IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, ET AL.,

Plaintiffs-Intervenors,

v.

CITY OF NEW YORK,

Defendant.

----------X

CIV. ACTION NO. 07-CIV-2067 (NGG) (RLM)

PLAINTIFFS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLASS-WIDE COMPENSATORY DAMAGES

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PLAINTIFFS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLASS-WIDE COMPENSATORY DAMAGES

Preliminary Statement

Plaintiffs-Intervenors have previously briefed the Court on the appropriateness of an award of class-wide compensatory damages under federal, state and city law. Plaintiffs-Intervenors' Reply Brief on their Motion for Summary Judgment on the Intentional Discrimination Claims cited statutory grounds in support of an award of compensatory damages. (Dkt. # 376, at 2-5.) Following the Court's liability order on intentional discrimination (Dkt. # 385) and the Court's Initial Remedial Order (Dkt. # 390), Plaintiffs-Intervenors provided further briefing regarding class-wide compensatory damages. *See* Joint Statement Regarding Relief Phase Issues (Dkt. # 400-1), at 59-61 and Plaintiffs-Intervenors' Response to Court's Request for Their Position Regarding Class-Wide Compensatory Damages (hereinafter, "Intervenors' Position Statement") (Dkt. # 401). Plaintiffs-Intervenors incorporate by reference the authority and argument advanced therein.

Introduction

In light of this Court's finding of intentional discrimination by the City against the Plaintiffs-Intervenors' Class (January 13, 2010 Order, Dkt. # 385), compensatory damages are available as a remedy under Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 1981a (a)(1), and under 42 U.S.C. §§ 1981 and 1983. *See, Johnson v. Railway Express Agency*, 421 U.S. 454, 460-61 (1975). Separately, under the New York State and City Human Rights laws, compensatory damages are an available remedy for both the City's disparate impact (July 22, 2009 Order, Dkt. # 294, "Disparate Impact Order") and its intentional discrimination. Compensatory damages are a necessary element of make-whole relief. Here, because of the unique nature of the firefighter job, each Class Member shares the same common harms – such as the loss of prestige, enjoyment of life, flexible scheduling and job security – that are inherent to having lost the opportunity to become a New York City firefighter. These common losses exist for all members of the Class, regardless of the specific circumstances of any particular Class member. Thus, the Court should award compensatory damages on a class-wide basis, to be distributed in a manner similar to the distribution of back pay.[1] Because material facts in support of this motion are not in dispute, the Court should enter summary judgment for the Plaintiffs-Intervenors as briefed more fully below.[2]

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[1] Submitted along with this brief is a Proposed Compensatory Damages Order that outlines a procedure for distributing a class-wide Compensatory Damages Fund. *See* Exhibit N, attached to Notice of Motion for Summary Judgment on Class-Wide Compensatory Damages.

The Plaintiffs-Intervenors are also filing, contemporaneously herewith, a separate motion, along with supporting documents and affidavits, for additional injunctive relief relating to recruitment and other matters.

[2] In the alternative, should the Court find material facts in dispute, Plaintiffs-Intervenors request that a hearing be set to resolve any such disputes.

Argument

Point I.

THE COURT SHOULD AWARD COMPENSATORY DAMAGES TO THE MEMBERS OF THE PLAINTIFFS-INTERVENORS' CLASS

Plaintiffs-Intervenors have proposed that the relief in this case include a class-wide award of compensatory damages. Because of the distinctive character of the firefighter job, the compensatory damages in this case can be awarded class-wide, in a manner similar to the award of back pay. The Court can determine the monetary value of the common loss suffered by the class and then distribute that amount to the entire class on a formula basis.

As proposed by the Plaintiffs-Intervenors, the Court would determine the amount of class-wide damages by taking into account (1) the hiring shortfall of 186 black candidates, and the delayed hire of 112 black candidates, as a result of the use of the City's use of Exams 7029 and 2043, (2) the length of time that the class members have been (and will continue to be) denied the firefighter position, or experienced a delay in their hiring, and (3) the value of the lost enjoyment of life – psychological, emotional, practical – that flows from the unlawful denial of the firefighter job. Taking those considerations into account, Plaintiffs-Intervenors propose that the Compensatory Damages Fund total $14.56 million. This sum, as calculated in Point I(C) below, is consistent with numerous awards for emotional harm in similar cases (*see* Point I(D)).

A. THE SUMMARY JUDGMENT STANDARD

The Court summarized the Rule 56 Standard in its Order of January 13, 2010 granting summary judgment on the intentional discrimination claims as follows: *Id.*, at 24. The Court described the standard as follows:

> "Summary judgment is appropriate when the pleadings and admissible evidence proffered to the district court 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....'" Major League

> Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 309 (2d Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). "Material facts are those which 'might affect the outcome of the suit under the governing law,' and a dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Coppola v. Bear Stearns & Co., 499 F.3d 144, 148 (2d Cir. 2007) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Conclusory allegations or denials are insufficient to create a genuine issue of material fact. Fed. R. Civ. P. 56(e)(2); Anderson, 277 U.S. at 256. Factual disputes that are irrelevant or immaterial to the disposition of a case cannot preclude a grant of summary judgment. See Loria v. Gorman, 306 F.3d 1271, 1282-83 (2d Cir. 2002).
>
> In considering a motion for summary judgment, the court construes the facts "in the light most favorable to the nonmoving party," and draws "all reasonable inferences in its favor." SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 137 (2d Cir. 2009). "[T]he moving party bears the burden of demonstrating the absence of a genuine issue of material fact." Baisch v. Gallina, 346 F.3d 366, 371-72 (2d Cir. 2003) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). In response, the nonmoving party "'must do more than simply show that there is some metaphysical doubt as to the material facts....'" Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).

