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-

City of New York, et al.,

Defendants.

--X

Civil Action No. CV 07 2067 (NGG) (RLM)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CONTINUED CLASS CERTIFICATION

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Preliminary Statement

The Vulcan Society, Inc., Marcus Haywood, Candido Nuñez and Roger Gregg, Plaintiffs-Intervenors herein, file this Memorandum of Law in Support of their Motion for Continued Class Certification. In support, Plaintiffs-Intervenors are also filing, contemporaneously herewith, the Declaration of Richard A. Levy, and five (5) affidavits, three from the named individual Plaintiffs-Intervenors Marcus Haywood, Candido Nuñez, and Roger Gregg, and two from class members Kevin Simpkins and Kevin Walker.

Introduction

This Court granted class certification in its Order entered May 11, 2009 ("Class Order"). The Court certified the Vulcan Society as representative of the class as a whole for the purposes of the liability phase of the proceedings and certified individual plaintiffs Marcus Haywood and Roger Gregg as representatives for a subclass that included black firefighters and firefighter

applicants who were harmed by Defendants' rank-order processing of applicants who passed Written Exam 2043 (Class Order, at 34).

I. Under the Procedures Established in *Robinson v. Metro-North*, this Court Should Continue the Class Certification Under Rule 23(b)(2)

This Court's decision certifying this case for class treatment during the liability phase relied upon the Second Circuit's decision in *Robinson v. Metro-North*, 267 F.3d 147 (2d Cir. 2001). That case defined the standards for class treatment of pattern or practice and disparate impact cases. In this Court's Class Order, the Court concluded as follows:

> If the court reaches the remedial stage, it will revisit its class certification decision in order to determine the most expedient method of going forward, including consideration of notice and opt-out procedures, as well as consideration of whether subclass representatives are needed. See Warren, 2004 WL 1562884, at *16 ("If liability is found, the certification issue may be revisited in connection with the damages phase."); see also Robinson, 267 F.3d at 171 ("the preferable course is for the district court to revisit the question of the Class Plaintiffs' 'fitness' to represent the class if and when the individual-relief stages of the claims occur").

Class Order, at 34.

The Vulcan Society and the individual named plaintiffs submit (a) that they remain appropriate class representatives during the remedial phase, and (b) that, in the alternative, the Court may designate additional individuals to represent subclasses respecting issues of damages.

A. The Vulcan Society Remains an Appropriate Class Representative for the Class as a Whole

With respect to the Vulcan Society, the Court found that

> the organization has an interest in the injunctive relief sought based upon the interests of its own members, including those whose hiring was allegedly delayed by the rank-order hiring from the challenged written examinations. The organizational mission of the Vulcan Society also aligns with the interests of those who were never hired on account of the challenged practices—and thus never got the opportunity to become black firefighters.

Class Order, at 23.

The Court concluded that in light of the Society's "demonstrated years of work and commitment to the increased hiring of black firefighters, including recruitment and training for written examinations," the Vulcan Society would "adequately represent the interests of the class as a whole." Class Order, at 23-4.

The Court's reasoning with respect to the liability phase applies with equal force to the remedy phase. The interest of the Vulcan Society in the injunctive relief to be ordered in this case, both on behalf of its current members as well as the applicants for hire, remains substantial. The Vulcan Society continues to seek increased minority recruiting, valid & unbiased tests and non-discriminatory treatment of black applicants and firefighters who comprise the class as a whole. It seeks this injunctive relief consistent with its long-term mission of ending the discriminatory hiring practices at the FDNY and remedying the unlawful exclusion of blacks from the firefighter position.

Nor does the fact that individualized relief is sought for some of the claims defeat the standing of the Vulcan Society. *See, Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Development*, 570 F.Supp.2d 533, 543 (S.D.N.Y. 2008) (finding associational standing based upon the association's request for injunctive relief on compelled speech and vagueness claims which did not require individualized proof.) In this case, injunctive relief on both the disparate impact (and disparate treatment) claims can be entered upon a finding of liability to the class, without individualized proof. Therefore, the Vulcan Society has standing to serve as a class representative.

The Court should find that the Vulcan Society remains an appropriate class representative with respect to class-wide injunctive relief, including the implementation and monitoring of any remedial orders entered in this case.

B. The Named Individual Plaintiffs-Intervenors Are Appropriate Class Representatives for the Entire Class

As noted above, *Robinson*, 267 F.3d at 171 directed that, at the remedial stage, the Court "revisit the question of the Class Plaintiffs' 'fitness' to represent the class if and when the individual-relief stages of the claims occur." The Court should revisit its May 11, 2009 determination not to grant class representative status to Candido Nuñez and to certify the other two named Plaintiffs-Intervenors, Marcus Haywood and Roger Gregg as appropriate representatives for a subclass of plaintiffs. In revisiting the class certification issue, the Court should conclude that, in light of the its ruling on liability, as well as the unique circumstances of this case, all three named individual Plaintiffs-Intervenors are appropriate representatives for the class as a whole during the remedy phase.

