

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., ET AL.,

Plaintiffs-Intervenors,

-against-

THE CITY OF NEW YORK, ET AL.,

Defendants.

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

ECF Case

RULE 56.1 STATEMENT OF UNDISPUTED FACTS

This statement of uncontested facts pursuant to Local Civil Rule 56.1 is submitted in support of Plaintiffs-Intervenors' motion for summary judgment on their claims of intentional discrimination by Defendant City of New York (the municipality) and Defendants Mayor Michael Bloomberg and Fire Commissioner Nicholas Scoppetta, and in response to Defendants' motion to dismiss. Plaintiffs-Intervenors respond, in the final section, to Defendants' Rule 56.1 Statement in support of their motion to dismiss the intentional discrimination claims.

THE FDNY HAS A LONG HISTORY OF EXCLUDING BLACKS

1. As of 1963, only 554 (4.15%) of all 13,320 employees in the FDNY (including non-uniformed employees) were black. Eight years later, in 1971, only 614 (4.12%) of all 14,873 FDNY employees were black. Levy Decl., Ex. S.

2. Plaintiff-Intervenor the Vulcan Society acted as plaintiff in a similar action against the FDNY in the 1970s, in which Judge Weinfeld of the Southern District of New York found "that the City's written and physical examinations for entry-level firefighters violated the Equal

Protection Clause of the Constitution because of their discriminatory impact on black and Hispanic applicants.” *United States v. City of New York*, No. 07-cv-2067, 2009 U.S. Dist. LEXIS 63153, at *8 (E.D.N.Y. July 22, 2009), citing *Vulcan Soc. of New York City Fire Dep’t, Inc. v. Civil Serv. Comm’n*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973), *aff’d in relevant part by* 490 F.2d 387 (2d Cir. 1973).

3. As they do here, the Vulcan Society in the 1970s action challenged a written examination used by the City to select entry-level firefighters, based on the statistically significant differences in pass rates between whites and minorities and the exam’s lack of relation to the skills necessary for the firefighter job. *Compare City of New York*, 2009 U.S. Dist. LEXIS 63153, at *28-40 *with Vulcan Soc.*, 360 F. Supp. at 1268-70.

4. The exam challenged in the previous litigation (Exam 0159) was administered in September, 1971. Judge Weinfeld found that the following statistical disparities between white and minority test-takers supported a finding that Exam 0159 was discriminatory:

a. While 18.4% of whites who took Exam 0159 ranked in the top 4,000 on the resulting eligibility list and passed the subsequent medical and physical exams, only 6.6% of black and Hispanic test-takers fared as well. Hence, whites passed the written, medical, and physical exams at 2.8 times the rate of minorities. The odds that this differential occurred by chance are less than one in 10,000. *Vulcan Soc.*, 360 F. Supp. at 1269.

b. While 11.5% of those who took Exam 0159 were black or Hispanic, only 4.5% of those who passed Exam 0159 and the subsequent medical and physical tests were black or Hispanic. *Id.*

5. Judge Weinfeld further found that the written exam was not job-related, based on

the following:

- a. The City of New York conceded that it had made no effort to validate either Exam 0159 or any previous firefighter entrance exam. *Id.* at 1273, 1275.
- b. In 1968, the City discontinued the FDNY's fifty-year practice of basing eligibility for entry-level positions on the results of both a competitive physical exam and a written exam. *Id.* at 1269. The City did so without plausible explanation and in direct contravention of the recommendation of the City's first black Fire Commissioner Robert O. Lowery. *Id.* ("In the absence of ... an explanation one may draw his own inference. A graded physical examination might well have had a significantly favorable impact upon the relative performance of minorities, since there is no basis upon which to find they would not have scored as well as whites on tests of physical ability"); *see also Vulcan Soc.*, 490 F.2d at 397-98.

6. At the close of the 1970s litigation, Judge Weinfeld ordered the City to hire one (1) minority candidate for every three (3) white candidates as part of the remedy for the City's violation of the Equal Protection clause. This order and Judge Weinfeld's underlying findings were affirmed by the Second Circuit. *See Vulcan Soc.*, 490 F.2d at 398-99.

7. At the time of the 1970s litigation, New York City's firefighting force was 5% black and Hispanic, even though this group comprised approximately 32% of the City's population that was age-eligible for a firefighting job. *Vulcan Soc.*, 360 F. Supp. at 1269.