B. THE UNDISPUTED EVIDENCE SHOWS THAT CLASS MEMBERS DENIED THE FIREFIGHTER JOB WERE DENIED SIGNIFICANT EMOTIONAL, PSYCHOLOGICAL AND PRACTICAL BENEFITS WHICH ACCOMPANY EMPLOYMENT IN THE FIREFIGHTER JOB.

The Court has found that the City of New York unlawfully denied to 186 black class members employment in the firefighter job which offers unique opportunities for the enjoyment of life. For an additional 112 class members, the City unlawfully delayed their appointment, thereby denying them the emotional, psychological and practical advantages of the position during the period of time their hiring was delayed. Those advantages, as summarized previously (*see* Intervenors' Position Statement, at 7-8), include (a) the loss of the prestige associated with the firefighter job; (b) the loss of the satisfaction that comes from a job which provides the ability to help others (even to save lives); (c) the loss of camaraderie and rewarding collective

activity that come with a job where employees live together in a team-oriented environment; (d) the loss of the unique challenge – physical, mental and emotional – and excitement of performing the firefighter job often under the pressures of an emergency situation; (e) the loss of the enjoyment of extra time – available because of the firefighter job's unique work schedule – to spend with family or friends, and/or to expand one's life experiences, either through the pursuit of additional schooling or a second career; (f) the loss of the satisfaction and peace of mind that comes with knowing that one's job provides unusual employment stability; (g) the loss of feelings of security that come from knowing that retirement with full pension and lifetime medical benefits are provided after 20 years of service, and (h) the loss of the potential for career advancement in the FDNY and the prestige and respect that accompany being a New York City fire officer. Each of the class members who would have been appointed as firefighters absent the City's discriminatory hiring process was denied these benefits of the job.

The City's own promotional literature for the firefighter job confirms its unique character, and the attendant opportunities for enjoyment of life. Those ads feature the headline:

"The Work Is Demanding. The Schedules Are Flexible,"

and carry a sub-caption:

"The Best Job in the World Has the Best Benefits in the World."

Pictures accompanying the ads include firefighters bicycling and playing basketball, and a mother hugging her child. (*See* Exhibit A to the Declaration of Richard A. Levy, dated September 28, 2010.)

The emotional benefits of the firefighter job have also been recognized nationally. A survey of Americans' attitudes toward their jobs found that occupants of the firefighter job ranked second only to that of the clergy in terms of their general happiness. National Opinion

Research Council/University of Chicago, "Job Satisfaction in the United States" (April 17, 2007), at 1 (available at http://www.norc.org/projects/general+social+survey.htm) (*See* Exhibit B to the Levy Declaration). And in terms of job satisfaction, the firefighter job nationally ranked third, behind only clergy and physical therapists. *Id.*, at 1. Finally, in terms of combined job satisfaction and general happiness, only clergy ranked higher than firefighters. *Id.*, at 1-2.

A United States Bureau of Labor Statistics study has recognized the unique opportunities provided by the firefighter job. That study showed that 28.1 percent of firefighters nationally hold second jobs. In fact, firefighters were found to moonlight more than any other occupation. *See* Amirault, Thomas, "Characteristics of Multiple Jobholders, 1995," Monthly Labor Review, 1997 (relied upon by Dr. Siskin in December 2009 Report of Bernard Siskin (Dkt. # 537-1), at 14, n.18).

The experiences of class members and incumbent firefighters, as set out in accompanying affidavits, demonstrate the type and degree of non-economic losses class members have suffered as a result of the City's unlawful conduct. Those affidavits describe the emotional and practical benefits accompanying the firefighter job compared to other jobs. Those affidavits show the following:

- John Coombs, a firefighter with eleven (11) years with the FDNY and President of the Vulcan Society, describes the feelings of pride that accompany being a firefighter, and the emotional satisfaction that comes with knowing that "people are counting on us, and that we are in the best position to help them." (Coombs 2/19/2010 Aff., Exhibit L, at ¶ 2)[3] He also describes the camaraderie that comes with working on a job where you "eat together, sleep together and do all of our

[3] The affidavits of class members and current firefighters relied upon throughout this Memorandum are attached to the Notice of Motion as Exhibits C through M).

work as a team." (*Id.*, at ¶ 3) Coombs has stated that the firefighter job has provided him with a "feeling of comfort knowing that when I retire, I will receive a pension for the rest of my life with medical benefits." (*Id.*, at ¶ 4) He has also described the emotional and practical benefits that flow from the free time firefighters have. "We really get to do what we want with our lives. . . . Being able to take care of my kids, instead of hiring a babysitter, is something I can't even place an economic value on." (*Id.*, at ¶ 6.)