Candido Nuñez is an appropriate class representative. At the time of this Court's May 11, 2009 ruling, the Court did not have available to it substantial information that showed the fitness of Nuñez to serve in that capacity. When the original class certification motion was filed, Plaintiffs-Intervenors Haywood and Gregg had submitted individual affidavits in support of their representative status, but Nuñez had not. Accompanying this memorandum is an Affidavit from Candido Nuñez setting forth his interest and ability to act as a class representative. Additionally, some months after the Plaintiffs-Intervenors' class certification motion was filed, the City took Nuñez's deposition. Nuñez's testimony in that deposition showed the depth of his knowledge of the firefighter job (Nuñez Dep., 68-78), the Firefighter Academy (Nuñez Dep., 59-66), the hiring process, including recruitment, test preparation, and

the nature of the written exam (Nuñez Dep., at 21-40) and his direct involvement in this litigation (Nuñez Dep., 94-104). His deposition showed, *inter alia*, that Nuñez is committed to being a firefighter (Nuñez Dep., 107, 109) and that he understood the nature of the claims raised in this case (Nuñez Dep., 41, 79-81, 102). His current Affidavit further demonstrates his continued involvement in and familiarity with the litigation, and his understanding of his obligations as a class representative. (Nuñez Aff., ¶5-6). Although Nuñez was hired from the Exam 2043 list, he was in the last Academy Class hired from that list. (Nuñez Aff., ¶ 3). Based on the foregoing, the Court should conclude that Nuñez is an appropriate class representative.

As to all three individual named Plaintiffs-Intervenors, this case stands now in a markedly different posture from the time of the Court's class certification ruling of May 11, 2009. Prior to this Court's ruling on liability, the United States had proposed subclasses aligned with the four separate practices challenged in this case on the rationale that "the United States and Plaintiffs-Intervenors could prevail with respect to some, but not all, of the challenged practices," (DOJ Brief, at 23) and that "the same arguments that may establish the City's liability with respect to one subset may not apply to the claims of another." (DOJ Brief, at 24). But these concerns are now moot. The Court found liability on both exams, and found both unlawful for the same reasons – the City's use of the two exams for ranking and pass/fail determinations were not job-related and consistent with business necessity. (Order of July 22, 2009, "Liability Order," at 92).

Because of the near-identity in Exams 7029 and 2043, and because of the interconnectedness of the two liability findings made with respect to the two exams, this Court should find that the three named individual Plaintiffs-Intervenors are adequate representatives for the overall class during the remedy phase. The two exams had common origins and are, in

essence, different sets of questions built on the same test design. As this Court has already found, Exams 7029 and 2043 used "the same job analysis and test plan," and essentially the "same test-writing process." Liability Order, at 45 & n. 24.

The physical exam also remained the same for both eligibility lists. Responses to DOJ Req. for Admission 40 ("The City used the same physical performance test ("PPT") for both Exam 7029 and Exam 2043.") Thus, while Exams 7029 and 2043 differ in terms of administration dates and resulting eligibility lists, they are closely identified in terms of design and content as well as their uses. This close identity in the two Exams created substantial commonality in class interests and injury.

The differences between Exams 7029 and 2043 are not sufficient to deny the certification of a class overall. As this Court noted in its May 11, 2009 Order, courts within the Second Circuit have certified classes "despite varying factual circumstances of the class members' claims," citing *Warren v. Xerox Corp.*, 2004 WL 1562884, *13 (E.D.N.Y. 2004). The Court in *Warren*, 2004 WL 1562884 at *12-*14 cites a number of cases finding that commonality and typicality was shown, despite such differences.

The Supreme Court has also concluded that commonality and typicality are present in situations indistinguishable from this case. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n15 (1982) ("If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)."); *Gratz v. Bollinger*, 539 U.S. 244, 253-56, 267 (Despite a number of changes in admissions guidelines over the applicable seven-year period, the Supreme Court held that an upperclass student applicant for transfer could also represent a class

which included freshman applicants in light of similarities in guidelines affecting both groups.) In *Gratz* there were some differences in treatment between transfer students and freshman class applicants, but the differences did not defeat class certification.

