IN THE UNITED STATES DISTRICT COURT
FOR THE 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

Case No. 07-CV-2067 (NGG)(RLM)

ECF Case

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DEFINE SUBCLASSES

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Introduction

Pursuant to this Court's Order dated June 6, 2011 ("6/6/11 Order"), Plaintiffs-Intervenors have moved for class certification of two subclasses – one for non-hire victims with respect to issues of make-whole relief, including backpay, benefits, retroactive seniority, priority hiring and noneconomic damages, and the second for delayed-hire victims seeking backpay, benefits, retroactive seniority and noneconomic damages. Plaintiffs-Intervenors propose that Roger Gregg, Marcus Haywood and Kevin Walker serve as class representatives for the non-hire victim subclass and that Candido Nuñez and Kevin Simpkins serve as class representatives for the delayed-hire victim subclass. Each of the proposed class representatives have submitted supporting affidavits which are filed contemporaneously herewith. Further, Plaintiffs-Intervenors propose that Levy Ratner, P.C. serve as counsel for the non-hire victims and that the Center for Constitutional Rights serve as counsel for the delayed-hire victims. The declarations of Richard A. Levy and Darius Charney in support of those designations of subclass counsel are also filed

contemporaneously with the filing of this motion. This memorandum of law is filed in support of the motion for certification of the two subclasses.

Argument

POINT I.
THE NON-HIRE SUBCLASS AND THE DELAYED-HIRE SUBCLASS BOTH MEET THE REQUIREMENTS OF RULE 23(a)

A. THE PROPOSED SUBCLASS DEFINITIONS

Plaintiffs-Intervenors propose that the two subclasses be defined as follows:

1. The Non-Hire Victim Subclass will include all black firefighter applicants who sat for either Written Exam 7029 or Written Exam 2043 and were not hired as firefighters from the eligibility lists created from the administration of either of those exams.
2. The Delayed-Hire Victim Subclass will include all black firefighters who were hired from the eligibility lists created through the use of either Written Exam 7029 or Written Exam 2043, except those who were hired in the first Academy classes hired from those eligibility lists.

Plaintiffs-Intervenors seek certification of these subclasses for the remedial phase with respect to the scope of class-wide relief, including aggregate back pay and benefits for the class (not including individual issues of mitigation), the amount and applicability of retroactive seniority, the monetary value of the intangible benefit of service as a New York City firefighter after taking into account the offsetting intangible cost of the risks to which New York City firefighters are exposed, the legal question regarding whether the monetary value of intangible benefits subclass members obtain from interim employment should offset the lost value of the intangible benefits, and, with respect to the Non-Hire Victim subclass only, the number of priority hires.

B. RULE 23(a) REQUIREMENTS

1. Numerosity

The Court has already found, in its Order of June 6, 2011, that both the Non-Hire Subclass and the Delay-Hire Subclass meet Rule 23(a)(1)'s numerosity requirement. (6/6/11 Order, at 25-26) ("Although the precise number of delayed hire and non-hire victims is presently unknown, Plaintiffs-Intervenors have established that the putative members of each of these two subclasses are sufficiently numerous that joinder of all class members would be virtually impossible.")

2. Commonality

The issues for which Plaintiffs-Intervenors seek class treatment at the remedy phase for both subclasses are narrowly drawn to encompass common questions of fact and law. They involve questions surrounding the amount of subclass aggregate back pay losses, the method of distribution of the subclass back pay, lost benefits for the subclass, the amount and applicability of retroactive seniority for the subclasses, and, for the non-hire subclass, the number of priority hires. These are questions common to each of the two proposed subclasses and constitute sufficient grounds for a finding of commonality.

For noneconomic losses, the Court has already found that both subclass members "share common questions of fact and law relating to the monetary value of the intangible risks and benefits of employment as a firefighter, and whether the monetary value of the intangible benefits of their interim employment should offset the value of the benefits of employment as a firefighter." (6/6/11 Order, at 26)

3. Typicality and Adequacy

The Court has already concluded that the Individual Intervenors, Haywood, Nuñez, and Gregg, are appropriate representatives of the noneconomic loss subclass. (6/6/11 Order, at 28-

29.) Their updated affidavits, submitted contemporaneously herewith (along with affidavits of additional proposed subclass representatives Kevin Simpkins and Kevin Walker) show that Nuñez and Simpkins are also appropriate representatives of the Delay-Hire Victim Subclass, and that Haywood, Gregg and Walker are appropriate representatives of the Non-Hire Victim Subclass.