- Michael Marshall, now a lieutenant in the NYC Fire Department, has contrasted his feelings as a firefighter to those he had while working as a union carpenter before he became a firefighter. Marshall has twenty-eight (28) years of experience with the FDNY. "I learned from my own experience that working as a carpenter meant you had to expect periods of layoff. . . . The unsteady nature of carpenter's work with its periods of unemployment led to insecurity about the future – one could never be confident that new work would quickly become available once a current construction project was finished. . . . This is in marked contrast to my experience at the FDNY. . . . The steady nature of firefighter work, and general perception that firefighters are rarely laid off, both qualified me for [bank] credit I had not qualified for before, and also made me feel much more secure financially." (Marshall 5/18/2010 Aff., Exhibit D, at ¶¶ 3-4.) Marshall also gained "great satisfaction" from being able to spend time with his children when they were growing up, "as a result of the nature of the firefighter schedule. Through about the tenth grade in high school, I dropped off and picked up my children from school on most days. My life revolved around them and their activities. My son played baseball, and I attended

every game he played." Finally, Marshall describes encounters he has had with police officers stopping him "where the reasons for my being stopped were not obvious to me." (*Id.*, at ¶ 9) But, because the police officers making those stops have always reacted positively when they learned that Marshall was a firefighter, Marshall has greater peace of mind regarding random police stops than he had prior to becoming a firefighter. (*Id.*, at ¶ 10-11).

- Current firefighter and Plaintiff-Intervenor Candido Nuñez was one of the last hires from the Exam 2043 eligibility list and has described how becoming a firefighter has changed his life: "As a firefighter, you always feel proud of the job that you do. For me in particular, it feels good to serve the community where I live. Everyone in New York loves firemen. People show us a lot of respect, and they are very thankful for what we do. People are always waving their hands at us and saying 'God bless you.'" (Nuñez 2/19/2010 Aff., Exhibit M, at ¶ 3.) He has also compared the advantages of his firefighter work schedule to that of his prior job as a boiler operator for the New York City Housing Authority: "My wife works full-time, so I stay with the baby on the days that I am not working. Because I have so much time off work, we only need to use a babysitter one or two days a week instead of every day. On the days that I am off work, I take my older son to the bus stop at 7:00 a.m., and I pick him up every day from school. Before I became a firefighter, I was a boiler operator for the New York City Housing Authority, and I would not have been able to take care of our infant or pick up my older son from school. It has been wonderful being able to spend so much time with my children." (*Id.*, at ¶ 5).

- Former Vulcan Society President Captain Paul Washington has described the satisfaction he has received from the volunteer work he has done on his days off. He became a firefighter nearly twenty-two (22) years ago, and became a member of the Vulcan Society Board less than two years after joining the FDNY. He also served as its President for eight years. (Washington 6/15/2010 Aff., Exhibit C, at ¶ 10) "Since I work only two days a week at the firehouse, I can treat the Vulcan Society almost as a separate full-time job. If my paying job required a daily work schedule, of course, I would only be able to do a fraction of the volunteer work that is so important to me." That volunteer work has included, among other things, the Vulcan Society's Role Models program, which sent black firefighters out to visit kids at New York City schools. "We talked to them about the history of blacks in the Fire Department, and we encouraged them to finish school and to stay away from drugs." (*Id.*, at ¶ 11) There were about twenty firefighters who participated in the Role Models program, reaching roughly 10,000 students over a four-year period. (*Id.*, at ¶¶ 11-12) Washington's volunteer work has also included the coordination of the Vulcan Society's recruitment campaigns in 1993-94 and again in 1996-97 (*Id.*, at ¶ 13), organization of a student drum line at a community center in Brownsville (*Id.*, at ¶ 14), helping stage hospital visits to children around Christmas time, a scholarship program for the children of Vulcan Society members, and various annual social events for the Vulcans' members and their families. (*Id.*, at ¶ 15) Washington has stated that "being an active member of the Vulcan Society has been incredibly emotionally rewarding for me. It means a lot to me to be able to spend time encouraging minority kids, being a presence in their lives, and at the

same time working to change the face of the Fire Department. . . . As I think about my work for the Vulcan Society over the past twenty years I can say that it has been one of the most satisfying parts of my life." (*Id.*, at ¶ 16.)

- Applicant Jamel Nicholson, who passed Exam 2043 but was too low on the eligibility list to be reached for hire, describes a job history in marked contrast to that of a NYC firefighter. From 2002 through 2007, he worked in various jobs and also went to school to become a plumber. "I worked in the shipping and receiving department at Memorial Sloan-Kettering Hospital, I worked as a plumber for Roto-Rooter, and I worked at FedEx. I was also unemployed for about four months." (Nicholson 7/1/2010 Aff., Exhibit H, at ¶ 3.) Nicholson was hired as a train conductor at the Metropolitan Transit Authority in January, 2008. For the first year and a half of his employment, he did not have a regular work schedule, but "provided relief when there were open shifts in the schedule or if someone else called out sick. . . . A shift would start any time between 9:59 p.m. and 3:59 a.m. Even though I was guaranteed forty (40) hours of work each week, I had to call in to the office each day to find out which shift I would be assigned to work." (*Id.*, at ¶ 4.) As of the summer of 2009, Nicholson got a regular schedule, dictated by his seniority – "I work afternoons from either 5:00 p.m. to 1:00 a.m., or from 4:00 p.m. to midnight. Also, my days off are Wednesday and Thursday, so I do not get any weekends off." The worst thing about his schedule is that "it makes it hard for me to see my kids. They are in school until about 3:00 p.m., and then I have to be at work in the afternoons by 4:00 or 5:00 p.m." (*Id.*, at ¶ 8) He also has limited vacation days, again assigned by seniority, which has prevented him from having

