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,

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

Plaintiffs-Intervenors,

ECF Case

-against-

THE CITY OF NEW YORK, ET AL,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR QUALIFIED IMMUNITY

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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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR QUALIFIED IMMUNITY

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

PRELIMINARY STATEMENT

Plaintiffs-Intervenors, the Vulcan Society, Inc., Marcus Haywood, Candido Nuñez and Roger Gregg, have raised class-wide pattern or practice claims of disparate treatment and disparate impact under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) ("Title VII"), the New York City Human Rights Law (Administrative Code of the City of New York §§ 8-101, *et seq.*) ("NYC HR Law"), the State Human Rights Law (Executive Law § 296, *et seq.*) ("State HR Law") and disparate treatment claims under the Civil Rights Acts of 1866 and 1871 (42 U.S.C. §§ 1981 & 1983). These claims are brought, as applicable, against the City of New York as well as the two individual Defendants, Mayor Bloomberg and Commissioner Scoppetta. Because no material disputes of fact exist and Plaintiffs-Intervenors are entitled to judgment as a matter of law, the Court should grant summary judgment for the Plaintiffs-Intervenors and against each of the Defendants on these remaining claims. The Court should also deny in the individual Defendants' claims of qualified immunity.

INTRODUCTION

This memorandum supports Plaintiff-Intervenors' Motion for Summary Judgment on the remaining claims in their case and responds to Defendants' Motion for Qualified Immunity. Broadly speaking, the claims are these:

First, Plaintiffs-Intervenors are entitled to summary judgment on their disparate impact claims against the City of New York under NYC and State Human Rights Laws. All the facts necessary to establish these claims have been found by this Court in its July 22, 2009 liability Order, and given the stricter liability standards imposed by the City and State Laws, *a fortiori*, judgment should be entered against Defendants on those claims. (Argument, Point I.)

Second, Plaintiffs-Intervenors are entitled to summary judgment on their disparate treatment (intent) claims against the municipal Defendant, the City of New York. There is no dispute that the City, and its officers, have known for decades of the drastic underrepresentation of blacks in the FDNY. The City nevertheless disregarded the anti-discrimination obligations imposed by law, the clear lessons learned from prior court cases in which it was involved (e.g., *Vulcans, Berkman, Guardians*[1]), the EEOC's *Uniform Guidelines* and the City's own EEO Policy. The cases are clear that the City is liable for a pattern-or-practice of intentional discrimination under federal law (Title VII, Sections 1981 and 1983), and equally liable under City and State law, particularly for violating its own anti-discrimination policies. (Argument, Points II, III and IV.)

Third, for essentially similar reasons, the individual Defendants, Fire Commissioner Nicholas Scoppetta and Mayor Michael Bloomberg, are personally liable for disparate treatment.

[1] *See Vulcan Soc. of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265 (S.D.N.Y. 1973), *aff'd in relevant part by* 490 F.2d 387 (2d Cir. 1973); *Berkman v. City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982) *aff'd,* 705 F.2d 584 (2d Cir. 1983); *Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 82 (2d Cir. 1980).

They affirmatively obstructed the Equal Employment Practices Commission's attempt to enforce the City's anti-discrimination policy, and they have offered no legitimate explanation for doing so. Indeed, their excuses are so obviously pretextual that they strengthen the inferences of unlawful intent. Defendant Scoppetta claims, for example, that he was satisfied that each ethnic group scored roughly the same on the challenged exams. Yet, the EEPC consistently informed him that the opposite was true. Bloomberg claims that he questioned current firefighters, probies and officers about the fairness of the exams and accepted and relied upon their statements that the exams they had passed were unbiased. Notably, he disregarded the concerns of the Vulcan Society, the EEPC and the U.S. EEOC, and never asked his DCAS Commissioner to validate the exams or study their impact. The purported justification for his actions (offered at deposition, but not earlier in answer to interrogatories) is so flimsy as to be patently disingenuous. (Argument, Point V.)

Finally, Defendants' motion for qualified immunity is unsupportable and must be denied. The doctrine of qualified immunity only applies were there is a lack of clarity in the law which makes the official conduct at issue objectively reasonable. Qualified immunity is not available given the showing here of intentional violation of – indeed contempt for – clearly established laws and the City's own policies intended to prevent discrimination in employment. (Argument, Point VI.)

FACTS NOT IN DISPUTE

We respectfully refer the Court to Plaintiffs-Intervenors Rule 56.1 Statement of Undisputed Facts for a full recitation of the facts in this case.[2] As we set forth more fully therein, the undisputed facts show that: (1) the FDNY has a long history of exclusion of black

[2] Citations to paragraphs of the Plaintiffs-Intervenors' 56.1 Statement of Undisputed Facts are abbreviated here as "(SOF __)."

firefighters, with data consistently showing around 3% black employment, (2) this drastic disparity in employment was a public issue long before the use of Exams 7029 and 2043, (3) prior litigation by the Vulcan Society, and other well-settled law, put the City on notice of their liability for the discriminatory selection practices used here, (4) many individuals and groups – including the New York City Equal Employment Practices Commission, the Public Advocate, the U.S. Equal Employment Opportunity Commission, the Vulcan Society, and others – demanded that Defendants investigate and revise their selection practices, and (5) Defendants refused, thereby actively and intentionally furthering race discrimination in selection.

RULE 56 STANDARDS

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiffs-Intervenors have met their "initial responsibility of informing the district court of the basis for its motion." *Id.* at 323. Once a moving party meets its Rule 56(c) burden, the non-movant "may not rely merely on allegations or denials in its own pleading," Rule 56(e), but must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *see also SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978). The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (internal citations omitted). It cannot resist summary judgment through "mere speculation or conjecture as to the true nature of the facts," *Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (citations

omitted), or through affidavits amounting to "self-serving conclusions." *BellSouth Telecomm. v. W.R. Grace*, 77 F.3d 603, 615 (2d Cir. 1996).

When the motion for summary judgment involves issues upon which the non-movant carries the burden of proof at trial, the moving party meets its Rule 56 burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Nothing more is required of the moving party in such circumstances:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 317-18.

POINT I

(AGAINST THE CITY OF NEW YORK)

IN LIGHT OF THIS COURT'S JULY 22, 2009 ORDER FINDING DISPARATE IMPACT LIABILITY AGAINST NEW YORK CITY UNDER TITLE VII, THE COURT SHOULD ENTER JUDGMENT AGAINST THE CITY ON DISPARATE IMPACT CLAIMS ARISING UNDER THE CITY AND STATE HUMAN RIGHTS LAWS

Under both the NYC HR Law and the State HR Law, an employer is liable if it maintains employment practices that have a disparate impact upon a protected group and that are not shown to be job-related. Because the NYC and State HR Laws apply either the same, or a more liberally construed, standard of liability than Title VII, and because the Court has already found disparate impact liability against the City under Title VII in its Order of July 22, 2009 ("Liability Order"), the Court should grant summary judgment against the City on the City and State disparate impact claims.

A. The New York City Human Rights Law Prohibits Practices That Have a Disparate Impact and Are Not Job-Related

Under the NYC HR Law, practices with adverse impact are prohibited by the text of the law itself. Section 8-107 (17) defines a practice that has a disparate impact as an "unlawful discriminatory practice" prohibited under that law. The City law provides as follows:

> An unlawful discriminatory practice based upon disparate impact is established when:
>
> (1) the commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any group protected by the provisions of this chapter; and
>
> (2) the covered entity fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to a significant business objective of the covered entity or does not contribute to the disparate impact . . . . "Significant business objective" shall include, but not be limited to, successful performance of the job.

NYC ADMIN. CODE § 8-107 (17).

Both the 1991 Amendment to the City Code, as well as the Local Civil Rights Restoration Act of 2005 (Local Law 85 of 2005), make clear that it was the intent of the City Council that the NYC HR Law be interpreted more liberally than federal law in terms of prohibiting discriminatory practices, including practices with disparate impact. *See*, *inter alia*, NYC ADMIN. CODE § 8-130 ("The provisions of this title *shall be construed liberally* for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those with provisions comparably-worded to provisions of this title, have been so construed." (emphasis added)); *Brightman v. Prison Health Servs., Inc.*, 62 A.D.3d 472 N.Y.S.2d 357, 358 (App.Div. 1st Dep't 2009) (concluding, after finding plaintiff's allegations stated claim under State HR Law, that "a

fortiori, they state a claim under the New York City Human Rights Law, which is more liberal than either its state or federal counterpart." (citations omitted)).

It follows that, if the undisputed evidence established adverse impact and that the City had failed to prove job-relatedness and business necessity under Title VII's standards, the evidence similarly establishes a failure to meet the standards of the NYC HR Law.[3] This Court has already found that practices of the City of New York resulted in a disparate impact under Title VII to the detriment of black individuals, a group protected by the provisions of the NYC HR Law. *United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at *13, 23-41, 44-62 (E.D.N.Y. July 22, 2009). This Court further found that the City has failed to show that such practice bore a significant relationship to a significant business objective. *Id.* at *89-160. Nothing more need be shown to prove a violation of the NYC HR Law.

B. The New York State Human Rights Law Also Prohibits Practices that Have a Disparate Impact and Are Not Job-Related

The State HR Law also prohibits practices that have a disparate impact upon a protected class and that are not justified by job-relatedness or business necessity. *State Div. of Human Rights v. Kilian Mfg. Corp.*, 318 N.E.2d 770 (N.Y. 1974). More specifically, New York courts have held that when an employer[4] fails to demonstrate that hiring procedures with a disparate impact are predictive of job performance, those practices are unlawful under the State HR Law. *People v. New York City Transit Auth.*, 452 N.E.2d 316, 317-19 (N.Y. 1983) ("an employment

[3] The City is a "covered entity" under the NYC HR Law. NYC ADMIN. CODE § 8-102(17) (defining "covered entity" to include "a person required to comply with any provision of section 8-107 of this chapter."). A person is defined to include "one or more, natural persons . . . , governmental bodies or agencies." §8-102 (1). And §8-107 makes it an unlawful discriminatory practice for "an employer or an employee or agent thereof" to discriminate against a member of a protected class. Therefore, the City, as a "governmental body or agency" is covered by the NYC HR Law.

[4] New York City is an employer under the State HR Law. N.Y. EXEC. LAW § 292(5) (defining employer as any employer with four or more persons in his employ); *see, e.g., Gryga v. Ganzman*, 991 F. Supp. 105 (E.D.N.Y. 1998).

practice neutral on its face and in terms of intent which has a disparate impact upon a protected class of persons violates the Human Rights Law unless the employer can show justification for the practice in terms of employee performance," citing *Matter of Sontag v Bronstein*, 306 N.E, 2d 405, 407 (N.Y. 1973)).

Federal courts have also applied Title VII disparate impact liability standards to disparate impact claims arising under the State law. *E.g., Duncan v. New York City Transit Auth.*, 127 F. Supp. 2d 354 (E.D.N.Y. 2001) *aff'd*, 45 Fed. Appx. 16, 2002 WL 1964401 (2d Cir. 2002) (applying same disparate impact liability analysis to State and Federal claims); *Berkman v. City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982) *aff'd,* 705 F.2d 584 (2d Cir. 1983) (applying disparate impact analysis to firefighter selection process under State HR Law and Title VII).

Thus, the factual findings reached by the Court in its July 22, 2009 Order provide the basis for entry of summary judgment against the City of New York under the State HR Law as well.