As to the non-hire victims, Haywood, Gregg and Walker are willing and qualified to represent a subclass of all other non-hire victims of the City's disparate impact and disparate treatment discrimination. (*See* Affidavit of Marcus Haywood, dated June 11, 2011, at ¶ 5; Affidavit of Roger Gregg, dated June 13, 2011, at ¶ 5; Affidavit of Kevin Walker, dated June 12, 2011, at ¶ 4). They will seek complete make-whole and noneconomic relief (Id.), and they are eligible to receive the remedies they are seeking on behalf of themselves and their fellow subclass members (Haywood Aff., at ¶ 10, Gregg Aff., at ¶ 11; Walker Aff., at ¶ 7). They also understand the issues upon which they do not represent the class (Haywood Aff., at ¶ 6; Gregg Aff., at ¶ 6, Walker Aff., at ¶ 5), and they agree that separate subclass counsel – Levy Ratner, P.C. – will represent them with respect to their unique interests. (Haywood Aff., at ¶ 11; Gregg Aff., at ¶ 12, Walker Aff., at ¶ 8.)

As to the delayed-hire victims, Nuñez and Simpkins are willing and qualified to represent a subclass of all other delayed-hire victims of the City's disparate impact and disparate treatment discrimination. (*See* Affidavit of Candido Nuñez, dated June 13, 2011, at ¶ 4-5; Affidavit of Kevin Simpkins, dated June 12, 2011, at ¶ 4-5.) They will seek complete make-whole and noneconomic relief. (Id., at ¶¶ 4-5, 7) They also understand the issues upon which they do not represent the class (Nuñez Aff., at ¶ 6; Simpkins Aff., at ¶ 6), and they agree that separate

subclass counsel – the Center for Constitutional Rights – will represent them with respect to their unique interests. (Nuñez Aff., at ¶ 9; Simpkins Aff., at ¶ 9).

These affidavits show that the Individual Intervenors and additional proposed class representatives are qualified to represent the interests of the two proposed subclasses. As the Court noted in its 6/6/11 Order, the Individual Intervenors and proposed subclass representatives "share a common interest in establishing the greatest possible monetary valuation" for their respective subclasses. (6/6/11 Order, at 29) Nor is there evidence that the Individual Intervenors and the other proposed class representatives have any claims or are subject to any defenses unique to them, or that there is any reason why, despite their common interests, they would be unable to fairly and adequately protect the interests of absent class members. (*See* Gregg Aff., at ¶ 10; Walker Aff., at ¶ 9; Simpkins Aff., at ¶ 11).

POINT II.
THE PROPOSED SUBCLASSES ARE ALSO APPROPRIATE FOR CERTIFICATION UNDER PROVISIONS OF RULE 23(b)

A. THE COURT HAS ALREADY FOUND CERTIFICATION OF NONECONOMIC DAMAGES APPROPRIATE PURSUANT TO RULE 23(b)(3)

This Court has already ruled that subclass certification of the noneconomic damages claims is appropriate only under Rule 23(b)(3), (6/6/11 Order, at 30) and with respect to a combined subclass of all who seek such damages, this Court has already held that the requisites for certification under Rule 23(b)(3) have been shown. (6/6/11 Order, at 33).

The Plaintiffs-Intervenors have now asked the Court to treat the noneconomic damages issues as part of the Non-Hire and Delayed-Hire Victim Subclass certification, rather than as a separate Noneconomic Loss Subclass. Just as Individual Intervenors Marcus Haywood, Roger Gregg and Candido Nuñez were appropriate class representatives for the combined subclass of

those seeking noneconomic damages, they should also be appropriate class representatives with respect to those issues if the Court certifies the Non-Hire and Delayed-Hire Victim Subclasses and includes the noneconomic damages as an issue included within the issues covered by certification of those subclasses.