vacation during the times when his children are off from school. (*Id.*, at ¶¶ 7, 9) Finally, in dramatic contrast to the appreciation people show to a firefighter for his work, most people show Nicholson and his fellow train conductors frequent displeasure at their work: "It is not unusual for people to curse at us, spit at us or throw things at us. This has happened to me personally several times. This happens because a passenger misses a train and wants the conductor to open the doors, or the passenger is angry because a train is running on a different track due to track work. Even though I have no control over the train schedules, a lot of people who use the MTA take their anger out on the MTA workers." (*Id.*, at ¶ 14.)

- Applicant and Plaintiff-Intervenor Marcus Haywood has described the losses he has experienced as a result of not being hired as a firefighter after taking Exam 2043. He continues to work as a part-time employee of the United Parcel Service, where he as worked for the past ten years. (Haywood 7/13/2010 Aff., Exhibit F, at ¶ 3.) He has worked shifts that began at 3:00 a.m., then a shift that ran from 6:00 p.m. to 1:00 or 2:00 a.m., and currently he works as an operations supervisor on a 3:00 a.m. to approximately 11:00 a.m. shift, working between 25 and 35 hours each week. (*Id.*, at ¶ 3) While Haywood has been with UPS for ten years, he still does not have enough seniority to obtain a day-time position outside the Operations department or to reach full-time status. (*Id.*) Because of the needs of his five children, and his 3:00 a.m. start time at work, Haywood lives on 4 to 4½ hours of sleep each night. (*Id.*, at ¶ 5.) As a practical matter, he has limited freedom with respect to sick and vacation days. The pressures at work and the need to keep his job minimize the opportunities for vacation time, sick leave and leave him with little or no flexibility to deal with

family emergencies. (*Id.*, at ¶¶ 6, 7) Nor is he earning sufficient pay to avoid relying upon public assistance. Haywood describes the need to rely upon such assistance as embarrassing and stressful to him. (*Id.*, at ¶ 10.)

This evidence shows that class members suffered significant common damages from the unlawful denial of the firefighter job – "The Best Job in the World" – and the unlawful delay in being hired.

On this basis, a class-wide award of compensatory damages is appropriate. *See*, *inter alia*, *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 55 (2d Cir. 2002) (relying upon "the objective circumstances of the violation itself" as substantiation for an award of compensatory damages of $50,000 to each of the named plaintiffs affected by the same unlawful job transfer); *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1138 (D.C. Cir. 1999) (upholding an award of compensatory damages to an entire class of plaintiffs, not on the basis of individual testimony regarding their losses, but rather, on the basis that damages "may be inferred from the circumstances of the violation."); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974) (finding, in housing discrimination case, that "humiliation can be inferred from the circumstances as well as established by the testimony."); *Accord*, *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980).

C. BOTH THE STATUTORY LANGUAGE AND CONGRESSIONAL INTENT OF THE 1991 CIVIL RIGHTS ACT SUPPORT THE AWARD OF COMPENSATORY DAMAGES HERE.

The 1991 Civil Rights Act called for an award of compensatory damages under Title VII; its goal in doing so was to expand the make whole purposes of the Act. (*See also* Intervenors' Position Statement, at 4-5, citing applicable authority under Title VII and the City & State Human Rights Laws.)

The express statutory language of the 1991 Civil Rights Act provides that elements of compensatory damages include, *inter alia*, "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). The declarations of the firefighters and firefighter applicants cited above demonstrate the losses of convenience and enjoyment of life that class members experienced when their appointment as firefighters was denied or delayed. It is those common losses, stemming from the nature of the job itself, for which the Plaintiffs-Intervenors seek to recover to make the class whole. Denial of these damages would mean that the class will not be made whole and Congressional intent will be frustrated.

This broad scope of compensatory damages relief is similarly available under the City and State Human Rights Laws. *Sanders v. Madison Square Garden, L.P.*, 2007 WL 2254698, *13 n.7 (S.D.N.Y., 2007), *modified on other grounds*, 525 F.Supp.2d 364 (S.D.N.Y., 2007) (concluding that "the Title VII damages analysis also applies to plaintiff's SHRL and CHRL claims."). *See also*, *Ochei v. Coler/Goldwater Memorial Hosp.*, 450 F.Supp.2d 275, 283 (S.D.N.Y., 2006) (observing that federal law acts as a floor, not a ceiling, on claims under the New York City Human Rights Law).