POINT II

(AGAINST THE CITY OF NEW YORK)

THERE IS NO GENUINE ISSUE OF FACT AS TO THE CITY OF NEW YORK'S DISPARATE TREATMENT OF PLAINTIFFS-INTERVENORS UNDER TITLE VII, AND PLAINTIFFS-INTERVENORS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

Summary judgment is also appropriate on Plaintiffs-Intervenors' pattern-or-practice disparate treatment claims under Title VII against municipal defendant, the City of New York. Pattern-or-practice disparate treatment claims are proved by establishing that "intentional discrimination was the defendant's 'standard operating procedure.'" *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 158 (2d Cir. 2001) (*citing Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)). At the liability phase, plaintiffs must produce sufficient

evidence to establish a prima facie case of a policy, pattern, or practice of intentional discrimination against the protected group. *Id.* While plaintiffs may rely on statistical evidence of defendant's treatment of the protected group *and* anecdotal evidence of discrimination, "statistics alone can make out a prima facie case of discrimination if the statistics reveal 'a gross disparity in [the] treatment of workers based on race.'" *Id.* (citation omitted). A plaintiff's manner of proof in a pattern-or-practice case is thus quite different from that required in an individual disparate treatment case. *Id.* at 158 n.5 (*citing, inter alia, Bell v. EPA*, 232 F.3d 546, 553 (7th Cir. 2000) ("In a pattern and practice disparate treatment case, statistical evidence constitutes the core of a plaintiff's prima facie case. Within the *McDonnell Douglas* individual disparate treatment model, however, statistical evidence is only one small part of a substantial web of evidence indicating pretext.")).

Once plaintiffs satisfy this prima facie requirement, "the burden [of production] then shifts to the employer to defeat [it] . . . by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant.'" *Id.* at 159 (*citing Teamsters*, 431 U.S. at 360). To do so, defendants must challenge plaintiffs' statistics based on their source, accuracy, or probative force. *Id.* A defendant may present its own "statistical summary treatment of the protected class and try to convince the fact finder that these numbers present a more accurate, complete, or relevant picture than the plaintiffs' statistical showing. Or the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination." *Id.* (*quoting* ARTHUR LARSON ET AL., EMPLOYMENT DISCRIMINATION § 9.03(2), at 9-23 to 9-24 (2d ed. 2001)).

If such evidence is proffered by defendants, the trier of fact "then must consider the evidence introduced by both sides to determine whether the plaintiffs have established by a

preponderance of the evidence that the defendant[s] engaged in a pattern or practice of intentional discrimination." *Robinson*, 267 F.3d at 159 (*citing Teamsters*, 431 U.S. at 336).

In the instant case, Plaintiffs-Intervenors' undisputed statistical, historical and anecdotal evidence – including facts already found by this Court – are more than sufficient to establish a case of pattern-or-practice discrimination by the City of New York.

A. This Court Has Already Found the Existence of Gross Statistical Disparities Between Black and White Candidates' Pass Rates and Eligibility List Rankings on Exams 7029 and 2043, Which Are Sufficient to Establish a Prima Facie Case of Pattern-or-Practice Discrimination

The statistical disparities between black and white employment and selection rates in this case are sufficient, on their own, to state a prima facie case of a pattern-or-practice of disparate treatment. In its Liability Order, this Court made numerous findings of fact concerning these statistical differences, which are material to the pending disparate treatment claim. *United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at *22-41 (E.D.N.Y. July 22, 2009). In particular, this Court found that:

I. With respect to Exam 7029:

a. 89.9% of white test-takers passed, while only 60.3% of black test-takers passed. Thus the pass rate of black candidates was 67% of the pass rate of white candidates, a disparity of 33.9 units of standard deviation. *Id.* at *29.

b. On the resulting eligibility list, black candidates were grouped disproportionately lower than white candidates, falling an average 630 places lower. The difference reflects a disparity of 6.5 units of standard deviation. *Id.* at *35.

c. Over 3200 individuals who took this exam joined the FDNY as probationary firefighters, of whom only 104 or 3.2% were black. *Id.* at *22.

II. With respect to Exam 2043:

a. The effective pass rate of white test-takers was 70.3%, while the effective pass rate of black test-takers was 59%. Thus the effective pass rate of black candidates was 59% of the pass rate of white candidates, a disparity of 21.9 units of standard deviation. *Id.* at *41.

b. On the resulting eligibility list, black candidates were grouped disproportionately lower than white candidates, falling an average 974 places lower. The difference reflects a disparity of 9.6 units of standard deviation. *Id.* at *35.

c. As of November 2007, over 2100 individuals who took this exam joined the FDNY as probationary firefighters, of whom only 80 or 3.7% were black. *Id.* at *22-23.

These differentials – ranging from 6.5 to 33.9 units of standard deviation – vastly exceed the statistical disparities that courts have found adequate to state a prima face case of pattern-or-practice discrimination. *E.g., EEOC v. Dial Corp.*, 469 F.3d 735, 741-2 (8th Cir. 2006) (statistical disparity between male-female hiring rates of nearly ten standard deviations could support finding of pattern or practice discrimination); *Wright v. Stern*, 450 F. Supp. 2d. 335, 347-48 & 364 n.18 (S.D.N.Y. 2006) (statistical evidence of lower probability of "wage promotions" for minority employees than for white employees, with standard deviations ranging from 4.2 to 5.23, "taken as a whole demonstrate a pattern or practice of discrimination"); *NAACP v. Town of East Haven*, 892 F. Supp. 46, 48, 50 (D. Conn. 1995) *remanded on other grounds by* 70 F.3d 219 (2d Cir. 1995) (statistical disparity of 4 to 6 standard deviations between number of black individuals employed in town's private sector and those employed by City East Haven was "sufficiently substantial" to establish prima facie case of pattern or practice discrimination).

B. In Addition to Gross Statistical Disparities, the City of New York Has a Long-Standing History of Race Discrimination in the Development and Use of Firefighter Exams

Although the statistical evidence cited above is sufficient to state a prima facie case of disparate treatment on its own, the FDNY's long-standing history of discrimination against black firefighter applicants provides additional grounds to support such a conclusion.

1. Examination 0159

In the early 1970s, Plaintiff-Intervenor Vulcan Society sued the City of New York for race discrimination based on the written exam administered by the City in 1971 to select entry-level firefighters (Exam 0159). *Vulcan Soc. of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265 (S.D.N.Y. 1973), *aff'd in relevant part by* 490 F.2d 387 (2d Cir. 1973). At the time, blacks and Hispanics comprised 5% of the FDNY even though they constituted at least 32% of the City's population. *Id.* at 1269. Judge Weinfeld, who presided over the case in the Southern District of New York, found the City liable for unconstitutionally discriminating against black applicants. *Id.* The court found that white test-takers passed Exam 0159 at 2.8 times the rate of minority test-takers. The odds that this disparity occurred by chance are less than one in 10,000. *Id.* Judge Weinfeld also found that Exam 0159 was not job-related because the City had not taken any steps to validate Exam 0159 or any previous firefighter exam. *Id.* at 1273, 1275. As a remedy, Judge Weinfeld ordered that the City hire one minority candidate for every 3 white candidates. The Second Circuit affirmed that remedy. *Vulcan Soc.*, 490 F.2d at 398-99. After court supervision of the hiring of firefighters ended in 1977, however, the City soon reverted to its former ways. Over the past eighteen years, black firefighters have never comprised more than 3.9% of the FDNY. (SOF, 14.)

2. Exams Subsequent to Judge Weinfeld's Order

In 1988, the City administered written Exam 7022 and the resulting eligibility list was used to appoint firefighters from 1990 through 1995. (SOF, 10.) In 1990, New York City's population was 29% black but its uniformed firefighting force was only 4% black. (SOF, 11.) Exam 7022 did nothing to improve the FDNY's disproportionate underrepresentation of black firefighters: only 2.24% of the top 5,000-ranked individuals who took the test were black, and only 112 people (1.3%) of the 2,256 individuals ultimately hired from this list were black. (SOF, 10, 12.) Despite these numbers, the City drew and hired even fewer entry-level black firefighters through its next written test, Exam 0084, which was first given in 1992. (SOF, 13, 70.)

While the FDNY claimed to have launched a recruitment effort after Exam 7022 to address the low numbers of black firefighters, it attracted even fewer black test-takers for Exam 0084 than it had for Exam 7022. (SOF, 13, 70.) While 10.8% of those who sat for Exam 7022 were black, only 6.4% of those who took Exam 0084 were black. (SOF, 70.) The eligibility list generated from this test was used to appoint firefighters from 1995 through 2000 and resulted in only 56 black hires – less than 2% of the total 2,692 individuals hired from this exam. (SOF, 13.) By the time the Exam 0084 list was exhausted, the percentage of black firefighters in the FDNY had fallen to a mere 3%. (SOF, 156.)

As early as 1994, the Equal Employment Practices Commission ("EEPC") began investigating the stark underrepresentation of minorities within the FDNY. (SOF, 69, 70.) The EEPC is the body responsible for investigating City agencies and recommending changes to ensure compliance with New York City's equal employment opportunity requirements. (SOF, 64-66.) The New York City Charter and Administrative Code provides that it has the authority to "review the uniform standards, procedures and programs" established by DCAS for the promotion of equal employment opportunity within City agencies and to "audit and evaluate the

employment practices and procedures of each city agency and their efforts to ensure fair and effective equal employment opportunity." (SOF, 65.)

3. Exams 7029 & 2043

In addition, even though the number of blacks on its firefighting force continued to remain at disproportionately low levels, when the City designed a new written exam in 1997, it blatantly disregarded the lessons of the 1970s Vulcans litigation and the instructions of the Second Circuit in the *Guardians* case[5] setting forth the ways in which the City could design a test that in fact measured the skills necessary for the job in question. (SOF, 25-37.) In the face of statistical evidence that its previous selection devices, which screened solely for cognitive abilities (on the written text) had had a predicable adverse impact, the City excluded black applicants in disproportionate numbers from the opportunity to be hired as firefighters and refused all entreaties to abide by the law.

C. Undisputed Anecdotal Evidence Shows That City Personnel, Although Aware of the Adverse Impact of Its Exams, Chose to Continue the Use of Written Tests that Had Not Been Validated in Violation of Explicit City Policies Calling for the Study of Adverse Impact and Job Relatedness of Tests

A wide range of undisputed anecdotal evidence also supports a finding of a pattern or practice of intentional discrimination by New York City. Numerous City officials had knowledge of the gross under-employment of blacks in the firefighter job throughout the relevant time period.[6] That knowledge spanned the administrations of Mayors Giuliani and Bloomberg, and involved knowledge by such critical decision-makers as Fire Commissioners Von Essen (who called the numbers "terrible" (SOF, 23)) and Scoppetta (who said, in 2002, "the Fire

[5] *Guardians Ass'n of the New York City Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 82 (2d Cir. 1980); *see also* discussion *infra* Point IV.A.1.

[6] (*E.g.*, SOF, 19-21, 23-24, 70-71, 74-76, 88, 104, 107, 124-127, 129, 134-137, 143, 153-154.)

Department is 93% white and male – there's something seriously wrong with that picture" (SOF, 127)) and Mayor Bloomberg (who acknowledged that the FDNY "was heavily weighted towards White males" (SOF, 129)).

Members of the Vulcan Society repeatedly called to the attention of City officials the discriminatory nature of the firefighter hiring examinations. As early as July 1, 1999, the Vulcan Society's public position was that Exam 7029 was not job-related, as the New York Times reported. (SOF 18.) While Commissioner Von Essen knew that blacks as a group did worse on the written exam, both in terms of pass rates as well as ranking (SOF, 24), this knowledge brought about no changes in the City's "standard operating procedure." The City used Exam 7029, a written test weighted exclusively with cognitive abilities and having foreseeable adverse impact, to screen candidates for hire into the firefighter job. (SOF, 25-36.) The City even chose a much higher than usual cutoff score of 84.705 with full knowledge of the adverse impact such use would create, totally rejecting the Second Circuit's admonition not to base pass marks solely on staffing needs. (SOF 34,103-106.)

As early as February, 2002, the FDNY's Assistant Commissioner for Human Resources acknowledged in writing that "questions have been raised about [the written exam's] fairness/bias." (SOF, 125.) Commissioner Scoppetta and Mayor Bloomberg have acknowledged meeting with representatives of the Vulcan Society in 2002 (SOF, 126, 131-132, 139), where the lack of job relatedness of the written examination was discussed. (SOF, 133-134). FDNY Deputy Commissioner for Administration Douglas White had numerous conversations with members of the Vulcan Society about the negative impact of the written tests, and has testified that he was present with Mayor Bloomberg when members of the Vulcan Society proposed alternatives to the existing firefighter selection procedures. (SOF, 134.) These meetings did not

result in any changes to the next exam. The City continued with its standard practice – it created and used Exam 2043 based upon the model of Exam 7029, which was plainly biased against black applicants. (SOF, 26-27, 103-107, 117.)