B. CERTIFICATION OF BACK PAY AND OTHER EQUITABLE RELIEF PURSUANT TO RULE 23(b)(2) IS PERMITTED UNDER *ROBINSON V. METRO-NORTH*

As to the equitable relief sought for the two subclasses pursuant to the Court's disparate impact finding (including back pay which Title VII treats as an equitable remedy), *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 169 (2d Cir. 2001), holds that certification under Rule 23(b)(2) is appropriate. ("Given that the 1991 Act did not alter the general remedial structure of disparate impact claims, we think it plain that (b)(2) certification of disparate impact claims seeking both injunctive and equitable monetary relief remains appropriate."). Even if the back pay and other make-whole relief sought for the two subclasses is treated as "non-incidental damages" under *Robinson*, subclass treatment pursuant to Rule 23(b)(2) remains appropriate so long as notice to the class and opt-out rights are provided. *Robinson*, 267 F.3d at 169-70. ("[A]ny due process risk posed by (b)(2) class certification of a claim for non-incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters-*i.e.,* the damages phase of the proceedings." (footnotes and citations omitted)). On the basis of *Robinson*, certification of the two proposed subclasses pursuant to Rule 23(b)(2) is appropriate for the back pay and equitable relief sought. The defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief (in the form of back pay, lost benefits, retroactive seniority and for the Non-Hire Victim Subclass, priority hiring, is

appropriate respecting the class as a whole. *Robinson* notes the long line of authority treating certification under Rule 23(b)(2) as appropriate. *Robinson*, at 169.

C. ALTERNATIVELY, CERTIFICATION OF BOTH SUBCLASSES PURSUANT TO RULE 23(b)(3) IS APPROPRIATE

Plaintiffs-Intervenors note that the Supreme Court has granted certiorari on the following question: "Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances." *Wal-Mart Stores, Inc v. Dukes*, ___U.S.___, 131 S.Ct. 795 (December 6, 2010). Therefore, because of the uncertainty raised by the Court's grant of certiorari, and because Plaintiffs-Intervenors also meet Rule 23(b)(3) standards, Plaintiffs-Intervenors seek certification of the subclasses under Rule 23(b)(3) as well as Rule 23(b)(2).[1]

This Court set forth the standards for certification under Rule 23(b)(3) in its June 6, 2011 Order. The Court correctly concluded that Plaintiffs-Intervenors are entitled to certification under Rule 23(b)(3) if they can

> "demonstrate that common 'questions of law or fact' predominate over 'any questions affecting only individual members'; and [] establish that the class action mechanism is 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *In re Strip Search Cases*, 461 F.3d 219, 225 (quoting Fed. R. Civ. P. 23(b)(3)). "As a general matter, the Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. (quoting In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001)). "The Rule 'encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Id. (quoting Fed. R. Civ. P. 23(b)(3) adv. comm. n. to 1966 amend.)

[1] By certifying the proposed subclasses under Rule 23(b)(3), the Court would avoid a "hybrid" Rule 23(b)(2)/Rule 23(b)(3) certification of the subclasses whereby the Court would rely upon Rule 23(b)(3) for the noneconomic losses and Rule 23(b)(2) for the equitable claims to certify the Non-Hire and Delayed Hire Victim Subclasses.

(6/6/11 Order, at 30)

The Court held that the Plaintiffs-Intervenors' proposed method of computation of noneconomic damages was "substantially the same" as the manner of computation of aggregate class-wide backpay. (6/6/11 Order, at 31.) Just as the Court concluded with respect to the non-economic damages that issues common to the noneconomic subclass predominated over individual issues, so the Court should conclude with respect to the proposed Non-Hire Victim and Delayed-Hire Victim Subclasses that issues common to each of those subclasses predominate over individual issues. Underlying the back pay, benefits (and for the non-hire subclass, priority hiring and retroactive seniority) claims of the subclass members are the common legal and factual questions already determined in the liability phase, as well as several separate questions of law and fact which await resolution in the remedial phase and are common to the members of each of the subclasses.

Common to each putative subclass member's claim for back pay, benefits (and priority hire and retroactive seniority) are the fact questions of the amount each of the subclasses would have earned in back pay and benefits as firefighters had the discrimination not occurred. There are also common legal questions with respect to the propriety of a subclass-wide back pay fund, the proper measure of the elements of the back pay fund, including, for example, the proper measure of losses with respect to health benefits, and the method of distribution of the subclass back pay fund. With respect to the Non-Hire Subclass, there are also legal questions with respect to priority hiring and both competitive and non-competitive retroactive seniority.