D. THE COURT SHOULD AWARD CLASS-WIDE COMPENSATORY DAMAGES OF $14.56 MILLION.

The Plaintiffs-Intervenors have proposed that the Court award $14.56 million in compensatory damages to the class of black firefighters. (*See* Proposed Compensatory Damages Order, Exhibit L, at ¶ 9.) Damages are calculated by: 1) determining the number of victims; 2) estimating the length of time that they suffered losses; and 3) establishing a monetary valuation of their injury.

1. The number of victims. The Court has found that 114 black applicants were wrongfully denied hire through the use of Exam 7029 and an additional 72 black applicants were wrongfully denied hire through the use of Exam 2043. (Disparate Impact Order, at 17, 19, 23.) Further, the Court has found that 68 black applicants experienced an unlawful delay in their hire through the use of Exam 7029 and an additional 44 black applicants experienced an unlawful delay in hire as a result of the use of Exam 2043. (Disparate Impact Order, at 20, 22.)

2. The length of the injury. Some victims were denied the emotional and practical benefits of the job for a longer period of time than others. The Court has already found that the median hire date for victims of Exam 7029 would have been February 2, 2003 had a non-discriminatory process been used. (Initial Remedial Order, at 9.) According to the projected schedule for identifying priority hires for both Exams 7029 and 2043, it is reasonable to estimate that the initial hire date for priority hires will be no earlier than December 31, 2011. (*See* "Timeline of Actions Under Proposed Relief Order," attached as Appendix B to Seeley Declaration of September 10, 2009, Dkt. # 316-1.) Thus, the Exam 7029 Non-Hire victims will have been denied the emotional and practical benefits of the firefighter job for a 9-year period (from February 2003 – December 2011 at the earliest).[4]

Likewise, the Court has found that the median hire date for the Exam 2043 Non-Hires, had a non-discriminatory process been used, would have been July 11, 2006. (Initial Remedial Order, at 9.) Assuming that December 31, 2011 is the earliest date upon which any of the Exam

[4] Not all priority hiring is expected to occur in the first Academy class (*See* First Remedial Order, at 48-49), therefore, even if some priority hiring occurred at the end of 2011, the 9-year period is an appropriate estimate of the damages period for the 7029 Non-Hires. As courts have noted in this context, ambiguities in connection with the calculation of damages should be resolved against the wrongdoer, *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3rd Cir. 1999), including the calculation of damages connected with future remedial hires. *Green v. USX Corp.*, 843 F.2d 1511, 1532-33 (3rd Cir. 1988); *see also*, cases cited *infra*, at 20.

2043 priority hires could be appointed, they will, on average, have been denied the benefits of the firefighter job for a 5.5-year period.

3. The monetary value of the loss. The Court should find that the annual emotional loss to each of the class members denied hire (i.e., the 186-person shortfall) is $10,000. Given the substantial evidence regarding the unique advantages – emotional, psychological and practical – of the firefighter job, estimating the non-economic losses at $10,000 per year for each shortfall hire is reasonable. Doing so leads to class-wide compensatory damages for the 7029 Non-Hires of $10,260,000 (i.e., 9 years × 114 class members × $10,000). Applying this same analysis to the Exam 2043 Non-Hires, leads to additional compensatory damages of $3,960,000 (i.e., 5.5 years × 72 class members X $10,000.) The combined total for the Exam 7029 and Exam 2043 Non-Hires is $14.22 million.

Delay Hires are also entitled to compensatory damages. This Court has already found that there were 68 Delay Hires from Exam 7029 who experienced among them aggregate delays of 20 years. (Initial Remedial Order, at 29; Disparate Impact Order, at 20-22.) An additional 44 class members hired from Exam 2043 experienced an aggregate delay of 14 years. *Id.* Applying the same $10,000 per year of losses for the Exam 7029 and Exam 2043 Delay Hires, their total compensatory damages would be $340,000 (i.e., 34 years × $10,000).

In summary, the Class Compensatory Damages Fund would total $14,560,000.[5] Under Plaintiffs-Intervenors' proposal, $14,220,000 would be divided among the 7029 and 2043 non-hires found eligible for a share of the back-pay fund (with 7029 claimants receiving a larger share than the 2043 claimants to reflect the longer period of time denied the firefighter job), and

[5] The Court also has discretion to award prejudgment interest on the compensatory damages award if necessary to fully compensate the class. *See Reiter v. Metropolitan Transp. Auth. of New York*, 2003 WL 22271223, at *15 (S.D.N.Y. 2003).

$340,000 would be divided amongst the 7029 and 2043 delayed hires. The method of distribution proposed by the Plaintiffs-Intervenors is set out below in Point I(E).

E. THE PROPOSED CLASS-WIDE COMPENSATORY DAMAGE AWARD IS WELL WITHIN THE RANGE OF AWARDS FOR EMOTIONAL HARM CASES APPROVED BY NEW YORK COURTS.

These proposed calculations of compensatory damages for the class are well within the range of awards affirmed by New York courts for "garden variety" emotional harm damages in employment discrimination cases. The total damage award proposed for the shortfall of 114 appointments from Exam 7029 represents, on average, $90,000 per claim ($10,000 per year for 9 years) and the proposed award for the shortfall of 72 in Exam 2043 hiring represents, on average, $55,000 per claim ($10,000 per year for 5.5 years). The proposed award for delay hires is significantly smaller because most of the delay hires suffered losses for a substantially shorter period of time than the non-hires. (Disparate Impact Order, at 20, 22.)