The City had knowledge of the discriminatory nature of the firefighter exams. Yet no investigation was made by the FDNY or DCAS into their adverse impact or job-relatedness despite City EEO Policy that expressly required, from as early as 1996, that such an investigation take place.[7] (SOF, 56, 86, 88, 94.) The undisputed evidence shows that, despite the obligation of every City agency head to conduct an adverse impact study of its employment practices, city agencies, as a general matter, did not do so. (SOF, 45-58.) One EEPC manager has testified that the city agencies were not conducting adverse impact studies of their hiring practices, in part because of the failure of the City to provide agencies with the resources to do so. (SOF, 58.)

In fact, prior to 2005, Mayor Bloomberg, by his own admission, took no steps to enforce the City's EEO Policy regarding the adverse impact of the firefighter exams ("I never directed the Fire or DCAS commissioners to examine whether the devices used to select candidates for firefighter adversely impacted any particular group."), and the only step he ever took in that regard was to "distribute" the new Citywide EEO Policy on January 31, 2005. Levy Decl., Ex. JJ, Interrogatory Response No. 50. (SOF, 146.) The Mayor, however, was the city official ultimately responsible for enforcement of the EEO Policy. (SOF, 48-51.)

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[7] The City's EEO Policies specifically required agency heads to review their hiring practices to see if they had an adverse impact on any racial group. If an adverse impact was found, the EEO Policies required the agency to determine whether the selection method or criteria was "job-related." If it was not, the agency was to discontinue its use. If it was found to be job-related notwithstanding the adverse impact, the EEO Policy nevertheless stated a preference that agencies use those methods or criteria that diminished adverse impact over those with a greater adverse impact, so long as the agency's "job-related aims are not compromised by using the [method or device] with a diminished impact." (SOF, 52-56.)

Despite obligations imposed upon the Mayor, the Commissioner of the FDNY, and the EEPC to assure that the City's EEO Policy be enforced, only the City's EEPC made any efforts, ultimately futile, to have the FDNY conduct an adverse impact study during the 1996-2003 period. (SOF, 67-102.) The EEPC called to City officials' attention the discriminatory nature of the firefighter exams and a new requirement, instituted for the first time in connection with Exam 7029, that candidates obtain 30 college credits prior to joining the Fire Academy. (SOF, 70-92, 95, 99-101.)

In fact, concerns about the discriminatory impact of the college credit requirement predate the EEPC's investigation and were voiced to then-Fire Commissioner Von Essen. Both Carol Wachter, DCAS's Assistant Commissioner for Examinations at the time that Exam 7029 was developed, and Tom Pattituci, the DCAS Assistant Commissioner for Examinations, voiced their opposition to the college credit requirement to Commissioner Von Essen. Wachter and Pattituci "didn't see a specific justification for it" and "were concerned about its effect on increasing adverse impact" against black candidates. (SOF, 106-107.) Ultimately, Commissioner Von Essen implemented the college credit requirement over these objections because, as Wachter testified, "what Commissioner Von Essen wants, Commissioner Von Essen gets." (SOF, 108.)

The EEPC learned, and advised the FDNY and ultimately Mayor Bloomberg that the pass rates for blacks on Exam 7029 was significantly below the pass rate of whites. (SOF, 75, 143.) Repeated efforts from 1999-2003 to get the FDNY to agree to conduct an adverse impact study of the exam as well as of the college credit requirement were for naught – the EEPC encountered resistance from Commissioners Von Essen and Scoppetta, and ultimately the FDNY refused to

conduct such analyses.[8] (SOF, 77-94.) Eventually the EEPC resorted to its weapon of last resort – an appeal to the Mayor to order the FDNY to conduct an adverse impact study. (SOF, 67-68, 95-101.) In over 200 audits of City agencies conducted under Commissioner Abraham May's leadership, only twice did the EEPC need to make such an appeal because a City agency refused to implement the EEPC's recommendations. (SOF, 96-100.) Mayor Bloomberg rejected the EEPC's request to direct an adverse impact study, despite his general awareness of problems with the firefighter exams and even despite having learned that the Vulcan Society had also filed a charge of discrimination with the EEOC related to Exam 7029 (SOF, 102, 120, 142), which the United States government was investigating.

The Court in *In Re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir. 1999) correctly noted that the continued use of discriminatory practices in the face of adverse impact and less discriminatory alternatives is "evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Id.* at 1322 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Here, the City's continued refusal to investigate adverse impact and job-relatedness, in the face of overwhelming evidence of bias, is strong evidence that racial discrimination was the City's "standard operating procedure" with respect to firefighter tests.

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[8] Although Commissioner Von Essen at one point agreed to conduct an adverse impact study of the college credit requirement, he then changed his position and did not undertake such an analysis. One need not be an expert to realize that a college credit requirement would adversely affect black applicants. If the FDNY had conducted an adverse impact study of the requirement, this obvious reality would have been confirmed empirically. As Plaintiffs-Intervenors expert, Dr. Joel Weisen concluded, the college credit requirement did have an adverse impact on blacks vis-à-vis whites. Levy Decl., Ex. RR, Wiesen Report I at 60-61. Using census data, Weisen compared the number of white and black males in the New York metropolitan area between the ages of 18 to 34 who had one year of college (approximately 30 credits). *Id.* Weisen found that blacks meet this requirement at only 61% the rate of whites. This disparity fails the 80% rule and reflects a highly statistically significant differential.

Given the uninterrupted history of bias against black individuals seeking entry into the FDNY workforce and the City's total disregard of its obligations to comply with prior case law regarding proper test construction, the *Uniform Guidelines* and its own EEO Policy, and the compelling statistical evidence of exclusion, Plaintiffs-Intervenors have established a pattern-or-practice discrimination, in violation of Title VII.

POINT III

(AGAINST THE CITY OF NEW YORK)

UNDER THE CITY AND STATE HUMAN RIGHTS LAWS, THERE IS NO GENUINE ISSUE OF FACT AS TO THE CITY OF NEW YORK'S DISPARATE TREATMENT OF PLAINTIFFS-INTERVENORS AND PLAINTIFFS-INTERVENORS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

The Court should also enter summary judgment for Plaintiffs-Intervenors against the City of New York on the class disparate treatment claims under the NYC and State HR Laws. Plaintiffs-Intervenors have outlined in detail[9], the basis for the liability of New York City under Title VII for a pattern or practice of intentional discrimination, applying the standards adopted by the Second Circuit in *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147 (2d Cir. 2001). The same facts which provide the basis for a finding of intentional discrimination under Title VII also provide a basis for a finding of intentional discrimination under the NYC and State HR Laws.

Numerous courts have held that the same liability standards apply to the analysis of employer liability for discrimination under Title VII and the State HR Law. *E.g., Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000) ("Identical standards apply to employment discrimination claims brought under Title VII, Title IX, New York Executive Law § 296 [State HR Law] and the Administrative Code of the City of New York."); *Smith v. Xerox Corp.*, 196

[9] *See* discussion *supra* Point II.

F.3d 358, 363 n.1 (2d Cir. 1999) ("Since claims under the [State HR Law] are analyzed identically to claims under the ADEA and Title VII, the outcome of an employment discrimination claim made pursuant to the [State HR Law] is the same as it is under the ADEA and Title VII. *Leopold v. Baccarat, Inc.,* 174 F.3d 261, 264 n.1 (2d Cir.1999).").

Furthermore, under New York State law, the City is also liable because of its condonation of the discriminatory use of the written examinations. *E.g.*, *Hill v. Children's Vill.*, 196 F. Supp. 2d 389, 400-01 (S.D.N.Y. 2002) ("New York law regarding employer liability for discrimination is stricter than federal law. In order to establish employer liability under the New York State Human Rights Law, a plaintiff must demonstrate that the employer acquiesced in the discriminatory conduct or subsequently condoned it."); *Melendez v. Int'l Serv. Sys., Inc.*, No. 97 CIV. 8051, 1999 WL 187071, at *15 (S.D.N.Y. Apr. 6, 1999) (holding that plaintiff stated a claim of unlawful acquiescence under New York law when he alleged that he reported his discriminatory treatment to numerous managers in his chain of command who took no remedial action); *Greene v. St. Elizabeth's Hosp.*, 487 N.E.2d 268, 269 (N.Y. 1985) ("An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation."); *New York State Dep't of Corr. Servs. v. McCall,* 109 A.D.2d 953, 954 (App.Div. 3d Dep't 1985) (although investigation was conducted into allegations of discrimination, defendant agency was liable for failure to take remedial measures); *Hart v. Sullivan*, 84 A.D.2d 865, 866 N.Y.S.2d 40, 41 (App. Div., 3d Dep't 1981) ("To resist a motion to dismiss, the complaint must allege that the employer had knowledge or acquiesced in the discriminatory conduct of a supervisor or co-worker"). Here, because City officials were aware of the problem, identified through EEPC audits, as well as by public officials and the Vulcan Society, but failed to conduct impact studies into the adverse effects and job-relatedness of

written exams 7029 and 2043, despite the City's own written EEO policy requirements that they do so, the City is liable under State law.

As noted above, either the same liability standards, or more stringent ones, apply to employer liability under the NYC HR Law. In relevant part, NYC ADMIN. CODE § 8-107(13)(b) expressly provides that an employer is liable for an unlawful discriminatory practice based upon the conduct of an employee where

> (1) The employee or agent exercised managerial or supervisory responsibility; or
>
> (2) The employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct *or failed to take immediate and appropriate corrective action*; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
>
> (3) The employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

(emphasis added); *see also,* NYC ADMIN. CODE § 8-130; *Brightman*, 62 A.D.3d at 472, 878 N.Y.S.2d at 357.

Here, Mayor Bloomberg and Commissioner Scoppetta exercised managerial or supervisory responsibility, along with other managers and supervisors involved in the continued discriminatory use of written examinations 7029 and 2043, and the City is responsible for that continued unlawful use. Neither took "immediate and appropriate corrective action" when confronted with evidence of the tests' adverse impact; to the contrary, they blocked "corrective action." In fact, a host of City managers and supervisors at the FDNY, DCAS, and the Mayor's Office, not only acquiesced in but in fact condoned and affirmatively facilitated the continued use of the racially biased written exams over objections by the EEPC. On the basis of the

foregoing, because there is no material dispute of fact, summary judgment against the Defendant City of New York is appropriate on the intentional discrimination claims brought under the NYC and State HR Laws.

POINT IV

(AGAINST THE CITY OF NEW YORK)

THERE IS NO GENUINE ISSUE OF FACT THAT THE CITY OF NEW YORK HAD A POLICY OR CUSTOM OF VIOLATING PLAINTIFFS' RIGHTS TO EQUAL PROTECTION, IN VIOLATION OF 41 U.S.C. § 1981 AND § 1983

In addition to having violated Title VII, the City of New York is liable for having violated 42 U.S.C. § 1981 and § 1983, under principles governed by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny. Section 1983 imposes liability on any "person" who, under color of law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law." 42 U.S.C. § 1983. The requirements for proving a violation of 42 U.S.C. § 1981 mirrors those necessary to establish a § 1983 violation.

Under *Monell*, a municipality is liable under § 1983 when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" results in a violation of the plaintiff's constitutional rights. *Monell,* 436 U.S. at 690; *see also Bradley v. City of New York*, 08-CV-1106, 2009 U.S. Dist. LEXIS 51532 (E.D.N.Y., Jun. 18, 2009), at *7. Similarly, municipal liability under § 1981 also attaches when it can be shown that a policy or custom resulted in the alleged rights violation. *E.g., Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004); *Brown v. Baldwin Union Free Sch. Dist.*, 603 F. Supp. 2d 509, 517 (E.D.N.Y. 2009); *Simpson v. Enlarged City Sch. Dist.*, 05 Civ 5144, 2007 U.S. Dist. LEXIS 71262, at *14 (S.D.N.Y. Sept. 26, 2007). Such liability "may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are *not solely*

attributable to the actions of named individual defendants." *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir. 1999) (emphasis added).

