UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, ET AL.,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK,

Defendant.

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

PUTATIVE SUBCLASS REPRESENTATIVES' SUPPLEMENTAL MEMORANDUM OF LAW RESPECTING IMPACT OF THE SUPREME COURT'S DECISION IN *WAL-MART V. DUKES*

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, Plaintiff, -and- THE VULCAN SOCIETY, ET AL., Plaintiffs-Intervenors, -against- CITY OF NEW YORK, Defendant.	Case No. CV 07 2067 (NGG) (RLM)

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Introduction

Following the Parties' conference with the Court on June 21, 2011, the Court entered an Order dated June 22, 2011 providing putative subclass counsel for the Non-Hire and Delayed-Hire Victim Subclasses the opportunity to submit supplemental briefing to respond to arguments raised by the City in its initial *Wal-Mart* brief as to questions relating to the subclasses' claims to compensatory damages for noneconomic losses. (Dkt. # 648.) Putative counsel for the Non-Hire and Delayed-Hire Victim Subclasses submit this Memorandum of Law in response to the City's arguments regarding certification of the non-economic claims.

Argument

POINT I.
CONTRARY TO THE CITY'S ARGUMENT, THE SUPREME COURT'S "TRIAL BY FORMULA" PROHIBITION TO CLASS CERTIFICATION DOES NOT ALTER THE LONG-STANDING INTERPRETATIONS OF TITLE VII'S RELIEF PROVISIONS

A. Long-Standing Federal Case Law, Including the Second Circuit's Decision in *Ingram v. Madison Square Garden*, Authorize the Class-Wide Calculation and Pro-Rata Distribution of Monetary Relief and Are Unaffected by the Supreme Court's Decision in *Wal-Mart v. Dukes*

As this Court recognized in its June 6, 2011 Order ("6/6/11 Order") (Dkt. # 640), a series of federal appellate decisions, including the Second Circuit's decisions in *Ingram v. Madison Square Garden Center, Inc*., 709 F.2d 807 (2d Cir. 1982) and *Robinson v. Metro-North Commuter Railroad Co*., 267 F.3d 147, 161 n.6 (2d Cir. 2001), authorize a class-wide approach to back pay and benefits under Title VII. (6/6/11 Order at 19-20). Those cases authorize class treatment of these monetary issues "where 'the number of qualified class members exceeds the number of openings lost to the class through discrimination.'" Relying upon *Ingram*, at 812-13, the Court correctly concluded that, in this case, "the fairer procedure is to compute a gross award for all the injured class members and divide it among them on a pro rata basis." (6/6/11 Order, at 20.)

These Title VII relief principles, as enunciated in *Ingram* and the other cases cited by the Court, are not Rule 23 principles, but rather are based upon the interpretation of Title VII's remedial provisions and are unaffected by *Wal-Mart*. The Supreme Court's decision in *Wal-Mart* does not address the situation of relief in a class case where the number of qualified class members exceeds the number of openings available for relief and does not alter this long standing appellate authority. In the Court's 6/6/10 Order, the Court correctly treated these

decisions as appropriate authority for fashioning the class treatment of back pay and benefits going forward, and *Wal-Mart* does not alter that conclusion.

The City's Initial *Wal-Mart* Brief (Dkt #645) agrees with this point with respect to back pay and benefits. ("The City agrees that the gross amount of back pay and benefits eligible for distribution to the actual victims of discrimination should be calculated on a class-wide basis.") (City's Initial *Wal-Mart* Brief, at 4.) But the City fails to recognize that these well-established Title VII "make whole" relief principles apply to all Title VII class remedies, not just back pay and benefits. The compensatory damages claims that Plaintiffs-Intervenors have pursued on a class basis in this case are also appropriately treated on a class-wide basis, applying a similar *Ingram*-type analysis as the Court has applied to the back pay and benefits claims. And, whether or not the Court concludes that the City is able to present "mitigation" evidence in the non-economic damages context, class-wide treatment is the fairest, most equitable approach to the treatment of non-economic damages.

