwise be granted in this action to include relief that would protect past, present and future discriminatees from injury based on employment practices that are not being challenged by the

United States but which nevertheless make up a part of the continuing violation for which a remedy is being sought. Even on the claims they share, Plaintiffs-Intervenors will likely seek different relief than the United States. For example, it may be that this is an appropriate case for preferential treatment of black firefighter applicants for a fixed period of time into the future. Under Supreme Court and Second Circuit law, such race-conscious relief remains appropriate in certain circumstances. See, e.g., Johnson v. Transp. Agency, 480 U.S. 616 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); U.S. v. New York City Board of Educ., 448 F.Supp.2d 397, 429, 436-39 (E.D.N.Y. 2006); Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n, 353 F. Supp. 1092 (S.D.N.Y. 1973) (Weinfeld, J.), aff'd 490 F.2d 387 (2d Cir. 1973) (upholding the district court's injunction requiring the City to hire one (1) minority candidate for every three (3) white candidates); Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 775 (2d Cir. 1975) (a reasonable preference in favor of minority persons in order to remedy past discriminatory injustices is permissible as "it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the 'rightful place' on the seniority ladder, which they would have occupied but for industry-wide racial discrimination"); U.S. v. Wood, Wire & Metal Lathers Int'l Union, 471 F.2d 408, 413 (2d Cir. 1973) ("While quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not….[T]he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future"); U.S. v. NAACP, Inc., 779 F.2d 881, 883-884 (2d Cir. 1985) (upholding "the interim use of racial preferences to remedy violations of Title VII based on findings of egregious past general discrimination and as a remedy for civil contempt stemming from violations of such a remedial order"); Horan v. City of Chicago, 2003 U.S. Dist.

LEXIS 17173 (N.D. Ill. Sept. 30, 2003) ("A governmental agency has a compelling interest in remedying its previous discrimination and may use racial preferencing to rectify that past conduct….Race-conscious promotions are an appropriate remedy where discrimination at the entry level necessarily precluded minorities from competing for promotions, and resulting in a departmental hierarchy dominated exclusively by non-minorities"); Mackin v. Boston, 969 F.2d 1273 (1st Cir. 1992) ("it is well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination"); U.S. v. City & County of San Francisco, 1997 U.S. Dist. LEXIS 21514 (N.D. Cal. Nov. 26, 1997).

The Department of Justice, under the current Administration, is not likely to pursue this type of affirmative relief, even if it is available to the class.[8] For the same reasons that Plaintiffs-Intervenors were entitled to intervene as parties in this action, they are irreplaceable as representatives of the proposed class. The Vulcan Society and Roger Gregg, Marcus Haywood and Candido Nuñez fought for changes in the screening and selection of applicants long before the United States decided to bring this action. They brought the EEOC charges that form the basis of this suit and have served as the real champions – and representatives – of the firefighters and firefighter applicants that they seek to represent. The Plaintiffs-Intervenors have lived through the process that they are challenging and have the best perspective on the ways in which it failed themselves and their peers. They are the proper representatives to carry this case forward and to see that appropriate remedies are accomplished.

[8] See U.S. v. New York City Bd. of Educ., 2008 WL 2201781, at *3-4 (E.D.N.Y. May 28, 2008) (it is the policy of the Department of Justice not to seek or agree to relief that goes beyond what is necessary to make whole "identified victims of a particular discriminatory practice," even where such relief may be available).

CONCLUSION

For all the reasons stated above, Plaintiffs-Intervenors respectfully request that their motion for the certification of a class action pursuant to Rules 23(a), 23(b)(2) and 23(b)(3) and their motion to amend and supplement their complaint pursuant to Rule 15(a) and (d) be granted in all respects.

Dated: New York, New York
June 25, 2008

Respectfully submitted,

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