A plaintiff establishes that the challenged conduct is attributable to the municipality and not just individuals by showing that it was "performed pursuant to a municipal policy or custom." This "policy or custom" requirement is met if the plaintiff can point to "a formal policy, promulgated or adopted by the City" that caused the rights violation or can show "that an official with policymaking authority took action or made a specific decision which caused the alleged violation." *Bradley*, 2009 U.S. Dist. LEXIS 51532, at *7.

A. The City Had a "Policy or Custom" of Discriminating Against Black Applicants for Entry-Level Firefighter Positions

In the instant suit, the undisputed facts are sufficient to establish the existence of a "policy or custom" of discriminating against black applicants in entry-level firefighter jobs. Specifically, the City had a custom of using improperly constructed written exams to screen firefighter applicants, both with knowledge of their racial impact and a conscious refusal to explore their validity or alternatives, despite the City's legal obligations to do so under its own EEO Policy and under State and Federal law. Additionally, the head of the FDNY and Mayor Bloomberg made several decisions that directly caused and continued the discrimination.

1. The City Had an Official Policy of Knowingly Using Unreliable and Judicially Invalidated Test Design Procedures

While the Supreme Court has not definitively stated what constitutes an official policy or custom, it has emphasized that, at minimum, the concept "generally *implies a course of action consciously chosen from among various alternatives*." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (Rehnquist, J., plurality) (emphasis added). The policy in question may be one made by a municipal official "possess[ing] final authority to establish municipal policy with respect to the action ordered." *Vives v. City of New York*, 524 F.3d 346, 350 (2d Cir. 2008). Additionally,

where a local government, or a department thereof, formally and as a body makes a decision, that decision constitutes an official policy. *See* SHALDON H. NAHMOD, 2 CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 6:18, at 6-57 (4th ed. 2008).

Here, the City's custom or policy consisted of the continued use of decades-old and judicially invalidated practices respecting exam development, including Exams 7029 and 2043 combined with knowledge of the racial impact of the use of those exams and the conscious decisions of policy-makers to block investigation into the validity of those exams or implement publicly available, less discriminatory alternatives, despite obligations to do so under applicable federal and City law, and formal policy.

Once the FDNY's written exams for selecting firefighters were found to be discriminatory in the 1970s Vulcans litigation, the City had to devise a new hiring mechanism. While the City was free to create any lawful means for appointing entry-level firefighters, it elected to use unlawful means – in this instance, biased written cognitive exams. Despite its experience with the 1970s Vulcans litigation and with challenges to other written entrance exams for municipal employment, when it came to creating a new FDNY entrance exam, the City continued to use judicially invalidated methods that had resulted in discriminatory civil service exams in the past.

Apart from the earlier Vulcans case, in *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 88 (2d Cir. 1980), the Second Circuit found that the City of New York had used a written exam that had a racially disparate impact in the hiring of police officers. That Court also concluded that the test was not job-related, *id.* at 88-106, and provided the City with an "'unusually complete discussion of the details of test validation,'" *United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist.

LEXIS 63153, at *95 (E.D.N.Y. July 22, 2009) (quoting BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 151 (3d ed. 1996)). Nevertheless, as this Court found in the Liability Order, when the City of New York created Exams 7029 and 2043 – well after *Guardians* had been decided as the law of this Circuit – the City simply "ignored the Second Circuit's guidance," *id.* at *112, and continued to use much of the same test development practices and procedures that had been in place before *Guardians* and which had led to the creation of a flawed, and racially-discriminatory employment device in that case.

For instance, the City's job analysis and its decision to use non-expert firefighters to draft the actual questions for Exams 7029 and 2043 were "inadequacies in the overall test development process [that] mirror those in *Guardians* – indeed, the City appears to be relying on the same practices for which it was criticized by the Second Circuit thirty years ago." *Id.* at *114.

Furthermore, though *Guardians* stated that an entrance exam should test for those abilities found to be important through a job analysis, with respect to Exams 7029 and 2043, the City's "standard operating procedure" was to the contrary. (SOF, 26-36.) This Court's previous factual findings show that the City failed to test for one-half of the eighteen cognitive abilities it found to be important to being a firefighter. *Id.* at *122-23. When asked why the omitted abilities were not tested for, Department of Citywide Administrative Services ("DCAS") Examiner Matthew Morrongiello, who was given responsibility by the City to develop Exam 7029, testified that the City's "standard operating procedure" at the time was <u>not</u> to test for those abilities. *Id.* at *123. That is, despite *Guardians*, the City as a matter of blanket policy refused to test for certain abilities, even if they were very important to the job. The City also failed to test for any non-cognitive abilities on Exams 7029 and 2043, *id.* at *131, even though, as early as

the mid-1970s, publicly available information from the federal Office of Personnel Management, the Department of Labor, and the U.S. Civil Service Commission separately identified non-cognitive abilities as some of the most important aspects of a firefighting job. *Id.* at *127. Even the City's own expert conceded that tests were available for evaluating such abilities when Exams 7029 and 2043 were administered yet the City failed to incorporate them, *id.* at *132.

As noted above, the City was fully knowledgeable – from prior court decisions, from DCAS analyses, from EEPC audits, from the Public Advocate's findings, and from public officials – about the racial impact of its customs and practices regarding test construction and use. Yet it acted to preclude the necessary changes that would have achieved compliance with applicable antidiscrimination laws and equal opportunity policies.

Additionally, by setting the passmark on Exam 7029 based solely on the number of firefighters the FDNY wished to hire, the City flatly "ignored *Guardians'* warning that the City should not simply choose 'as many candidates as it needed, and then set the cutoff score so that the remaining candidates would fail.'" *Id.* at *140 (quoting *Guardians*, 630 F.2d at 79). By setting the passmark on Exam 2043 based solely on a "default" rule in City Civil Service regulations, the City ignored *Guardians*' conclusion that "there should generally be some independent basis for choosing the cutoff," such as "by using a professional estimate of the requisite ability levels, or, at the very least, by analyzing the test results to locate a logical 'break-point' in the distribution of scores." *Guardians*, 630 F.2d at 79-80; *see also Fickling v. New York State Dep't of Civil Serv.*, 909 F. Supp. 185, 192 (S.D.N.Y. 1995). Even more probative of the City's intent is the fact that, at the time it (DCAS and the FDNY) was considering a passmark of 84.705 for Exam 7029, it knew that this cutoff resulted in an 89.84% pass rate for white test-takers but only a 61.19% pass rate for black test-takers. Carol Wachter,

DCAS's Assistant Commissioner for Examinations at the time that Exam 7029 was developed, testified that the City set the passmark for Exam 7029 at 84.705 after she had seen the City's statistical analysis of pass rates and that she spoke to Tom Pattituci, the DCAS Assistant Commissioner for Examinations, about the adverse impact evidenced by the 89%-61% differential for white versus black firefighter candidates. (SOF, 103-105.) Nevertheless, the City proceeded to use 84.705 as the passmark. The use of these test results was a fully conscious, intentional discriminatory act.

2. Mayor Bloomberg's Actions and Deliberate Inactions Caused the Violation of Plaintiffs' Constitutional Rights.

Monell liability also attaches where an official with policymaking authority took action, or made a specific decision, causing a violation of constitutional rights. *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986); *see also Bradley*, 2009 U.S. Dist. LEXIS 51532, at *7. For this theory of *Monell* liability to apply, the evidence must establish three facts.

First, the act or decision in question must have been made by a decision-making official who was responsible for "establishing final government policy respecting such activity." *Pembauer*, 475 U.S. at 483. "Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law." *Id.* An official has final authority "if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions." *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 41 (2d Cir. 1983). Second, the evidence must show that "a deliberate choice to follow a course of action [was] made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembauer*, 475 U.S. at 483. And finally, the evidence must establish that the policymaking

official "'had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action . . . was 'obvious,' . . . and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference.'" *Bradley*, 2009 U.S. Dist. LEXIS 51532, at *8 (*citing Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 129 (2d Cir. 2004)). Each of these requirements are met in this case.

(a) Bloomberg Was Responsible for Final Government Policy

The Office of the Mayor (a) was responsible for enforcing the City's EEO Policy (SOF, 48-51), (b) was the only City body with enforcement authority vis-à-vis EEPC recommendations (SOF, 68), and (c) was responsible for oversight of DCAS (SOF, 46.). With respect to the EEO Policy, while it required agency heads to undertake various actions to ensure equal employment opportunity within the agency, enforcement of the policy ultimately rested with the Office of the Mayor.[10] And though the EEPC was charged with investigating agencies for compliance with the EEO Policy, it did not have the power to compel agencies to adopt any recommended corrective actions. Instead, the EEPC had to turn to the Mayor for such an order. (SOF, 48-51, 68.)

DCAS (formerly, the Department of Personnel) is an agency under the control of the Mayor's Office. (SOF, 68.) Under the EEO Policy, DCAS is required to work with City agencies to promote equal employment opportunity and meet their obligations under the Policies. (SOF, 45, 55, 57.) Yet both Mayors Giuliani and Bloomberg failed and refused to enforce this

[10] The 1996 EEO Policy provided that "[t]he Mayor of the city of New York has ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced." The responsibility of the Mayor with respect to the EEO Policy did not change under the Bloomberg administration, as Mayor Bloomberg agreed that his duty was "to do the best I can to make sure those policies are followed, and if they are not followed, to inquire and do due diligence to see if there is a rational explanation that a good faith attempt was made and it didn't work or there was miscommunication or whatever, and take appropriate steps to help the agency try to follow them in the future." (SOF, 48-51.)

requirement. (SOF, 58.) Mayor Bloomberg could have – indeed was obligated to – ordered DCAS to provide the technical assistance necessary for agencies to conduct disparate impact analyses (which it had systematically been failing to provide) or by simply directing the FDNY to conduct one, as had been asked by the EEPC. To the contrary, Mayor Bloomberg blocked the EEPC's attempt to obtain FDNY compliance with the City's EEO Policy by refusing to enforce its request. (SOF, 100-102.)

Thus, the failure of DCAS and the FDNY to comply with the City's EEO Policies was not the result of happenstance but the result of an affirmative policy and practice of the City of New York – at the agency-head level and, in particular, by the Mayor's Office – to deny enforcement of the City's EEO Policies, policies designed to ensure that City agencies did not discriminate.

(b) Mayor Bloomberg Made a Deliberate Choice to Continue the City's Customs Regarding Invalid Use of Discriminatory Exams

Mayor Bloomberg was given an extensive report by the EEPC outlining the discriminatory impact of Exam 7029, its efforts to seek compliance with its recommendations regarding the test, and the basis for their need to take the extraordinary step (taken only twice in 200 audits) of seeking mayoral assistance. (SOF, 95-100.) He chose to rebuff the EEPC and its request after sitting on it for 6 months and with no explanation except that he was satisfied with what the FDNY was doing. (SOF, 102.) He exercised his final governmental authority by choosing not to enforce those policies. As Bloomberg's interrogatory answers make unmistakably clear, prior to 2005, he took no steps to enforce the EEO Policy regarding the firefighter exams ("I never directed the Fire or DCAS commissioners to examine whether the devices used to select candidates for firefighter adversely impacted any particular group."). Levy Decl., Ex. JJ, Interrogatory Response No. 50. (SOF, 106.)

Mayor Bloomberg's *post hoc* excuse for his conduct was to say that he asked members of the FDNY – i.e., members of the 97% white firefighting force, who successfully passed written exams – if they thought the exams were biased, and they said "no." (SOF, 139-140.) Obviously, these individuals were not professionals in the field of test evaluation or validation, and the *Uniform Guidelines* make clear that such anecdotal evidence of validity does not comport with federal standards. 29 C.F.R. § 1607.9. Notably, when Bloomberg previously answered interrogatories on the subject, there was no mention of this purported informal survey. Declaration of Richard A. Levy, dated October 30, 2009 (hereinafter "Levy Decl."), Ex. JJ, Responses to Interrogatories No. 39, 65. Likewise, the Mayor's explanation that he decided to focus on recruitment *in lieu of* addressing the apparent bias in the exams effectively stymied rather than remedied the problem of discrimination against black applicants. The Mayor himself finally conceded at his deposition that he did not know that recruiting would increase the number of black firefighters in the FDNY, if the entrance exam was biased. (SOF, 149.)