8. Despite Judge Weinfeld's findings that the exam for entry-level firefighters was racially discriminatory, and despite court-ordered changes to New York City's selection process, the hiring rates and exam pass rates of whites has continued to significantly outpace that of black

applicants over the past thirty years, and the ratio of black and white firefighters has remained stagnant at around 3%. See ¶¶ 10-15, 17, 20 *infra*.

9. In the thirty years since the expiration of the Court's injunction in 1977, New York City has administered various iterations of its entry-level firefighter exam.

10. In 1988, the City administered Exam 7022 and used the resulting eligibility list to fill entry-level firefighter positions from 1990-1995. Of the 5,000 top-ranked candidates on the eligibility list generated from this test, only 112, or 2.24%, were black. Levy Decl., Ex. C.

11. As of 1990, New York City's population was 29% black. However, the FDNY's uniformed force was only 4% black. Levy Decl., Ex. K at 2.

12. By 1995, the total number of black hires from Exam 7022 was 29 out of 2,256 (a black hiring rate of less than 1.3%). Levy Decl., Ex. D.

13. The next exam, Exam 0084, was first administered in 1992 and was used to hire entry-level firefighters from 1995 through 2000. The Exam 0084 eligibility list resulted in 53 black hires out of 2,692 total hires (a black hiring rate of less than 2%). Levy Decl., Ex. D.

14. From 1991-2006, black firefighters have never comprised more than 3.9% of the total FDNY firefighting force. Levy Decl., Ex. A.

15. At the time the instant litigation was commenced in 2007, the percentage of black firefighters in the FDNY had dropped to 3.4%. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *3.

PRIOR TO ANY HIRING FROM EXAMS 7029 AND 2043, THE EXCLUSION OF BLACKS FROM THE FDNY HAD BECOME A PUBLIC ISSUE

16. Individuals within New York City government, including the FDNY and other agencies, have long been aware of the extremely low number of blacks in the firefighter job.

17. In May 1999, the NEW YORK DAILY NEWS reported that "African-Americans now

account for only 3% of New York firefighters,” making the FDNY “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. The NEWS also reported that Manhattan Borough President Virginia Fields had sent a letter of concern to then-Fire Commissioner Thomas Von Essen. *Id.*

18. In a July 1, 1999 article in the NEW YORK TIMES, then-president of the Vulcan Society, Paul Washington, stated that the exam used to select entry-level firefighters was not job-related. Levy Decl., Ex. Q.

19. In May 2001, New York City Public Advocate Mark Green sent a letter to Fire Commissioner Von Essen, and copied Deputy Mayor Joseph J. Lhota, concerning the lack of diversity in the fire department. The Public Advocate noted that as of December 2000, 93% of the firefighting force was white, and the percentage of black and Hispanic firefighters was lower than it had been twenty-five (25) years earlier. Levy Decl., Ex. B.

20. The Public Advocate’s letter included the following table illustrating how the “firefighter force is the least diverse ethnically, racially, and by gender of all the uniformed services in the City”:

	Latinos	African Americans	Women
Fire Department	3.2%	3.8%	0.3%
Police Department	18.0%	16.6%	15.3%
Sanitation Department	14.6%	24.3%	2.3%
Correction Department	18.0%	61.4%	37.5%

21. The Public Advocate also presented Commissioner Von Essen with the following table about fire departments in other cities with one million or more residents, showing that “New York now lags far behind other major cities when it comes to African-American and Latino representation”:

City	African American and Latino Population	African American and Latino Firefighters
New York	52%	7%
Los Angeles	57%	40%
Chicago	62%	29%
Houston	62%	31%
Philadelphia	51%	30%
Phoenix	39%	22%
San Diego	33%	23%
Dallas	61%	28%
San Antonio	65%	50%

22. Defendants do not claim that the fire departments of these other major American cities perform worse than the FDNY or that their firefighters are any less competent than those in New York City. In fact, Commissioner Scoppetta said that he had not talked to representatives of other large fire departments about the results of their testing procedures. Levy Decl., Ex. HH, Scoppetta Tr. 32-33.

23. In December 2001, after the election of Mayor Bloomberg, the GOTHAM GAZETTE reported that the FDNY had only 321 black firefighters, which was less than the 600 black firefighters in the Department in 1965. Levy Decl., Ex. LL. The story stated that “Even Fire Commissioner Von Essen has admitted there is a problem. At a swearing-in ceremony for a new class of recruits last year, he said, ‘*The breakdown of the Fire Department is terrible – it’s 94 percent white male, and it’s one of the issues that we are constantly being criticized for.*’” *Id.* (emphasis added). The GAZETTE also reported on the EEP’s audit of the FDNY. *Id.*

24. Commissioner Von Essen was not only aware of the “terrible” demographics of the firefighting force, he was also aware during his time as Commissioner that blacks as a group tended to perform worse than whites on the firefighter selection tests, both in terms of pass rates and ranking. Levy Decl., Ex. YY, Von Essen Tr. 66:5-11.