B. The Federal Law Principles Upon Which Plaintiffs Rely for the Calculation of Class-Wide Non-Economic Losses Do Not Require the Consideration of Individual Mitigation Evidence

The City's position with regard to the non-economic damages claims fails to consider the nature of the class non-economic claims raised on behalf of the Plaintiff-Intervenor subclasses. The Plaintiffs-Intervenors have sought class certification only for those non-economic damages that arise from the unique character of the firefighter job that the class members were denied. The claim focuses upon the characteristics of the job, particularly, but not exclusively,[1] upon the lost opportunities for the enjoyment of life that arise from the unique work schedule afforded

[1] The Court correctly summarizes those unique job characteristics in its 6/6/11 Order, at 30, n. 14.

firefighters (e.g., working one 24-hour shift in a given four-day period). *See*, *e.g.*, Affidavit of John Coombs, dated February 19, 2010 (Dkt. # 401) (also attached hereto as Exhibit A), ¶ 5.

Federal case law upon which Plaintiffs-Intervenors' rely for this class claim provides that damages can be inferred from the circumstances of the defendant's violation of the law. Therefore, in this case, damages can be inferred from the denial of the job with its unique work characteristics. The cases relied upon by the Plaintiffs-Intervenors include the following: *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 111, 1138 (D.C. Cir. 1999) (upholding an award of compensatory damages to a class of plaintiffs, not on the basis of individual testimony regarding their losses, but rather on the basis that damages "may be inferred from the circumstances of the violation"); *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002) (in multiple-plaintiff action, relying upon "the objective circumstances of the violation itself" to uphold compensatory damages of $50,000 to each of the named plaintiffs affected by the same unlawful job transfer); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552-53 (9th Cir. 1980) (concluding for one of the two plaintiffs that "humiliation could be inferred from the surrounding circumstances"); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974) ("We are satisfied that under decided federal cases among the circuits, compensatory damages may be awarded for the humiliation suffered by plaintiffs, whether inferred from the circumstances or established by testimony . . . .").

Because Plaintiffs-Intervenors claims for non-economic damage focus upon the common loss of the intangible benefits of the job that arise from the unique characteristics of the job, it is not necessary to assess each individual claimant's state of mind and job status during the damage period. Rather, the Court would hear testimony from firefighters and/or class members who are able to provide the Court with evidence so that the Court could evaluate the opportunities for the

enjoyment of life as a firefighter versus that of other jobs that lack those unique characteristics. On that basis, the Court could evaluate the intangible loss associated with the denial of the firefighter job. While the Court would properly weigh in that balance the attendant stress that firefighters feel when holding the job, that too does not require the testimony about the state of mind of all class members – indeed, unless they have already been hired as firefighters, they would not be able to testify on that issue as they would not have experienced that stress.

Because Plaintiffs-Intervenors do not seek to recover for all of the individual non-economic damages that members of the class may have experienced, but only those losses directly resulting from the denial of the unique characteristics of the firefighter job, the individual state of mind of the class members need not be considered. Just as the Court in *In Re Nassau Country Strip Search Cases*, 2008 WL 850268 (E.D.N.Y. 2008) certified for class treatment under Rule 23(b)(3) the general damages (but not the more individualized special damages) arising from strip searches, so the Court here should certify the class-wide damages issues proposed by the Plaintiffs-Intervenors. And just as the Court in *In Re Nassau Country Strip Search Cases*, 742 F.Supp.2d 304 (E.D.N.Y. 2010) awarded class damages for the common losses experienced by the class, without considering their individual special circumstances, so the Court here can evaluate the common non-economic losses to the class arising from the denial of opportunities afforded by the firefighter job without consideration of any special individual circumstances. That class-wide amount can then be allocated to the eligible claimants on an appropriate pro-rata basis.

C. Even If Mitigation Evidence Is Permitted, Class Treatment of Compensatory Damages Based Upon the Ingram-Model Is Appropriate

But even if the Court concludes that individual "mitigation" evidence is necessary, as the Court noted in its June 6, 2011 Order, such mitigation evidence can be heard in the claims

hearing process. (6/6/11 Order, at 32.) The only circumstance where Plaintiffs-Intervenors believe that "mitigation" evidence would be appropriate would be in those circumstances where class members have, during the class period, been employed in a job that offered the same unique set of circumstances afforded by the New York City firefighter job. Plaintiffs-Intervenors are not aware of any other such jobs, other than the New York City firefighter job itself. And for class members already hired into that job (i.e., the delayed hires), the Plaintiffs-Intervenors' proposed method of distributing the damages based upon length of time class members were denied the job effectively mitigates the fact that those class members have held the job for a period of time during the class period.