(c) The Mayor Was on Notice of a Potentially Serious Problem of Unconstitutional Conduct

Mayor Bloomberg and other City officials had been on notice, for a substantial period of time, of the problem of disproportionate exclusion of black applicants from the firefighter job in the FDNY and of the possible invalidity of the written exams being used by the FDNY. Mayor Bloomberg, a long-time resident of New York City, took office in January 2002 and, through personal observation and professional interactions with FDNY management, quickly became aware of the dearth of black firefighters in New York. (SOF, 129.) Among other things:

- In April 2002, Mayor Bloomberg had a meeting with, among others, then-President of the Vulcan Society, Paul Washington, during which Washington voiced concerns about "the legality of the entry level firefighter examinations and

other selection procedures [and] raised with the Mayor [the Vulcan Society's] belief that the exams are a poor indicator of one's ability to do the job." (SOF, 131-133.)

- On August 9, 2002, the Vulcan Society filed a charge with the United States Equal Employment Opportunities Commission ("EEOC") alleging that firefighter Exam 7029 had an adverse impact against black applicants and alleging intentional discrimination by the City of New York in its firefighter hiring practices. As Mayor Bloomberg admits, he would have learned about the EEOC charge at around this same time. (SOF, 120,142.)
- In April 2003, the EEPC sent Mayor Bloomberg a Report recounting the history of its audit of the FDNY with respect to its hiring of minorities, its statistical findings of disparate pass rates between white and black candidates (including the 89%-61% differential on Exam 7029), and the FDNY's failure and refusal to implement various corrective measures aimed at bringing it into compliance with the City's EEO Policy. (SOF, 143.)
- In 2004, the EEOC issued a decision on the Vulcan Society discrimination charge that was sent to the City of New York. The EEOC concluded that an analysis of test scores on Written Exam 7029 "indicate a high degree of adverse impact against African-American applicants, and all the differences in percentages between blacks and whites are highly statistically significant." The EEOC also found that the exam was not validated (i.e., had not been shown to have a meaningful correlation to job performance). (SOF, 121.)
- On February 24, 2005, three additional charges of discrimination were filed by

Marcus Haywood, Roger Gregg and Candido Nuñez, black men who were denied appointment as a result of Exam 2043. As with the Vulcan Society charge contesting the City's use of Exam 7029, the EEOC determined that Exam 2043 had adverse impact and had not been validated by the City of New York. (SOF, 123.)

- The City of New York refused to conciliate the dispute with the EEOC notwithstanding the agency's determinations and other evidence of the written exams discriminatory impact. (SOF, 122.)
- In 2005, the New York Daily News reported that "the FDNY has the widest racial divide by far in city government …," a fact which could not have escaped the Mayor. (SOF, 151.)
- Also in 2005, then-City Councilmember Yvette Clarke wrote to Mayor Bloomberg saying that the FDNY entry-level exam could be revised to be more job-related. (SOF, 150.)
- That same year, Mayor Bloomberg acknowledged his own failure to improve the number of black firefighters in a phone call to Paul Washington, president of the Vulcan Society at the time, saying words to the effect of, "I know I haven't been good on this issue." (SOF, 152.)
- In 2006, Councilman Charles Barron, then-State Senator David Paterson, and other government officials wrote to Mayor Bloomberg raising concerns about the disproportionately low percentage of minorities in the FDNY. (SOF, 153.)
- Around this same time, Congressman Charles Rangel also sent Mayor Bloomberg a letter voicing concern about the failure of the FDNY to improve black

representation and specifically asking him to change the scoring method for the next written exam. (SOF, 154.)

- Vulcan Society president Paul Washington again met with Mayor Bloomberg in 2006 and, in particular, discussed replacing the existing scoring method for the written firefighter exam with a pass/fail methodology and instituting an oral component to the entry exam. (SOF, 155.)

Throughout this time, though on notice of discrimination caused by the use of Exams 7029 and 2043, Mayor Bloomberg refused to take actions that were in his, and only his, authority to change the City's testing practices. These actions could have ended the discrimination. His decisions not to use the tools readily available to him and to block others (the EEPC in particular) from compelling compliance was intentional and warrants a finding of liability against the City of New York.

B. The City's Policies or Customs Resulted in a Violation of Plaintiffs' Constitutional Rights to Equal Protection

A plaintiff may prevail on a § 1983 claim based on an Equal Protection violation by proving that a defendant acted with the intent or purpose of discriminating on the basis of race. "The plaintiff need not show, however, that a government decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial, for 'rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996).

Nor is it necessary for a plaintiff to produce direct evidence of clear racial animus on the part of defendants. As with most intentional discrimination claims, such "smoking gun" evidence is usually not available nor is it legally required. *E.g., Chambers v. TRM Copy Centers*

Corp., 3 F.3d 29, 37 (2d Cir. 1994) ("Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence."); *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) ("employment discrimination is often accomplished by discreet manipulations and hidden under a veil of self-declared innocence").

Accordingly, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266. As noted by the Second Circuit, the necessary intent may be established indirectly in a number of ways:

> "The foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." [*United States v. City of Yonkers*, 837 F.2d 1181, 1227 (S.D.N.Y. 1987) (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979) (other internal quotation marks and modification omitted))]; *see also Hart v. Community School Board of Education*, 512 F.2d 37, 46-48, 51 (2d Cir. 1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 183-84 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 44 L. Ed. 2d 449, 95 S. Ct. 1950 (1975). Other probative sources may include "departures from the normal procedural sequence," [*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977)], "substantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," *id.*, ... , [*see Yonkers*, 837 F.2d at 1235].

City of Yonkers, 96 F.3d at 612.

Here, the decisions and conduct of top-level officials and policymakers within the City of New York to refuse to take actions that could have ameliorated if not ended the discrimination in

the FDNY, when viewed in context, supports a finding of intentional discrimination. The City's long-standing underrepresentation of blacks in the FDNY and its history of using firefighter selection exams that have a disparate impact are relevant starting points in considering whether the City practiced a policy of intentional discrimination.[11] *See, e.g., Village of Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.") Notwithstanding this history, the City followed its usual customs regarding exam construction and use when it created Exams 7029 and 2043. Those practices were essentially the same as ones that had been criticized in previous litigation and that had led to the creation of discriminatory exams in the past. It was readily foreseeable that the continued use of such judicially-discounted methods would result in yet another racially discriminatory exam, nonetheless the City did not adopt any alternative means for drafting or using the entrance exams challenged in this lawsuit.

Furthermore, despite knowledge of the adverse impact of the use of the exams, and entreaties from the EEPC, the City refused to conduct studies of the Exams' adverse impact and job-relatedness. Such studies were required by the City's own EEO Policies and, as the City knew because of prior litigation, were required by the federal EEOC's *Uniform Guidelines on Employee Selection Procedures* to ensure non-discrimination. This failure by the City not only *foreseeably* perpetuated the racial imbalance in the FDNY, but also constituted a departure from stated or official policy, further supporting an inference of intentional discrimination.

[11] *See supra* Point II.B.-C.

On the basis of the foregoing, the Court should enter summary judgment for the Plaintiffs-Intervenors on the §§ 1981 and 1983 racial discrimination claims against the City of New York.

POINT V

(AGAINST INDIVIDUAL DEFENDANTS)

SUMMARY JUDGMENT IS WARRANTED AGAINST DEFENDANTS SCOPPETTA AND BLOOMBERG INDIVIDUALLY UNDER FEDERAL, STATE AND CITY LAW

A. Defendants Scoppetta and Bloomberg Personally Participated in the Challenged Discriminatory Conduct

1. Defendant Scoppetta's Participation

The facts are undisputed that Defendant Scoppetta knew of the appalling statistical disparity in black and white firefighter employment in the FDNY. (SOF, 124-127.) He was told by the EEPC that the results of the 1999 exam failed the 80% rule (SOF, 76) and that the City's EEO Policy required his agency to conduct adverse impact studies and validity studies (SOF, 75-78) and knew that the EEPC had persistently demanded such studies (SOF, 79, 87-94). Scoppetta also knew that the Vulcan Society had raised concerns about the validity of the 1999 exam (SOF 126, 136). There is no dispute that Defendant Scoppetta, having such knowledge, refused to investigate the issue in violation of local law. (SOF, 86-87, 128.)

Between 1996 and 2001, before his time as Fire Commissioner, Scoppetta attended town hall meetings with Mayor Giuliani at which the issue of minority underrepresentation in the FDNY was raised. Levy Decl., Ex. HH at 16-17.[12] Since becoming Fire Commissioner in

[12] Both Bloomberg and Scoppetta were likely aware of the stark underrepresentation of blacks in the FDNY long before they took their offices in January 2002. Media reports contained allegations of race discrimination against the FDNY at least as early as 1999 and continuing through Defendants' terms. *See* Levy Decl., Ex. Q, KK, LL, MM, NN. Prominent public officials such as Public Advocate Mark Green also raised concerns of which Bloomberg and Scoppetta are likely to have been aware. *See* Levy Decl., at B.

January 2002, he has been aware of "questions" as to the adverse impact of the firefighter exams on black applicants, and within the first few months that he was at the FDNY, he learned that the Department was 93% white. *Id.* at 16-17, 76-77.

In April 2002, Scoppetta met with the Mayor and discussed diversity in the FDNY. Levy Decl., Ex. E. He also had several meetings with Captain Washington on the same topic. (SOF, 126.) At a meeting of the FDNY's "Advisory Committee" in August 2002, Deputy Fire Commissioner Douglas White heard Captain Washington express the concern that "you don't need to score 85 or above [on the 7029 written exam] to be a good firefighter." Levy Decl., Ex. V. (The passmark on Exam 7029, which was in use in August 2002 was 84.705, *see City of New York*, 2009 U.S. Dist. LEXIS 63153, at *28-29.) Deputy Commissioner White acknowledged that "Paul Washington had made those arguments to the Commissioner, Nicholas Scoppetta and the Mayor, Michael R. Bloomberg." (Ex. V; SOF, 136.) There can be no doubt that Scoppetta was aware of specific complaints about bias in the entry-level firefighter test.

In September 2002, Commissioner Scoppetta was quoted in the NEW YORK DAILY NEWS as saying "the Fire Department is 93% white and male – there's something seriously wrong with that picture." Levy Decl., Ex. NN. The fact that Scoppetta was aware of this exclusion and yet disregarded the complaints of Captain Washington without any investigation – even though, as discussed below, such an investigation was independently required by the City's EEO Policy – is strong evidence of an intent to discriminate.

The New York City Charter requires the heads of all City agencies (such as the Fire Commissioner) to adopt and implement EEO plans in compliance with the standards established by DCAS. NYC Charter, § 815(19). In 1996, DCAS issued a citywide EEO Policy that was in effect until it was revised by DCAS and Mayor Bloomberg in 2005. Levy Decl., Ex. F, G. Both

EEO Policies require that agency heads examine their employment selection procedures to determine whether they pose barriers to equal employment opportunity. Levy Decl., Ex. F at 14-15, Ex. G at 12-13. If an exam has an adverse impact, the Policies require that the agency heads determine whether the exam is job-related. *Id.*

When Scoppetta came into office, the EEPC had been auditing firefighter Exam 7029 for more than two (2) years and had found that the pass rate for whites on Exam 7029 was 91.6%, compared to pass rate for blacks of only 61%. (SOF, 75.) As the EEPC informed the FDNY, this disparity violated the EEOC's 80% Rule and "indicate[s] adverse impact." (SOF, 76.) The EEPC recommended to Scoppetta that the FDNY take several corrective actions to come into compliance with the EEO Policy, including that the FDNY conduct adverse impact studies of the written portion of Exam 7029 and of the newly-instituted requirement that candidates obtain 30 college credits prior to appointment. (SOF, 87-92.)