**GUARDIANS PUT DEFENDANTS ON NOTICE THAT THEIR
DESIGN AND USE OF EXAMS 7029 AND 2043 WAS FLAWED**

25. After New York City was found to have used racially discriminatory entrance exams for firefighting positions in the 1970s *Vulcan Society* litigation, it was also found to have used racially discriminatory entrance exams for its police force. In *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79, 82 (2d Cir. 1980), the Second Circuit Court of Appeals affirmed the lower court's finding that the police department entrance exam had a racially disparate impact. *Id.* at 88. The Court then reviewed the manner in which the City had designed that exam and concluded that the test was not job-related. *Id.* at 88-106.

26. *Guardians* contained an “unusually complete discussion of the details of test validation,” *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *95, quoting Lindemann & Grossman, *EMPLOYMENT DISCRIMINATION LAW* 151 (3d ed. 1996). Nonetheless, when the City created Exams 7029 and 2043, it “ignored the Second Circuit’s guidance.” *Id.* at *112.

27. For example, as this Court has noted, the City’s job analysis and use of 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.

28. Even though *Guardians* required that entrance exams test for those abilities found to be important through a job analysis, the City identified “eighteen cognitive abilities . . . deemed important to the job of firefighter, but only nine of those abilities were tested.” *Id.* at *123.

29. The City did not measure the two *most* important abilities for the firefighter job – oral comprehension and oral communication – based on a claim that “structured interviews” would not be feasible, *Id.* at *123, but without claiming that other methods for testing oral ability had been considered and rejected.

30. The other seven (7) cognitive abilities rated as “important” were omitted not because of a claim that they could not be measured but simply because the “standard operating procedure” was not to test for such abilities. *Id.* at *123 (quoting Morrongiello Dep. Tr. 443).

31. Nor did the City test for non-cognitive abilities, although, as this Court found, “tests for non-cognitive abilities have been available for decades,” *Id.* at *131, long before the development and use of Exams 7029 and 2043.

32. The federal government has published studies confirming the importance of testing for non-cognitive abilities since the mid-1970s:

- a. As early as 1975, the federal Office of Personnel Management conducted a nationwide study to “provide job information that local fire departments could use in developing their own firefighter selection procedures.” *Id.* at *125. This publicly available study “found that 11 of the 20 required firefighter abilities and characteristics were non-cognitive, and that only four were cognitive.” *Id.* at *125-26 (internal quotations and citation omitted);
- b. The federal “Department of Labor’s Occupational Information Network (‘O*NET’), which provides comprehensive job descriptive information including information about knowledge, skills, abilities and work styles” has long identified “non-cognitive abilities as an important part of the municipal firefighter job.” *Id.* at *126 (internal quotations and citation omitted); and

- c. In 1977, the U.S. Civil Service Commission published a study in order to “identify the major tasks performed by entry-level firefighters across the United States” concluded that “the five most important attributes of the job of firefighter are non-cognitive.” *Id.* at *127.

33. In addition, firefighters have rated physical abilities as more important to the job than cognitive abilities, with physical ability earning an importance rating of 56% and cognitive abilities an importance rating of 44% in a recent 2005 survey by the Department of Citywide Administrative Services (“DCAS”). Levy Decl., Ex. PP; Ex. QQ, Carnival Tr. at 96. As Judge Weinfeld put it, “One hardly needs an expert to be aware of the importance of physical capacity in performing the duties of a fireman.” *Vulcan Soc.*, 360 F. Supp. at 1277 (S.D.N.Y. 1973).

34. Yet Defendants scored the physical test in such a way that its functional weight was zero among the more than 70% of test-takers who received a perfect score, i.e. 100%. Levy Decl., Ex. RR, Wiesen Report II at 81-82. Within this large group of candidates, who were the ones most likely to be hired, differences in their physical ability did not factor into their ranking relative to each other on the eligibility list. *Id.*

35. This Court also pointed out that the City’s method of setting the pass mark on Exam 7029 – based solely on the number of firefighters the FDNY wished to hire – “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 105).

36. Likewise, the Court noted that the City’s method of setting the pass mark on Exam 2043 – based on the “default” passing score set by the City’s civil service rules – was improper under *Guardians*, as explained in *Fickling v. New York State Dep’t of Civil Serv.*, 909 F. Supp.