A number of employment discrimination cases within the Second Circuit have affirmed compensatory damage awards in "garden variety" emotional harm cases (ones without requiring doctor or psychiatrist intervention) that exceed the awards proposed here. *Meacham v. v. Knolls Atomic Power Laboratory*, 381 F.3d 56, 78 (2d Cir. 2004), *certiorari granted on other grounds and judgment vacated by KAPL, Inc. v. Meacham,* 544 U.S. 957 (2005) (upholding, in an age discrimination claim under New York state law, "garden variety" emotional distress damages of $125,000); *Cross v. New York City Transit Authority,* 417 F.3d 241, 259 (2d Cir. 2005) (concluding, in a race and age discrimination case, that New York courts "uphold awards of more than $100,000 without discussion of protracted suffering, truly egregious conduct, or medical treatment."); *Quinby v. WESTLB AG*, 2008 U.S. Dist. LEXIS 62366 (SDNY 2008) (upholding award of $300,000 in compensatory damages for a single incident of retaliation in the context of gender discrimination allegations, while reviewing cases and finding that awards for

"garden variety" emotional harm claims in New York which lack extraordinary circumstances and lack medical corroboration generally range between $30,000 and $125,000); *Lynch v. Town of Southampton*, 492 F. Supp. 2d 197, 207 (E.D.N.Y. 2007) (adopting view that awards for "garden variety" compensatory damages in New York generally range between $ 30,000 and $125,000 in the context of a First Amendment case involving a volunteer worker); *Accord*, *Watson v. E.S. Sutton, Inc.*, 2005 U.S. Dist. LEXIS 31578 (S.D.N.Y., September 6, 2005); *see also, Patrolmen's Benevolent Ass'n*, 310 F.3d at 56 (approving award of $50,000 in compensatory damages for each of the plaintiffs subject to the same racially discriminatory job transfer). This authority supports the class-wide award in the amount sought by the Plaintiffs-Intervenors.

F. PLAINTIFFS-INTERVENORS' PROPOSED METHOD OF DISTRIBUTION IS CONSISTENT WITH LONG-STANDING AUTHORITY.

1. The Delay Claimants.

Plaintiffs-Intervenors propose that the compensatory damages awarded to Delay Hires from Exams 7029 and 2043 be divided equally among those the Delay Hire class members who file proof of claim forms and are found eligible for back pay relief (the eligible "Delay Claimants"). Under the September 2009 PRO (Dkt. #315-2), only Delay Claimants hired after the median dates for Exams 7029 and 2043 would be eligible for retroactive seniority and back pay. There remains an unresolved question as to whether, ultimately, the Court will adopt this restriction upon relief for the Delay Hires. The Court's Initial Remedial Order raises a question regarding this limitation upon relief, albeit in the context of the award of retroactive seniority. However, the September 2009 PRO maintains the same limitation upon the award of back pay to the Delay Hires (*See* September 2009 PRO, at ¶ I (5) (a) & (b)).

In response to the Court's Order, the Plaintiffs-Intervenors and the United States briefed the Court on the issue (Joint Statement, at 35-39), arguing in support of the United States' position that the limitation of relief to those hired after the median hire date was the fairest, and most appropriate distribution of relief to the Delay Hires. Plaintiffs-Intervenors believe that the award of compensatory damages to the Delay Hires should be based on the same approach as used for the award of back pay. If the Court ultimately determines that seniority and back pay relief to the Delay Hires should not be limited to those hired after the median dates, the same determination should apply to the award of compensatory damages.

2. The Non-Hire Claimants.

Plaintiffs-Intervenors propose that the Compensatory Damages Fund be distributed to eligible Exam 7029 and 2043 Non-Hire Claimants in amounts that reflect the different lengths of time that they were denied the firefighter position. As noted above, the Exam 7029 claimants will have been denied the firefighter job for, on average, 9 years, and the Exam 2043 claimants will have been denied the firefighter job for, on average, 5.5 years. Therefore, Plaintiffs-Intervenors propose that the distribution of the Compensatory Damages Fund for Non-Hire Claimants should be on a pro-rata basis so that each eligible Exam 2043 Non-Hire Claimant receives an equal amount which is 61% (5.5 years divided by 9 years) of the amount awarded to each of the eligible Exam 7029 Non-Hire Claimants.

For example, if the total fund for the Non-Hire Claimants is $14,220,000, and the claims procedure results in a total of 2,000 eligible Non-Hire Claimants, with 1,000 being Exam 7029 Claimants and 1,000 being Exam 2043 Claimants, each of the Exam 7029 Claimants would receive $8,832.30 and each of the Exam 2043 Claimants would receive $5,387.70. ($5,387.70 ÷ $8,832.30 = 61%); (1,000 × $8,832.30 = $8,832,300); (1,000 × $5,387.70 = $5,387,700).