Conclusion

Based upon the foregoing, the Court should certify the Non-Hire and Delayed Hire Victim Subclasses, both with respect to class-wide back pay and benefit issues but on the class-wide compensatory damages claims raised by the Plaintiffs-Intervenors as well.[2]

Dated: June 24, 2011
New York, New York

[2] While this brief focuses upon Title VII remedies, the Putative Subclass Representatives seek class certification of the back pay, benefits, and non-economic damages pursuant to this Court's findings of disparate impact and disparate treatment liability under the City and State Human Rights Laws, in addition to the intentional discrimination findings under federal law. The City and State Human Rights Laws do not include the same statutory exclusion of compensatory damages as a remedy for a disparate impact violation as is the case under Title VII, and therefore, the non-economic damages are an appropriate remedy for the violations of the City and State disparate impact prohibitions.

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

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

THE VULCAN SOCIETY, ET AL.,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK, ET AL.,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF JOHN COOMBS

I, JOHN COOMBS, being duly sworn state the following:

1. I am a firefighter in the FDNY and the president of the Vulcan Society, a plaintiff-intervenor in this matter. I submit this affidavit in support of plaintiffs-intervenors' application for class-wide compensatory damages.

2. I have been a firefighter since 1999. For all these years, I have felt a great deal of pride in my work. I agree with people who describe the job as a calling. When we go out on runs, we know that people are counting on us, and that we are in the best position to help them. It brings me a lot of emotional satisfaction, and I know that other firefighters feel the same way. People call us "New York's Bravest," and there is a lot of dignity that comes from being a part of the FDNY.

3. Life in the fire house also brings its own benefits. We eat together, sleep together and do all of our work as a team. Even though it is difficult for minority firefighters to be so underrepresented in the force, there's a sense of camaraderie in the FDNY that is different from other jobs.

4. Because the FDNY is such stable employment, as a firefighter I also have a strong feeling of job security. Especially over the past year – when a lot of people are out of work or only getting part-time, piecemeal jobs – I and other firefighters I know have realized how great it feels to know that your job is secure, that your benefits and pension are secure, and that there are opportunities for career advancement within the FDNY. There's also a feeling of comfort knowing that when I retire, I will receive a pension for the rest of my life with medical benefits.

5. Aside from the emotional satisfaction of the job itself, you cannot underestimate how much time off firefighters have to enjoy the rest of their lives. Firefighters in the FDNY have an extremely flexible work schedule. Within one or two months after graduating from the Firefighter Academy, firefighters are able to arrange their work schedules so that we work one (1) twenty-four (24) hour shift each (4) day period (which adds up to working just eight (8) days per month). During these 24-hour shifts, firefighters eat and sleep at the firehouse unless they are out on a run. Outside of those 2 shifts every 8 days, firefighters do not have any other work-related obligations. This means that we have at least five (5) days off per week. I don't know of any other job with that kind of schedule.

6. Since we have so much free time, we really get to do what we want with our lives. I use most of my free time to raise my kids. Being able to take care of my kids, instead of hiring a babysitter, is something I can't even place an economic value on. I would never give that up.

7. I also do a lot of volunteer work with kids in Brooklyn. I take them on camping trips and mentor them. We have time to bowl, visit museums and take day trips. Firefighters can also use their free time to start a small business, work a second job or go back to school.

8. The free time that I have means that if any crisis come up – whether someone in my family is sick, someone loses a job, or any other emergency comes up – I can be there to handle it, without worrying about work. When my mom had a stroke in 2007, I did not have to worry about spending time with her. I was able to exchange shifts with co-workers to get the days off I needed. For people who have a different job, an emergency might mean that they have to miss work, quit their job, or even get fired. Life is a lot less stressful when you know you can handle whatever comes up.

9. All of the advantages of the job that I have been describing are available to all firefighters generally.

JOHN COOMBS

Sworn to before me this
19th day of February, 2010

NOTARY PUBLIC

DANA LOSSIA
Notary Public, State of New York
No. 02LO6161295
Qualified in Kings County
Commission Expires February 20, 2011

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