185, 192 (S.D.N.Y. 1995).

THE ADVERSE IMPACT OF EXAMS 7029 AND 2043 WAS DRASTIC

37. The City of New York began creating Exam 7029, which is challenged in the instant litigation, in 1997. Levy Decl., Ex. UU at p. 4. Exam 7029 was first administered in February 1999 and was used to hire firefighters through at least 2004. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *22. Based on the cutoff passing score used on this exam, the pass rate of white candidates was 89.9%, while the pass rate of black candidates was 60.3%. Stated otherwise, the pass rate of black candidates was only 67% of the pass rate of white candidates, a disparity equivalent to 33.9 units of standard deviation. *Id.* at *29.

38. Additionally, on the eligibility list created from the combined Exam 7029 and the physical performance test results, black candidates were grouped disproportionately lower than white candidates, with an average ranking 630 places lower than that of white candidates. This difference amounts to 6.5 units of standard deviation. *Id.* at *35.

39. By the time the Exam 7029 eligibility list was retired, over 3200 individuals who had taken that test had joined the FDNY as probationary firefighters. Only 104 or 3.2% of these individuals were black. *Id.* at *22.

40. Exam 2043, which is also challenged in this litigation, was administered first in 2002 and used to appoint entry-level firefighters through at least January 2008. *Id.* at *22. Based on the cutoff passing score used on this exam, the pass rate of white candidates was 97.2%, while the pass rate of black candidates was 85.4%. Stated otherwise, the pass rate of black candidates was 87.8% of the pass rate of white candidates, a disparity equivalent to 21.8 units of standard deviation. *Id.* at *32

41. The effective pass rate of white candidates on Exam 2043 was 70.3%, while the

effective pass rate of black candidates was 41.5%. Stated otherwise, the effective pass rate of black candidates was 59% of the effective pass rate of white candidates, a disparity equivalent to 21.9 units of standard deviation. *Id.* at *41.

42. With respect to the eligibility list created from the combined Exam 2043 and the physical performance test results, black candidates again were grouped disproportionately lower than white candidates, with an average ranking 974 places lower than that of white applicants. This difference amounts to roughly 9.6 units of standard deviation. *Id.* at *38.

43. As of November 2007, the City of New York had hired over 2,100 entry-level firefighters from the Exam 2043 eligibility list. Of this total, only 80 individuals, or 3.7% were black. *Id.* at *22-23.

44. This Court has noted – and it has long been the case – that if the difference between an expected number and the observed number is greater than 2-3 units of standard deviation, a prima facie case of disparate impact is established. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *51, citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). “The statistics in this case, however, are uniformly beyond 3 units of standard deviation, and, for many of the analyses performed, *drastically* beyond that.” *Id.* at *60 (emphasis added).

DEFENDANTS HAVE A POLICY AND PRACTICE OF VIOLATING CITY CHARTER CHAPTER 36 AND THE CITY’S EQUAL EMPLOYMENT OPPORTUNITY POLICY

45. The New York City Charter requires that DCAS establish and enforce uniform standards and procedures for City agencies to use in establishing EEO programs and plans. NYC Charter § 814(12),(13). The City Charter also requires agency heads to establish EEO plans “in accordance with” the DCAS procedures and standards. NYC Charter § 815(19).

46. DCAS is a Mayoral agency and is under the control of the Mayor’s Office. NYC

Charter § 6.

47. In 1996, pursuant to those City Charter provisions named above, Mayor Rudolph Giuliani's DCAS promulgated an Equal Employment Opportunity Policy ("EEO Policy") laying out the standards and procedures to be used by New York City agencies to prevent unlawful discrimination under city, state and federal law. Levy Decl., Ex. F.

48. 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." Levy Decl., Ex. F at 17.

49. The 1996 EEO Policy remained in force until it was replaced by Mayor Bloomberg in 2005. Levy Decl., Ex. G.

50. As Mayor Bloomberg acknowledged, City agencies are required to follow the EEO policy. Levy Decl., Ex. H, Bloomberg Tr. 51:2-53:9.

51. Bloomberg testified that, as Mayor of New York City, one of his responsibilities is to set EEO policy for City agencies and "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." Levy Decl., Ex. H, Bloomberg Tr. 59:2-60:5.

52. Under both the 1996 and 2005 EEO Policies, agency heads are required to examine their agency's employment policies and practices – including its hiring or selection mechanisms – to determine whether they pose barriers to equal opportunity within the agency. Levy Decl., Ex. F and G.