Commissioner Scoppetta repeatedly disregarded the EEPC's recommendations and refused to comply with the EEO Policy. (SOF, 87-94.) He never conducted an adverse impact study; nor did he ever ask DCAS to conduct one. *Id.* Given Scoppetta's understanding of the barrier to appointment faced by black candidates (as evidenced by the "93% white" makeup of his department, and the disparate pass rates of blacks and whites), his refusal to comply, when required by law to do so, is strong evidence from which to draw an inference of discriminatory intent.

As noted above, Commissioner Von Essen, Scoppetta's predecessor, actually agreed to study the adverse impact of the FDNY's new 30 college credit requirement. (SOF, 84.) Scoppetta backpedalled on this promise and never studied the impact of the college credit requirement. (SOF, 94.) When DCAS finally hired a professional psychometrician to help

develop Exam 6019, she concluded that the college credit requirement was not justified. (SOF, 113.) In fact, she opined that construction experience would be more useful for firefighting than college courses. (SOF, 114.) Scoppetta himself had no evidence that those with college credits make better firefighters. (SOF, 115.) Despite all this, Commissioner Scoppetta continued to oppose dropping the college credit requirement. *Id.* This is further evidence of an intent to discriminate.

In December 2002, the same month that the EEPC sent Scoppetta and others the final results of their audit, the City administered another discriminatory entry-level firefighter test, Exam 2043, modeled on Exam 7029. (SOF 91-92, 159.) The FDNY was aware that DCAS would not be conducting a new job analysis for Exam 2043, because the FDNY is directly involved in supplying firefighters to participate in job analyses when they are conducted. (SOF 118.) Based on what he knew from the EEPC about the results of Exam 7029 – that 91.6% of white passed compared to 61% of blacks – Scoppetta had every reason to believe that Exam 2043 would also have discriminatory impact, and in fact it did.

In April 2003, the EEPC asked the Mayor to intervene to order the FDNY to study the adverse impact of its selection devices. (SOF 95, 100-101.) Scoppetta discussed the Report with the Mayor, and he must have prevailed in his views, because the Mayor declined to order the FDNY to comply with the EEPC's corrective actions. (SOF, 102.)

The Executive Director of the EEPC testified that there are only two agencies that have chosen not to comply with corrective actions recommended by the EEPC and have necessitated a Report to the Mayor: the FDNY and Administration for Children's Services ("ACS"). (SOF, 96, 97.) Before becoming Fire Commissioner, Scoppetta was the Commissioner of ACS from 1996-2001. (SOF 98.) The EEPC's audit of ACS focused on the hiring practices in use during the

period of Scoppetta's administration. (SOF, 98-99.) Thus, Scoppetta's history of non-compliance with anti-discrimination policy pre-dates his tenure at the FDNY. This history provides additional evidence of his intent to flaunt anti-discrimination policy and law.

Scoppetta claims that he made diversity a priority, but during his tenure in office, the percentage of black firefighters in the FDNY never went above 3.31%, according to the City's own documents. Levy Decl., Ex. A. As of May 2009, the percentage of black firefighters had fallen to 3.14% (SOF, 158.) Nor did Scoppetta take any of the steps that were required of him to end the ongoing discrimination occurring in his Department. His own personal conduct served to preserve unlawful discriminatory hiring practices for the full eight (8) years of his incumbency as Fire Commissioner.

2. Defendant Bloomberg's Participation

There is no dispute that Defendant Bloomberg was, like Commissioner Scoppetta, well aware of the severe underrepresentation of blacks in the FDNY and that he too refused to investigate the issue in violation of local law. (SOF, 129-134, 136, 143-146.) Bloomberg became aware of the lack of racial diversity in the FDNY early in his administration through personal observation and professional dealings with the FDNY. (SOF, 129.) He realized that the FDNY workforce "was heavily weighted towards White males." *Id.*

Bloomberg met with Commissioner Scoppetta, and thereafter with representatives of the Vulcan Society, in April 2002. (SOF, 131.) While Bloomberg says he does not recall the specific content of the meeting (SOF, 132), Captain Washington recalls that he specifically "raised questions about the insufficiency of the City's firefighter recruitment program, as well as the legality of the entry level firefighter examinations and other selection procedures." (SOF, 133.) He also "raised with the Mayor [the Vulcan Society's] belief that the exams are a poor indicator of one's ability to do the job." (SOF, 133.) As noted above, Deputy Fire

Commissioner White acknowledged that Captain Washington had raised these concerns with the Mayor. (SOF, 134, 136.)

In August 2002, the Vulcan Society filed a charge of discrimination with the U.S. EEOC alleging that Exam 7029 had an adverse impact on black applicants and alleging intentional discrimination. Levy Decl., Ex. W. Mayor Bloomberg testified that he would have learned "essentially right away" that the EEOC charge had been filed. (SOF, 142.) If the Mayor knew of the charge, the Fire Commissioner likely knew of it as well.

In April 2003, the EEPC issued a document entitled "Report to the Mayor Pursuant to the Failure of the New York City Fire Department to Comply With Certain Equal Employment Opportunity Requirements of Chapter 36 of the New York City Charter." Fraenkel Decl., Ex. 3. The Report shows the pass rate discrepancy on Exam 7029 and raised the issue of bias against black applicants. *Id.* at EEPC 0362. It also informs the Mayor that Commissioner Scoppetta had refused to conduct an adverse impact study. *Id.* at 0346. The EEPC Report requested that the Mayor require the FDNY to conduct an adverse impact study of Exam 7029. *Id.* At that time, the FDNY was still hiring in rank order from the Exam 7029 eligibility list, and it would not begin hiring from the Exam 2043 eligibility list for over a year. (SOF 116, 119.)

Mayor Bloomberg discussed the EEPC's report with Scoppetta and with Deputy Mayor for Legal Affairs Carol Robles-Roman. (SOF, 102.) Any substantive discussion of the Report would – or should – have included a consideration of the 1996 EEO Policy, which was in effect at the time. That policy provides that "[t]he Mayor of the city of New York has *ultimate responsibility* for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced." Levy Decl., Ex. F at p. 17 (emphasis added). Thus, Mayor

Bloomberg was the designated City official ultimately responsible for ensuring that the City's EEO Policy was implemented, and that policy clearly required an impact study.

Bloomberg responded to the EEPC's Report six (6) months after it was issued, in October 2003. Levy Decl., at Ex. Z. Bloomberg's letter states only that he had determined that "the Fire Department has adequately addressed the points raised in the EEPC's Report." *Id.* (Bloomberg sent a nearly identical letter to the EEPC in response to the Report concerning ACS, which had been submitted to the Mayor simultaneously with the FDNY Report. Levy Decl., at Ex. X, Y). Bloomberg later claimed to have no recollection of the EEPC's Report or his response to it, but he never denied having received it or having decided to reject its recommendation. (SOF, 145.) In spite of his "ultimate" responsibility for enforcing the EEO Policy (SOF, 48), Bloomberg, like Scoppetta, offered no legitimate justification for his refusal to comply with the City's EEO Policy or for his actions to continue the use of discriminatory selection practices. (SOF, 140-141, 146-149.) *See* Point V(D) *infra.*

Mayor Bloomberg is not only ultimately responsible for the enforcement of City EEO Policy, he is also ultimately responsible for DCAS. NYC Charter § 6. As a mayoral agency, DCAS is under the direct control of the Mayor's Office. *Id.* Yet during Mayor Bloomberg's oversight, and for many years before the Bloomberg administration, DCAS continually violated clear obligations imposed by the *Uniform Guidelines on Employee Selection Procedures* (1978), which require that selection procedures be professionally validated using one of three approved methods. 29 C.F.R. § 1607.5A-B. DCAS did not professionally validate either of the discriminatory exams, nor could they have given the extensive flaws in the exams' design, construction and use. (SOF, 61.)

The EEOC's probable cause finding with respect to Exam 2043 was received by the Mayor and Scoppetta in June 2004, only one month after the eligibility list for Exam 2043 was certified in May 2004. Fraenkel Decl., Ex. 4. Had Bloomberg and Scoppetta acted on this information, they could have avoided four (4) more years of employment discrimination. Their refusal to act in response to the EEOC's findings is further evidence of discriminatory intent. As a result, hiring from a strikingly biased and exclusionary eligibility lists continued into 2009.

B. There Is No Genuine Issue of Fact as to Commissioner Scoppetta's and Mayor Bloomberg's Individual Liability Under City & State Human Rights Laws

1. Liability of Managers and Supervisors

Unlike Title VII of the Civil Rights Act of 1964, both the NYC and the State HR Laws provide for the liability of individuals. Under Executive Law § 296 and Administrative Code § 8-107, an individual, employed in a supervisory capacity, may be liable for discriminatory conduct if he/she participated in that conduct:

> A supervisor is an "employer" for purposes of establishing liability under the NYSHRL if that supervisor "actually participates in the conduct giving rise to [the] discrimination." *Tomka [v. Seiler Corp.],* 66 F.3d [1295 (2d Cir. 1995)] at 1317. In addition, the NYSHRL states that it shall be an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." N.Y. Exec. Law § 296(6). In *Tomka,* we found that this language allowed a co-worker who "actually participates in the conduct giving rise to a discrimination claim" to be held liable under the NYSHRL even though that co-worker lacked the authority to either hire or fire the plaintiff. *Tomka,* 66 F.3d at 1317.

Feingold v. New York, 366 F.3d 138, 157-58 (2d Cir. 2004).

The court in *Feingold* concluded that the same rule applied under the NYC HR Law, *id.* at 159, and further that, for an individual to be subject to liability under both laws, it is only

necessary that the individual have the authority to hire or fire employees, and need not be the supervisor with authority to hire or fire the plaintiff, *id.*, at 158.

Under New York law, acquiescing in the discriminatory conduct constitutes a level of participation sufficient to impose liability. *Miotto v. Yonkers Public Schools*, 534 F. Supp. 2d 422, 428-29 (S.D.N.Y. 2008) (noting that, under New York law, "an employer's calculated inaction in response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation.")(citations omitted); *Ahmed v. Compass Group*, 2000 U.S. Dist. LEXIS 10789, *15 (S.D.N.Y. 2000) ("[A] supervisor's failure to take adequate remedial measures can rise to the level of 'actual participation' under [NYHRL] § 296(6).")(citation omitted); *Lewis v. Triborough Bridge & Tunnel Auth.*, 77 F. Supp. 2d 376, 384 (S.D.N.Y. 1999) ("Case law establishes beyond cavil that a supervisor's failure to take adequate remedial measures can rise to the level of 'actual participation' under HRL § 296(6)").

2. Defendants Scoppetta and Bloomberg Meet the Requirements for Individual Liability

Commissioner Scoppetta not only had hiring authority, but, as described in detail above, he also had specific responsibilities under New York City's EEO Policy to take steps to prevent discriminatory hiring. (SOF, 45, 52-56.) Yet he directly participated in actions that continued the unlawful use of test results from two discriminatory written cognitive ability exams. (SOF, 128.) When confronted with evidence requiring an investigation into the use of those examinations, he acquiesced to and condoned their continued use without investigating their adverse impact, their job-relatedness or the availability of less discriminatory alternatives. *Id.* Scoppetta's acquiescence in the use of the discriminatory tests for hiring purposes was unlawful under case law interpreting the State HR Law and under the express language of the NYC HR Law. Because the material facts are not in dispute, summary judgment on liability under the

NYC and State HR Laws should be entered against Defendant Scoppetta as an active participant who acquiesced in disparate impact and disparate treatment discrimination.

As set out more fully above, Mayor Bloomberg is also individually liable for his actions and failures to act wherein he acquiesced in and/or condoned unlawful discrimination. Bloomberg had knowledge of the disparities in hiring black firefighters (SOF, 129, 136-137, 142-143) yet he participated in decisions to continue the use of racially biased, written cognitive-ability exams despite their recognized adverse impact (SOF, 143-148). By failing to comply with his obligations under the EEO Policy, and by turning down the EEPC's request for enforcement, Mayor Bloomberg actively blocked legally required steps to halt discrimination. *Id.* Such conduct exceeds the "acquiescence" standard that triggers liability under City & State law. Accordingly, summary judgment against Mayor Bloomberg under NYC and State HR Laws is warranted.