In light of these close connections between the two exams, there is little risk of conflict between the named Plaintiffs-Intervenors, all of whom took Exam 2043, and the remainder of the class regarding remedy. The provisions of the Proposed Relief Order submitted by the United States exemplify these close connections. They demonstrate the continuing identity of interests of the overall class and the unlikelihood of fundamental conflict. A significant number of the elements of that Proposed Order treat all test-takers the same, without differentiation amongst those who took Exams 7029 or 2043 and without differentiation as to whether they were hired or not. Class members, without differentiation as to exam taken, are proposed to be eligible for back pay (Proposed Relief Order, ¶¶18-24); class members, without differentiation as to exam taken, are proposed to be eligible for priority hire (Proposed Relief Order, ¶¶ 41-44); and class members who receive priority hires are proposed to be treated similarly with respect to retroactive seniority (differentiated only by where the median date for the hiring on the two exams took place.) (Proposed Relief Order, ¶9). The delayed hires from both exams are treated similarly to those not hired, in that they would receive retroactive seniority and back pay, as would the priority hires (Proposed Relief Order, ¶¶ 9, 21).

Newberg on Class Actions has observed:

> The conflict of interest prong of the adequacy of representation criterion concerns the relationship of the representative plaintiff to the other class members. This test envisions a situation for denying representative status <u>when some form of fundamental antagonism</u> relating to the common issues exists between the plaintiff and the class members. Antagonism may superficially emerge in various forms. Some courts have denied or limited

> classes because of potential competition among employees for a finite number of employment opportunities. [fn. omitted]
>
> On the other hand, most courts have recognized that such potential competition among employees is a normal feature of employment discrimination suits of all types and exists in individual suits – between plaintiff and class members, among different minorities in a broad class composed of multiple categories of employees, and so on. Therefore, the prevailing view is that such potential competition for employment opportunities does not bar class certification or adequacy of representation.

Newberg on Class Actions, §24:33. There is no fundamental antagonism between the named Plaintiffs-Intervenors and the class they seek to represent sufficient to require subclasses in the damages phase.

In *Robinson*, the Second Circuit held that conflict was to be determined on the basis of whether or not class representatives were part of the class, possessed the same interest and suffered the same injury as the class members. *Id.* at 170-71. Marcus Haywood, Roger Gregg and Candido Nuñez meet this standard. Their experiences with Exam 2043 and their injuries are similar to those of class members injured by both Exam 2043 and Exam 7029. Like other exam passers, both those hired as well as those not hired, all three named Plaintiffs-Intervenors lost opportunities to accrue seniority and to receive the increasing salary and other benefits accruing to those hired ahead of them as firefighters. Those who failed the exams experienced the same injuries as the three named Plaintiffs-Intervenors who passed, because in both cases their scores caused them not to be reached for hiring or caused a delay in their hiring. The class members who scored a 65 on Exam 2043, for example, or a 78 on Exam 7029 – just below the pass marks on each exam – may be as qualified to serve as a New York City firefighter as the three named Plaintiffs-Intervenors, who each had passing scores but were injured because their exam scores were low. In substance, the named Plaintiffs-Intervenors possess the same interest and suffer the

same injury as all class members injured by the exams, regardless of which exam was taken, and regardless of where their scores fell on the overall range.

Marcus Haywood and Roger Gregg have also submitted affidavits in support of this motion which show, *inter alia*, (a) their continuing interest in the firefighter job and (b) their belief that relief should be similar (and class-wide) for those who took both exams. See Affidavits of Marcus Haywood and Roger Gregg, filed contemporaneously herewith. They seek the remedies of back pay, compensatory damages and priority hiring to make up for the shortfall in hiring of black applicants, without regard to the exam taken. They are knowledgeable about this lawsuit and continue to have a strong interest in its outcome, both for themselves individually as well as for the class as a whole. (See Affs. of Haywood, ¶¶ 2-7, Gregg, ¶¶ 2-7, & Nuñez, ¶¶ 4-8). In light of the foregoing, the three named individual Plaintiffs-Intervenors are appropriate class representatives for all class members at the remedy stage.

C. Alternatively, the Court May Designate Additional Individuals to Represent Subclasses Respecting Issues of Damages

Alternatively, if the Court concludes that Haywood, Gregg & Nuñez cannot adequately represent the class as a whole, Second Circuit authority provides that "if the district court deems it appropriate, it can direct that class members who are entitled to seek individual relief be named as additional class representatives. (Citations omitted)." *Robinson,* 267 F.3d at 171.

1. If the Court Orders the Creation of Subclasses, No More Than Two are Necessary

As argued above, Plaintiffs-Intervenors believe that subclasses are unnecessary at this stage, in light of the close connections between Exams 7029 and 2043 and the Court's similar liability findings respecting those two exams. However, if the Court views otherwise, Plaintiffs-Intervenors submit that two subclasses should be sufficient. The Supreme Court in *Falcon*, 457

U.S. 147, 158-59, held that, at least in some circumstances, a single class consisting of applicants for hire and employees seeking promotion would be inappropriate, although the Supreme Court in footnote 15 of that decision indicated that class certification would be appropriate if both applicants and employees were affected by the same "biased testing procedure."[1] If the Court concludes that a single class of successful and unsuccessful job applicants injured by the City's use of Exams 7029 and 2043 is inappropriate for the remedy stage here, two subclasses could be created: one consisting of those hired as a result of scores achieved on Exams 7029 and 2043 and another consisting of those not hired as a result of scores achieved on Exams 7029 and 2043.[2]

Candido Nuñez is an appropriate representative of a subclass of those hired as a result of scores achieved on the two exams; and Marcus Haywood and Roger Gregg are appropriate representatives of a subclass of those not hired as a result of scores achieved on the two exams. They are members of those potential subclasses, possess the same interest and have suffered the same injury as members of those subclasses.