This method for distributing the class-wide fund is consistent with applicable authority from a variety of contexts, both in the Second Circuit as well as other courts. That authority stands for the principle that, when the individuals harmed by a defendant's practices cannot be identified with certainty, the amount of class losses should be divided among all class members.

For instance, in a prison conditions class action, *Langley v. Coughlin*, 715 F.Supp. 522, 558 (S.D.N.Y. 1989) the Court concluded that class certification was appropriate because the Court could, in the damages phase, establish a per-diem award for the unconstitutional conditions, while permitting the opt-out of any class members who "were more grievously injured.")[6]

Similarly, under the National Labor Relations Act, upon which Title VII's relief provisions were modeled (*see Albemarle Paper Co. v, Moody*, 422 U.S. 405, 419 (1975)), courts have authorized formula distributions among the members of the larger affected group, where "it is impossible to do more than approximate the conditions which would have prevailed in the absence of discrimination." *F.W. Woolworth Co. v. NLRB,* 121 F.2d 658, 663 (2d Cir.1941).

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[6] The Court in *Langley* reasoned as follows:

> Compensation for pain and suffering – whether physical or emotional – inevitably involves substantial inexactitude, and thus it is not surprising that the federal courts have countenanced the use of arbitrary but efficient across-the-board measures of such suffering, even in non-class cases. *See, e.g., Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583, 587 (2d Cir.1961), *cert. denied,* 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed.2d 526 (1962) (assessing pain-and-suffering damages for eleven crewmen of capsized ship at $150.00 per hour regardless of individual circumstances and cause of death (if any), which varied from shark bite to exposure to drowning). In class cases, the courts have found still further justification for accepting some degree of imprecision in damage awards, even for economic loss, if substantial justice is done. [citations omitted]

Courts have held in a number of employment discrimination cases that some degree of imprecision in the award of damages for economic loss, including compensatory damages, is justified. The Eleventh Circuit has applied this principle in the context of the calculation of compensatory damages under § 1983. *See Slicker v. Jackson*, 215 F.3d 1225, 1229-31 (11th Cir. 2000). Generally, the cases recognize that in calculating class-wide losses, unrealistic exactitude is not required and uncertainties "should be resolved against the discriminating employer." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Uncertainties in the calculation of losses do not mean that no damages are awarded. Other courts have held that back pay should be awarded to the class even where exactitude in determining what would have happened in a non-discriminatory scenario was difficult, if not impossible to achieve. *See*, *inter alia*, *Stewart v. General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976), *cert. denied,* 433 U.S. 919, 97 S.Ct. 2995, 53 L.Ed.2d 1105 (1977) ("Given a choice between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter."); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975), *cert. denied,* 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976) ("We commend the court particularly to the use of pro rata shares [citations omitted] in those instances where the quagmire [of hypothetical judgments] persists even after reasonable efforts geared toward greater individual certainty have been attempted."); *see also*, *Cruz v. Local Union Number 3*, 34 F.3rd 1148, 1157 (2d Cir. 1994) (difficulty in calculating back pay under Title VII should not result in the denial of a reasonable estimate).

Therefore, the Court should award class-wide compensatory damages in the amount of $14.56 million and adopt the Plaintiffs-Intervenors' proposed method of distribution.

Point II.

THE COURT SHOULD ORDER UNCONDITIONAL CLASS CERTIFICATION

This Court has conditionally certified the individual Plaintiffs-Intervenors as class representatives for the remedial phase of this litigation.[7] However, the Court directed that the Plaintiffs-Intervenors propose appropriate subclass representatives in recognition of a potential conflict between the non-hire class members and the delay hires. (Initial Remedial Order, at 55.)

The Plaintiffs-Intervenors have asked the Court to reconsider this issue, in light of the fact that (1) the Court has already ruled that priority hiring with competitive seniority will be granted to certain of the non-hire class members who show their eligibility (Initial Remedial Order, at 21-22) and (2) sufficient due process safeguards for objecting class members exist, since they will be given notice with rights to object and opt-out prior to final entry of any order granting such compensatory relief. (Initial Remedial Order, at 8, 16; Joint Statement, at 66; Intervenors' Position Statement, at 12.) *See Robinson v. Metro-North R.R. Co.*, 267 F.3d 147, 166 (2d Cir. 2001) ("any due process risk posed by (b)(2) class certification of a claim for non-

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[7] The Court stated:

> The court will conditionally certify the Individual Intervenors to represent a class of all black firefighters or firefighter applicants who sat for either Written Exam 7029 or Written Exam 2043 and were harmed by the City's pass/fail or rank-ordering use of one or more of those examinations. The remedial interests of the individual class members are broadly aligned. With respect to individuals who were not hired, it is largely speculative at this point whether potential conflicts exist among them. But, the interests of incumbent black firefighters who were delayed in hiring may, in certain respects, be antagonistic to individual black firefighter applicants who are seeking hiring relief. For example, such individuals may prefer that non-hire victims not be awarded priority hiring or retroactive seniority. [footnote omitted] Subclasses broken down according to delay victims and non-hire victims would address this potential antagonism.

Initial Remedial Order, at 52.

incidental damages can be eliminated by the district court simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters—*i.e.*, the damages phase of the proceedings.")