C. There Is No Genuine Issue of Fact as to Defendant Scoppetta's and Defendant Bloomberg's Individual Liability Under 42 U.S.C. § 1981 & § 1983

1. Standard for Finding Individual Liability

A § 1983 plaintiff[13] must prove that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009). Thus, the § 1983 plaintiff must "prove that the defendant acted with discriminatory purpose." *Id.*; *see also Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991) ("Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983").

[13] Employment discrimination claims brought pursuant to § 1981 and § 1983 are governed by the same substantive standards. *E.g., Knight v. Nassau Cty Civil Serv. Comm'n*, 649 F.2d 157, 161-62 (2d Cir. 1981); *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004); *Adorno v. Port Auth. of New York & New Jersey*, 258 F.R.D. 217, 230 (S.D.N.Y. 2009).

As noted in Point IV (B) above, proof of an intent to discriminate, however, need not be based on a so-called "smoking gun." Rather, as the U.S. Supreme Court has long recognized, "[a]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976); *see also Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979) ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"); *Personnel Administrator of Mass v. Feeney*, 442 U.S. 256, 279 (1979)("Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the identified law], a *strong inference that the adverse effects were desired can be reasonably drawn.*")(emphasis added).

In conducting this inquiry, the Court may consider: (1) whether the impact of the action "bears more heavily on one race than upon another," *see Davis*, 426 U.S. at 242, (2) "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," (3) "[t]he specific sequence of events leading up to the challenged decision," as well as (4) procedural or substantive departures from the normal course of conduct. *See Village of Arlington Heights*, 429 U.S. at 266-67; *see also United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996).

As discussed in detail above, Defendants Scoppetta and Bloomberg not only had direct knowledge of ongoing and drastic discrimination, their personal involvement in furthering it meets the Second Circuit's "personal involvement" standard for finding § 1983 liability. Given the totality of the relevant, undisputed facts, the Court should find that Defendants Bloomberg and Scoppetta engaged in intentional discrimination.

2. The Magnitude of the Disparate Impact Here Is Evidence of Intentional Discrimination

As the Court noted in *Village of Arlington Heights*, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." 429 U.S. at 266. The effect of Bloomberg's and Scoppetta's refusing to investigate Exam 7029 was to allow its biased eligibility list to remain in use and to maintain the same discriminatory selection process via the use of Exam 2043. The impact of that decision clearly bore "more heavily on one race than another," *Davis*, 426 U.S. at 242. As this Court has found, it resulted in hiring shortfalls of 293 black and Hispanic firefighter candidates, as well as delayed hiring of 112 black candidates. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *35, *38, *42. These results contributed to a clear pattern of exclusion of minority firefighters from City employment, to such a degree that in 2006 – midway through the use of Exam 2043 – the FDNY was only 3.31% black, a percentage which fell to 3.14% by 2009. Levy Decl., Ex. A, Ex. VV. This pattern is "unexplainable on grounds other than race" and is strong evidence of intentional discrimination.

3. The Long and Well-Known History of Exclusion of Blacks from the FDNY Is Evidence of Intentional Discrimination

Over the past eighteen (18) years, black firefighters have never comprised more than 3.9% of the total New York City firefighting force. Levy Decl., Ex. A. As the Supreme Court held in *Teamsters*, "[s]tatistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination." 431 U.S. at 339-40 n.20. The statistics in the FDNY when Bloomberg and Scoppetta took office – and for decades prior to 2002 – were a major aberration from the norm for the City and the nation as a whole. Levy Decl., Ex. B. In 1999, the NEW YORK DAILY NEWS referred to the FDNY as "by far the whitest agency in the city, as well as the least diverse fire department in any major city in the country."

Levy Decl., Ex. KK. Commissioner Scoppetta heard complaints about the underrepresentation of blacks in the FDNY at least as early as 1996 (SOF, 124), and Mayor Bloomberg was aware of the problem early on in his administration (SOF, 129).

4. The Sequence of Events Leading Up to the Use of Exam 2043 Is Evidence of Intentional Discrimination

As detailed above, complaints of discrimination as to Exams 7029 and 2043 were made to both Scoppetta and Bloomberg virtually from their first days in office, and then continually for years. (See Point V(A).) Their repeated and total disregard of the laws that are intended to prevent discrimination is strong evidence supporting an inference of discrimination.

5. Defendants' Departure from Procedural and Substantive Norms Is Evidence of Discrimination

Defendants' failure to follow the City's EEO Policy is a clear example of departure from procedural and substantive norms upon which inferences of discrimination can be drawn. *Village of Arlington,* 429 U.S. at 267; *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997) (departures from procedural regularity can raise a question as to the employer's good faith); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036 (7th Cir. 1991)(though not conclusive, an employer's failure to follow the requirements of an affirmative action plan is probative of discriminatory intent); *Alvarado v. Bd. of Trs. of Montgomery Cmty. Coll.*, 928 F.2d 118, 122 (4th Cir. Md. 1991)(evidence that the defendant violated two internal policies in failing to promote plaintiff "establish[es] that the [defendant's] reasons for not promoting him were not supported by the facts and were therefore merely pretextual.").

Here, Defendants Scoppetta and Bloomberg entirely ignored the EEO Policy governing their conduct – a Policy that is intended to prevent the very kind of hiring discrimination that occurred here. They also deviated widely from the law established in *Guardians v. City of New York*, 630 F.2d 79 – a New York City case – controlling test construction and use for more than

twenty (20) years. High-ranking officials of the City, who are provided with abundant legal assistance, cannot claim ignorance as a defense to their failure to abide by well-settled law. Scoppetta's and Bloomberg's deviation from the City's own policies, and their violation of Second Circuit law, is further evidence that they acted with the purpose or intent to discriminate.

D. The Proffered Reasons for Supporting the Discriminatory Exams are Pretextual, Do Not Excuse the Unlawful Conduct, and Further Imply Unlawful Intent

1. Defendant Scoppetta

Commissioner Scoppetta offers no legitimate, non-discriminatory basis for his refusals to follow the EEO Policy and EEPC recommendations to the detriment of black firefighter candidates. He testified that he had looked at pass rates on the exams and that "every ethnic group passes the test in roughly, roughly the same proportion as they take the tests." Levy Decl., Ex. HH at 80. This is not only demonstrably false – indeed, ridiculously inaccurate – it is not an objectively reasonable belief in light of Scoppetta's involvement in the EEPC audit. This excuse is a pretext. It underlines the strength of the evidence against him and bolsters the inference of unlawful intent.

2. Defendant Bloomberg

First, Bloomberg claims that he did not know that the exams were unlawful because no one, including the City Council and the EEPC ever explicitly made such an allegation to him. Def. Mem. at 11-12, 14-16. This claim is unavailing and untrue. Both Defendants are charged with knowledge of the clear laws and regulations that govern their actions, including the City EEO Policy and the *Uniform Guidelines* which require adverse impact analyses and validity studies if an impact on a protected class is found.[14] But, more than that, Bloomberg knew the

[14] Neither Defendant in this case can plausibly claim ignorance. Scoppetta is an attorney by training, has taught at NYU Law School and was in private practice for sixteen (16) years. Levy

Exam 7029 test results because they were sent to him by the EEPC. Bloomberg blocked the EEPC's effort. His false excuse adds support to the evidence that he acted with the intent to discriminate.

Second, Bloomberg attempts to justify the City's use of the unlawful exams by asserting that the "real" problem was poor recruitment (SOF, 147, 149).[15] But as Bloomberg acknowledged, if a test is biased then recruitment will not help the situation. (SOF, 138.)

Third, Bloomberg claims that the reason the City did not study the impact of Exam 7029 was because "it seemed best to spend public resources to move forward with new exams and new recruitment strategies rather than spending scarce public money to do an impact study on past tests and requirements." Levy Decl., Ex. JJ at Interrogatory Responses 32-33 (emphasis added). Had Bloomberg "moved forward" with a new non-discriminatory exam and expanded recruitment, this purported rationale may have been entitled to some weight. But the "new" test they implemented, Exam 2043, was virtually identical to Exam 7029 (*see City of New York,* 2009 U.S. Dist. LEXIS 63153, at *66, *81-82) and had the same kind of discriminatory impact and the same lack of demonstrable validity. Six months after the Mayor obstructed the EEPC's attempt

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Decl., Ex. HH, Scoppetta Tr. at 7, 23-24. Furthermore, both Bloomberg and Scoppetta have legal counsel, and internal EEO staffers, with whom to consult concerning their obligations. In fact, in his letter rejecting the EEPC's report, Bloomberg indicated that he had consulted with Carol Robles-Roman, Deputy Mayor for Legal Affairs, before choosing to ignore the EEPC's request that he direct the FDNY to comply with the City's EEO Policy. (SOF, 102.)

[15] It should be noted that Bloomberg and Scoppetta had an independent obligation to properly recruit minority firefighter applicants under the 1996 City EEO Policy. Levy Decl., Ex. F at 14. This recruitment obligation is separate and apart from their obligation to ensure that the selection devices being used were non-discriminatory. *Id.* Despite their frequent references to the importance of recruitment, Defendants were actually quite unsuccessful in improving their recruitment problem. More black applicants (1,749) took the test in February 1999 than in December 2002 (only 1,393). *See City of New York,* 2009 U.S. Dist. LEXIS 63153, at *22, *32. Back in 1992, there were 2,009 black test takers, and there were 3,629 in 1988. Nor do Defendants claim that they studied their recruitment program to determine whether it adversely impacted potential minority applicants.

to force an impact study, the City began using the discriminatory Exam 2043 eligibility list, and it continued in use until this year. (SOF, 144, 159.)

Fourth, as discussed earlier, Defendant Bloomberg asserts that he believed the discriminatory exams were lawful because he spoke to firefighters, officers and probies who were hired from the discriminatory tests and asked their opinions as to whether those exams were fair. (SOF, 139-141.) Unsurprisingly, these – presumably 93% white test passers – purportedly said the test was not biased. *Id.* The explanation is insubstantial and probably a *post hoc* fabrication. Defendant Bloomberg's responses to Plaintiffs-Intervenors Interrogatories make no reference to these conversations with firefighters, officers or probies, despite a specific request by Plaintiffs-Intervenors to "[i]dentify any communications . . . concerning the written or physical examinations used to screen applicants for the entry-level firefighter position in the FDNY." Levy Decl., Ex. JJ at Interrogatory Responses 39, 65.

Even if true, however, the *Uniform Guidelines* specifically prohibit employers from assuming that a test is valid based on "testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes." *Uniform Guidelines* at 29 C.F.R. § 1607.9A. The Mayor does not claim that he spoke to DCAS personnel, or to any outside testing expert, about the job-relatedness of the exams or available alternatives. He asked probies. He obviously steered clear of sources that would have confirmed what the EEPC was telling him, and what the EEOC told him in its determination about the Exams' doubtful validity.

Fifth, Bloomberg and Scoppetta attempt to avoid liability by arguing that it was DCAS's responsibility to develop and use lawful employment tests, and that there is a legal presumption that public officials, such the DCAS examiners, perform the duties required of them and do so in

good faith. Def. Mem. at 13. This argument, too, is unavailing. DCAS was obligated to study the adverse impact of employment tests, verify the validity of exams with adverse impact and use less discriminatory alternatives with equal validity. However, Bloomberg and Scoppetta were also independently obligated by the City's EEO Policy to ensure that selection procedures do not discriminate. Levy Decl., F at p. 15, 17 ("Agencies will examine all devices used to select candidates for employment to determine whether these devices adversely impact any particular racial, ethnic, disability, or gender group. To the extent that adverse impact is discovered, *agency heads* will determine whether the device is job-related. If the device is not job-related the agency will discontinue using that device." . . . "The Mayor of the City of New York has ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced.") In any event, as noted, each of these Defendants was explicitly advised by the EEPC of the apparent illegality of the hiring practices, so presumptions of proper performance were rebutted.