2. In the Alternative, if the Court Orders the Creation of Four Subclasses, the Court Should Appoint Affiants Nuñez, Haywood, Gregg, Simpkins and Walker to Represent Those Subclasses

If the Court concludes that four subclasses are appropriate (i.e., two separate subclasses consisting of those hired as a result of scores achieved on each of the two exams, and two other

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[1] This is like the situation here involving class members denied hire or delayed in their hire, with both rejected applicants and delayed hires (now current employees) affected by the same biased exams.

[2] Both subclasses would meet numerosity requirements. The subclass of persons hired from the two exams would have at least 203 members. As the Court's liability Order found, there were 104 class members hired from 7029 (Liability Order, 20) and 80 class members hired from 2043 (Liability Order, at 22). Dr. Siskin's September 10, 2009 Affidavit reports that an additional 19 class members have been hired subsequently. The subclass of persons who applied but were not hired from Exams 7029 and 2043 would have approximately 2,939 members. (Liability Order, at 16). Courts have repeatedly held that, while no magic number for numerosity exists, generally speaking classes larger than forty (40) meet the numerosity requirement. *See, e.g.*, *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546. 1553 (11th Cir. 1986).

subclasses consisting of those not hired as a result of scores achieved on each of the two exams), the Court should

1) certify Nuñez as representative of a subclass of those delayed in their hiring as a result of scores achieved on Exam 2043;

2) certify Haywood and Gregg as appropriate representatives of a subclass of those who were not hired as a result of scores achieved on Exam 2043;

3) order that class member Kevin Simpkins be named as representative of a subclass of those delayed in their hiring as a result of scores achieved on Exam 7029. *See Robinson*, ("If the district court deems it appropriate, it can direct that class members who are entitled to seek individual relief be named as additional class representatives."). *Id.* at 171.

Simpkins took Exam 7029 and received a written score of 87.058. He was ranked # 4815.5 on the Exam 7029 eligibility list. (October 6, 2009 Affidavit of Kevin Simpkins ("Simpkins Aff."), filed contemporaneously herewith, ¶ 4. He graduated from the Academy in August, 2003 and currently serves as a firefighter in Engine 233 in Brooklyn. (Simpkins Aff., ¶ 5). He is knowledgeable about this lawsuit (Simpkins Aff., ¶¶ 6, 8) and is aware of the potential remedies which may be available to class members (Simpkins Aff., ¶ 8) and understands the responsibility of a class representative towards other class members and is willing to serve in that capacity. (Simpkins Aff., ¶¶ 9-10).

4) order that class member Kevin Walker be named as a representative of a subclass of those not hired as a result of scores achieved on Exam 7029. Walker took Exam 7029 and received a raw score of 77.467 on the written test. (October 5, 2009 Walker Affidavit, filed contemporaneously herewith, ¶ 6). Upon learning from a New York Times article that this Court had entered a liability finding against the City, he contacted the Center for Constitutional Rights

and inquired as to how he might become involved in the case. (Walker Aff., ¶ 8). He remains interested in becoming a New York City Firefighter. (Walker Aff., ¶ 7). Walker has met with Plaintiffs-Intervenors' counsel, and has been briefed on the history and the status of this case. (Walker Aff., ¶ 9). He is aware that it is likely that this litigation will continue for some period of time and that, as a class representative, he is responsible for protecting the interests of the entire class. (Walker Aff., ¶ 9).[3]

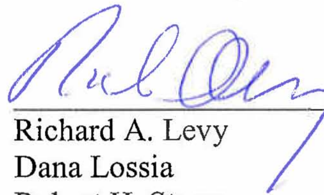
Conclusion

For all the foregoing reasons, this Court should order continuing class treatment, with the Vulcan Society and the three named individual Plaintiffs-Intervenors as class representatives. Alternatively, the Court should order that the two additional named class members – Simpkins and Walker – be added as class representatives as outlined above.

Dated: October 7, 2009
New York, New York

Respectfully submitted,

LEVY RATNER, P.C.



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[3] Each of these four subclasses would also meet numerosity requirements. As noted in footnote 2, supra, approximately 104 class members hired from 7029 and approximately 80 class members were hired from 2043. 1,749 black applicants took Exam 7029 and 1,393 black applicants took Exam 2043. (Liability Order, at 16).

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