Plaintiffs-Intervenors have also argued that the risk of conflict between those seeking priority hiring relief and those seeking back-pay relief is more illusory than real. Class members will not know the likelihood of their obtaining priority hire until the very end of the eligibility process (and for some even later if the total number found eligible exceeds the 186 shortfall number). This means that those who are primarily interested in priority hiring relief will have a significant interest in back pay relief as well, since that may be the only relief they are ultimately able to obtain. (*See* Joint Statement, at 68.)

Furthermore, under current case law, such potentially-objecting class members would also have the right to appeal the Court's judgment on the relief issues to which they have objected, even without formally intervening in the case. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002). In light of the Court's prior ruling providing for priority hires and competitive seniority (Initial Remedial Order, at 55), the creation of sub-classes does not appear to provide the potentially antagonistic class members with any additional protection than is afforded them without sub-class treatment.

The current conditional class representatives, Marcus Haywood, Roger Gregg and Candido Nuñez, include individuals who are both non-hires and delay hires. Marcus Haywood and Roger Gregg are non-hire class members (6/25/08 Affidavit of Marcus Haywood, Dkt. # 176, at ¶ 12; 5/08/08 Affidavit of Roger Gregg, Dkt # 145, at ¶ 11) and Candido Nuñez is a delay-hire class member (9/30/09 Affidavit of Candido Nuñez, Dkt. # 333, at ¶ 3). These three

individuals, then, do provide representation of both the non-hire as well as the delay-hire perspective.

The need for the creation of sub-classes remains highly speculative, and the views of both sides of the largely theoretical conflict are represented. On the basis of the foregoing, Plaintiffs-Intervenors ask the Court to certify, without condition, a class of all black firefighters or firefighter applicants who sat for either Written Exam 7029 or Written Exam 2043 and were harmed by the City's pass/fail or rank-ordering use of one or more of those examinations, with Marcus Haywood, Roger Gregg and Candido Nuñez as Class Representatives.

However, if the Court does not authorize a single class, it should create two subclasses, with Candido Nuñez and Kevin Simpkins representing the subclass of delay hires from Exams 7029 and 2043, and Kevin Walker, Marcus Haywood and Roger Gregg representing the subclass of non-hires from Exams 7029 and 2043. Each of these five potential class representatives has previously submitted affidavits to the Court demonstrating their interest in the case, their interest in relief that the Court orders, and their ability to serve as class representatives. (In addition to the affidavits referred to above, *see* Affidavits of Kevin Walker and Kevin Simpkins, Dkt. # 331 and # 332.[8])

[8] Kevin Simpkins is an appropriate representative of the subclass of black firefighters who were hired from the Exam 7029 eligibility list and were harmed by Defendant's rank-order processing of applicants; Kevin Walker is an appropriate class representative of the subclass of black firefighter applicants who sat for Written Exam 7029, were not hired, and were harmed by Defendant's use of Written Exam 7029 as a pass/fail screening device with a cutoff score of 84.705; Candido Nuñez is an appropriate representative of the subclass of black firefighters who were hired from the Exam 2043 eligibility list and were harmed by Defendant's rank-order processing of applicants; and Marcus Haywood and Roger Gregg are appropriate class representatives of the subclass of black firefighter applicants who sat for Written Exam 2043, were not hired, and were harmed either by Defendant's use of Written Exam 2043 for rank-ordering or as a pass/fail screening device with a cutoff score of 70.00.

In further support of this motion, Plaintiffs-Intervenors are filing contemporaneously herewith affidavits from each of the Individual Intervenors, as well as the alternative putative class representatives, stating that they have each reviewed this compensatory damages proposal, that they are satisfied with the methodology and calculations used, and that the method of distribution proposed is reasonable and fair under all the circumstances. (*See* Affidavits of Candido Nuñez dated August 4, 2010 (Exhibit E); Marcus Haywood dated August 5, 2010 (Exhibit G); Kevin Simpkins dated August 9, 2010 (Exhibit I); Kevin Walker dated August 4, 2010 (Exhibit J); and Roger Gregg, dated August 26, 2010 (Exhibit K)).

With or without subclasses, continued class certification is appropriate. (*See* Intervenors' Position Statement, at 6-11.) Because Plaintiffs-Intervenors seek to recover compensatory damages for the common non-economic loss of enjoyment of life that class members experienced as a result of not being hired into the firefighter job, there are common questions of law and fact; indeed, the common questions of fact and law predominate at this damages phase, thereby making class treatment appropriate. The focus is not on individualized experiences of emotional distress that class members may have suffered by being denied the firefighter job, but rather, those emotional losses that arise from the underlying factual circumstances of the City's unlawful conduct. *See*, *Patrolmen's Benevolent Ass'n.*, 310 F.3d at 55; *Berger*, 170 F.3d at 1138.

Conclusion

On the basis of the foregoing, the Court should grant Plaintiffs-Intervenors' Motion for Summary Judgment awarding the black firefighter class compensatory damages in the amount sought by the Plaintiffs-Intervenors herein, and certify the class (or alternatively, sub-classes) for class-wide compensatory damages.

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New York, New York

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