Finally, each of the manifestly false and pretextual excuses offered by Scoppetta and Bloomberg to justify their conduct provide support for a finding of intentional discrimination. *See Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt.") *citing Wright v. West*, 505 U.S. 277, 296 (1992); *Wilson v. United States*, 162 U.S. 613, 620-621, (1896); J. WIGMORE, EVIDENCE § 278(2), at 133 (J. Chadbourn rev. ed. 1979). As the Supreme Court in *Reeves* noted, "once the employer's justification has been eliminated, discrimination may well be the most

likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Reeves,* 530 U.S. at 148.

POINT VI

RESPONSE TO DEFENDANTS' MOTION FOR QUALIFIED IMMUNITY

Defendants Bloomberg and Scoppetta cannot be shielded from suit by a claim of qualified immunity because, in fact, there is sufficient evidence of a constitutional violation to support a finding of intentional discrimination.[16]

A. Pursuant to Federal Qualified Immunity Doctrine, the Rights Protected by § 1983 Were "Clearly Established" and It Was Not "Objectively Reasonable" for Bloomberg or Scoppetta to Believe That Their Actions Were Lawful

The federal doctrine of qualified immunity protects a government official from suit only if the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The Second Circuit uses a three-part test to determine whether a right is "clearly established:"

> (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Schechter v. Comptroller of the City of New York, 79 F.3d 265, 271 (2d Cir.1996). Where "the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19.

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[16] Municipal defendants, such as New York City, have no immunity from damages under § 1983. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

Plaintiffs-Intervenors' rights under 42 U.S.C. § 1981 and § 1983 were clearly established at the time of Defendants Bloomberg and Scoppetta's actions, *i.e.*, from January 2002 (when they took office) through September 2007 (when the Complaint was filed). The right to be free of invidious discrimination is so well established that all public officials are to be charged with knowledge of it. *See Smith v. Lomax*, 45 F.3d 402, 407 (11th Cir. 1995) (racial discrimination in public employment of "patently obvious illegality"); *Sanchez v. City of Santa Ana*, 936 F.2s 1027, 1040 (9th Cir. 1990) ("governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination," quoting *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988), vacated on mootness grounds, 490 U.S. 1016 (1989); *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F2d 541, 546 (8th Cir. 1984) ("The right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of law."); *Fulcher v. City of Wichita*, 445 F. Supp. 2d 1271, 1281 (D. Kan. 2006) *rev'd on other grounds* (denying a motion to dismiss on the basis of qualified immunity because defendant was aware of policies having a disparate impact on minorities and ignored and failed to correct such policies)(citing cases).

Qualified immunity applies only where it was "objectively reasonable" for the official to believe that his or her acts were lawful. *Provest v. City of Newburgh*, 202 F.3d 146, 160 (2d Cir. 2001). As the Second Circuit recently explained, violation of a "clearly established" law is never "objectively reasonable." *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 434 n.11 (2d Cir. 2009) (a state actor "who violates clearly established law necessarily lacks an objectively reasonable belief that his conduct was lawful. We clarify here that the two are part of the same inquiry, not independent elements as some cases suggested.").

Anyone in the position of New York City Mayor or Fire Commissioner would have understood that intentional race discrimination is unlawful, but the law governing intentional employment discrimination is more particularized than that. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). The Supreme Court has elaborated that

> officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in [*United States* v. *Lanier,* 520 U.S. 259 (1997)], we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Hope v. Pelzer, 536 U.S. 730, 741 (2002) (emphasis added).

Defendants here clearly had the "fair warning" required by *Hope*. The Vulcans' 1973 Equal Protection Clause case is so "fundamentally similar" to the current situation that it put Bloomberg and Scoppetta squarely on notice that their conduct was unconstitutional.

Defendants argue that qualified immunity protects an official from both "mistakes" of fact and of law. Def. Mem. at 9. But official conduct can only be called a "mistake" if it is within the bounds of discretion conferred on the official. In other words, "mistakes" are only protected if they are "objectively reasonable" in light of a lack of clarity in the law itself. *Butz v. Economou*, 438 U.S. 478, 507 (1978). Qualified immunity does not shield from liability "officials who ignore limitations on their authority imposed by law." *Id.* at 493-94. Defendants'

actions – supporting unvalidated exams with demonstrated adverse impact, blocking the EEPC's efforts to avoid the discriminatory practices, and flatly disregarding federal and local anti-discrimination law with no legitimate, non-discriminatory reason – were not "mistakes" within their discretionary authority; they were violations of clearly-established law.

Given the clarity of federal law in this area, it was not objectively reasonable for Bloomberg and Scoppetta to believe that their actions in furtherance of the City's discriminatory hiring system were lawful.

B. Neither Defendant Scoppetta nor Bloomberg is Protected from Suit by the New York State Law of Qualified Immunity

Defendants argue that "New York state law offers a similar, if not stronger, defense" on qualified immunity (Def. Mem. at 10) and that, "under the stronger New York State Governmental immunity provisions" "all state and local claims against the Mayor and Fire Commissioner must also be dismissed." (Def. Mem. at 19.) Defendants are wrong. Regardless of the relative "strengths" of the federal versus state immunity doctrines in the abstract, on the facts of this case, New York immunity law provides no basis for dismissal of the claims under the NYC and State HR Laws.

1. Because of Scoppetta's Failure to Follow the City's Own Policies Regarding Investigation of Adverse Impact and Job-Relatedness of the FDNY Hiring Procedures, No Immunity Is Available to Him in His Individual Capacity

Defendants assert that under New York state law "an official's discretionary acts may not be a basis of liability even if the actions were negligent or malicious." But Defendants overlook another principle of New York immunity law that is enunciated in *Haddock v. New York*, 75 N.Y.2d 478, 484, 554 N.Y.S.2d 439, 443 (1990), one of the cases Defendants cite in their brief. In *Haddock*, the New York Court of Appeals rejected the claims of immunity for municipal defendants when the evidence showed that the City's own policies governing the underlying

controversy had not been followed. *Haddock* involved claims of the negligent retention of a New York City Parks Department employee who was convicted of raping a nineteen-year-old girl in a maintenance shed on City property during the course of his employment by the City. The Court of Appeals held that no immunity was available because the City had failed to comply with its own procedures regarding investigation of criminal records of newly hired employees. Procedures in effect at that time, including City Personnel Department guidelines, called for an individualized determination of the qualifications of individuals with criminal convictions in light of a number of factors. No such individual review of the attacker had occurred. The Court of Appeals rejected the immunity defense on the following basis:

> The City's argument for *any* immunity here has a fundamental flaw. . . . There is no indication that, before the attack on plaintiff, the City made any effort to comply with its own personnel procedures for employees with criminal records. . . .
>
> The immunity afforded a municipality presupposes an exercise of discretion in compliance with its own procedures. Indeed, the very basis for the value judgment supporting immunity and denying individual recovery for injury becomes irrelevant where the municipality violates its own internal rules and policies and exercises no judgment or discretion. Given the scope of the immunity--which frees municipal defendants of liability where others in similar circumstances might have to respond in damages (*see, e.g.,* Hall v Smathers, 240 NY 486) – that critical omission cannot be cured by later supposition that, had a review been made, the employee's placement would have remained unchanged.

Haddock, 75 N.Y.2d at 485. (Emphasis added.)

The evidence here shows a similar failure on the part of Scoppetta to comply with City procedures – i.e., the City's own EEO Policies. As noted above, those policies required that each agency head assess the agency hiring procedures, to ascertain whether any had an adverse impact, and if such adverse impact were found, to evaluate the job-relatedness of the device and the availability of alternatives with less impact. Levy Decl., Ex. F at 14-15, ¶¶ VI (A) and (A2).

Scoppetta did not comply with this policy. He did not investigate the adverse impact of the FDNY hiring exams, even when urged by the EEPC to do so (SOF, 128); nor did he or anyone at the City evaluate the validity of those exams or institute alternate devices to diminish adverse impact. *City of New York,* 2009 U.S. Dist. LEXIS 63153. In short, Defendant Scoppetta is unable to show entitlement to immunity from liability under the State and City HR Laws, and there is no need for the Court to make further inquiry on this issue.

2. Because of Bloomberg's Failure to Comply with and Enforce the City's Own Policies Regarding Investigation of Adverse Impact and Job-Relatedness of the FDNY Hiring Procedures, no Immunity is Available to Him in His Individual Capacity

The evidence also shows a failure on Bloomberg's part to comply with the City's own EEO Policies, even though he has "has ultimate responsibility" for making sure that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced. (Emphasis added.) Levy Decl., Ex. F at 17, ¶ VII(A). There is no dispute that the Mayor did nothing to enforce the City's EEO Policy with respect to Exams 7209 and 2043; in fact he effectively obstructed appropriate action. (SOF, 146-147.) Under the rule in *Haddock*, Defendant Bloomberg is not entitled to immunity from liability under the State and City HR Laws.

3. Both Defendants Scoppetta and Bloomberg Violated Clearly Established Statutory Rights, of Which They Were Aware, and Cannot Claim Immunity

Additional grounds exist, over and above the authority of *Haddock*, to deny immunity to the individual Defendants. In *Doyle v. Rondout Valley Cent. Schl. Dist.*, 3 A.D.3d 669, 670-71, 770 N.Y.S.2d 480 (App.Div., 3d Dep't 2004) the Court held that qualified immunity was available to the individual defendant "provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [citations omitted]." Applying that standard here, it is plain that the statutory claims upon which

Plaintiffs-Intervenors rely – claims of both disparate impact as well as intentional discrimination under the NYC and State HR laws – were clearly established statutory rights of which a reasonable person would have been aware at the time of the actions by Commissioner Scoppetta and Mayor Bloomberg.

The intentional discrimination claims arising under NYC and State HR Laws involved clearly established law, and neither Scoppetta nor Bloomberg can show that he is entitled to immunity on the intentional discrimination claims. Intentional discrimination has been unlawful, under the State HR Law since prior to 1958, *American Airlines, Inc. v. State Comm'n for Human Rights*, 29 A.D.2d 178, 286 N.Y.S.2d 493, 495 (App.Div., 1st Dep't 1968) and prior to 1991 with respect to City law, which added a private cause of action in that year. New York City Council Committee on General Welfare Report on Proposed Introductions ## 465-A and 536-A. Levy Decl., Ex. SS.

With respect to disparate impact claims under the NYC HR Law, since its enactment in 1991, § 8-107(17) of the Administrative Code of the City of New York has defined an unlawful discriminatory practice as one based upon disparate impact, and has imposed upon an employer the obligation to show, as an affirmative defense, that the discriminatory practice "bears a significant relationship to a significant business objective." *See, e.g., Levin v. Yeshiva University*, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001). The NYC HR Law further provides that in the employment context, "significant business objective" includes, *inter alia*, "successful performance of the job." This, too, is clearly established statutory law of which reasonable persons in Defendants Scoppetta's and Bloomberg's positions should have known.

Similarly, since at least 1974, New York courts have interpreted Executive Law § 296 as making unlawful those employment practices which have a disparate impact and are not job

related. *State Div. of Human Rights v. Kilian Mfg. Corp.*, 360 N.Y.S.2d 603, 607-09 (N.Y. 1974); *People v. New York City Trans. Auth.*, 59 N.Y.2d 343, 348-49 (N.Y. 1983) (Under Human Rights Law an employer must justify a facially neutral practice that has a disparate impact on a protected class in terms of employee performance or business necessity.). *See also*, *Berkman*, 536 F.Supp. 177 (E.D.N.Y. 1982), *aff'd* 705 F.2d 584 (2d Cir. 1983), which applied disparate impact analysis to the City's firefighter selection process under the State HR Law as well as Title VII in 1982.

The State HR Law clearly prohibits the practices that Bloomberg and Scoppetta authorized. A reasonable person in Defendants Scoppetta's and Bloomberg's positions would have known these practices violated New York State Law and, therefore, no immunity is available to these Defendants.

CONCLUSION

For the reasons stated above, summary judgment should be granted to Plaintiffs-Intervenors on their claims against the City of New York, Mayor Bloomberg and Commissioner Scoppetta under the City, State and Federal law referred to in Points I through V, and Defendants' motion for qualified immunity should be denied.

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