And while there are also individual questions, the Court has provided for the resolution of those issues in the individual claims process. (6/6/11 Order, at 24, 33-43.) Thus, subclass treatment of the applicable make-whole relief issues for these two subclasses will allow the

parties to avoid relitigating the calculation of earnings had class members been employed by the FDNY, and relitigating the calculation of the value of benefits lost. Resolution of these common fact questions on a class-wide basis will substantially improve the efficiency of deciding each subclass member's claims. And just as the Court found in the context of the Noneconomic Loss Subclass that "the Individual Intervenors have already conducted extensive litigation on behalf of the noneconomic loss subclass in the liability phase of this case and it would be a more efficient use of scarce judicial resources to continue litigating questions relating to black victims' compensatory damages claims in a single forum" (6/6/11 Order, at 33), the same applies to the make-whole issues of back pay, benefits, priority hire and constructive seniority. Therefore, class treatment of the issues common to the Non-Hire Victim Subclass and Delayed-Hire Victim Subclass is superior to other available methods for fairly and efficiently adjudicating the controversy.

On the basis of the foregoing, the Court should certify, under Rule 23(b)(2) and/or under 23(b)(3), the two subclasses proposed herein.

POINT III.
LEVY RATNER AND THE CENTER FOR CONSTITUTIONAL RIGHTS, RESPECTIVELY, WILL EFFECTIVELY REPRESENT THE INTERESTS OF THE NON-HIRE VICTIM AND DELAYED-HIRE VICTIM SUBCLASSES

Plaintiffs-Intervenors propose that Levy Ratner, P.C. represent the Non-Hire Victim Subclass and that the Center for Constitutional Rights represent the Delayed-Hire Victim Subclass. Counsel for each of the firms has filed contemporaneously herewith declarations setting forth the basis for their meeting Rule 23(g) requisites to subclass representation. Those declarations show that counsel recognize their obligations to the respective subclasses with respect to the relief issues which each subclass seeks. (*See, e.g.*, Declaration of Richard A. Levy, dated June 13, 2011, at ¶ 6 & Declaration of Darius Charney, dated June 13, 2011, at ¶ 6)

(acknowledging that the interests of their respective subclasses in make-whole relief are their only interests with respect to the make-whole relief in the case).

The Court has already certified a class with respect to injunctive relief, for which the Vulcan Society will act as class representative. (6/6/11 Order, at 28.) The Vulcan Society's interest in the remedial stage of the case is thus limited to questions of injunctive relief (*e.g.*, development and approval of the new selection procedure, insuring that future applicants are not hindered by barriers to employment that have a racial impact and are not sufficiently job-related, and monitoring compliance with the Court's Orders with respect to injunctive relief issues). Because the Vulcans' interests do not extend to questions of individual make-whole or non-economic relief, class counsel may continue to represent the Vulcans with respect to injunctive relief without that representation presenting a conflict with their representation of the separate non-hire and delayed-hire subclasses. Counsel understand that their representation of the Vulcan Society does not extend to the monetary and injunctive relief issues covered by their representations of the proposed subclasses. (Levy Decl, ¶ 6 & Charney Decl., ¶ 6)

Representation of the two subclasses by Levy Ratner and the Center for Constitutional Rights is appropriate. The two firms have been involved in the litigation from the outset, and are fully cognizant of the underlying issues upon which each of the subclasses seeks relief. Courts have previously endorsed such representation under similar circumstances. *See*, *e.g.*, *Vuyanich v. Republic Nat. Bank of Texas,* 82 F.R.D. 420, 435-36 (N.D.Tex. 1979) (In employment discrimination case, the Court ordered subclasses with separate counsel because a potential conflict existed between those subclasses, and permitted prior class counsel to continue as counsel for subclasses not in conflict); *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litig.,* 2001 WL 1842315 (N.D. Ohio) (same). *See also Shores v. Arkansas Valley*

Environmental & Utility Auth., 1980 WL 1391 (N.D.Ala. 1980) (concluding that joint subclass representation was appropriate in light of waiver of conflicts made in good faith by class representatives and counsel).[2]

Conclusion

On the basis of the foregoing, the Court should certify the two subclasses as proposed. The Non-Hire Victim subclass should be certified with Marcus Haywood, Roger Gregg and Kevin Walker as class representatives and Levy Ratner, P.C. as subclass counsel. The Delayed-Hire Victim subclass should be certified with Candido Nuñez and Kevin Simpkins as class representatives and the Center for Constitutional Rights as subclass counsel.

Dated: June 13, 2011
New York, New York

LEVY RATNER, P.C.

/s/ Richard A. Levy

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[2] The Second Circuit has adopted a similar approach to conflicts stemming from counsel's prior representation of the class as a whole and, subsequently, a subgroup with conflicting interests. *See In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 18-19 (2d Cir. 1986) (permitting former class counsel to represent a group of objectors to the class settlement).

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