53. The 1996 EEO Policy provides that, as a general matter,

All agencies policies and practices must promote equal employment opportunity. Thus, agency heads are required to assess the employment practices of their respective agencies to determine whether there are barriers to equal opportunity.

Levy Decl., Ex. F at 14.

54. The 2005 EEO Policy follows a similar general principle, but requires that agencies draft plans to satisfy this goal:

Agency heads are required by the New York City Charter to annually prepare, adopt and implement a plan to provide equal employment opportunity. The plan must be prepared based on uniform procedures and standards provided by DCAS. DCAS will work with agency heads to help them develop realistic and achievable goals. Each agency head or, at his or her direction, the agency EEO officer and/or personnel officer, should review agency statistical information (including total employment and new hires and promotions, by race/ethnicity and gender) The agency head should then work with the EEO officer, the General Counsel and the personnel officer to identify: (1) whether there are any barriers to equal opportunity with the agency; (2) the agency's obligations as a result of government grants and/or contracts; and (3) what, if any, corrective actions are required under court decrees and/or governmental audits. ...

Levy Decl., Ex. G at 12-13 (emphasis added).

55. With respect to hiring mechanisms, the 1996 EEO Policy specifies that:

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. Devices which diminish adverse impact will be preferred over those with greater impact provided the agency's job-related aims are not compromised by using the device with a diminished impact. ... Agencies will describe their selection procedures which have an adverse impact and the initiatives which will be undertaken to diminish or eliminate that impact. As the local civil service administration for most City agencies, the Department of Personnel [now DCAS] will be instrumental in establishing selection criteria for most civil service positions, but agencies must

take primary responsibility for examining criteria for selecting persons for discretionary positions.

Levy Decl., Ex. F at 15 (emphasis added).

56. The 2005 EEO Policy adopts essentially the same rule, set forth as follows:

Each agency's plan [for equal employment opportunity] must, at a minimum, include the following: ...

A commitment that the agency will assess the manner in which candidates are selected for employment, to determine whether there is any adverse impact upon any particular racial, ethnic, disability, or gender group. To the extent that adverse impact is discovered, the agency head will determine whether the criteria being utilized are job-related. If the criteria are not job-related, the agency will discontinue using that method. Methods which diminish adverse impact will be preferred over those with greater impact, provided that the agency's job-related aims are not compromised by using the method with a diminished impact. ...

Levy Decl., Ex. G at 13 (emphasis added).

57. The EEO Policy requires DCAS, a mayoral agency, to work with City agencies to ensure compliance with its equal employment mandates. Levy Decl., Ex. F at 15, G at 12-13.

58. However, Eric Matusewitch, Deputy Director of the Equal Employment Practices Commission ("EEPC"), testified in separate litigation that DCAS does not provide such support:

Q. How is the city doing adverse impact studies?

A. The citywide EEO policy requires the city agencies to examine all of their selection processes to determine whether they disproportionately screen out women and minority candidates. DCAS has the responsibility for providing technical assistance to city agencies to do those sophisticated kinds of studies.

Q. Are they being done?

A. We have been told that DCAS has not and is not providing technical assistance to city agencies.

- A. As I mentioned before, the Department of Citywide Administrative Services is responsible for providing technical assistance to city agencies to conduct these adverse impact studies. They told us over the years that they have not provided the technical assistance to the city agencies.
- Q. In the absence of technical assistance from DCAS, what is the city or city agencies doing in terms of adverse impact analysis?
- A. Our audits reveal no agency, virtually no agency we have audited has done adverse impact studies in the absence of the technical assistance.
- Q. And since agencies are entities which are part of the city, is it correct to say that the city is not conducting any adverse impact analysis?
- A. To the extent that city agencies constitute the city government, yes.

Levy Decl., Ex. I (emphasis added).

**DEFENDANTS HAVE A POLICY AND PRACTICE OF VIOLATING
THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES**

59. The *Uniform Guidelines on Employee Selection Procedures*, jointly adopted in 1978 by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice, plainly state that the use of any selection procedure that has an adverse impact on the basis of race “will be considered to be discriminatory” unless the procedure is validated in accordance with the *Guidelines*. 29 C.F.R. §1607.3A.

60. Under the *Uniform Guidelines*, there are three (3) professionally acceptable methods for validating an employee selection device: construct validation, criterion-related validation, and content validation. 29 C.F.R. §1607.5A-B.

61. Defendants claim that they validated Exams 7029 and 2043 using content validity, but, as this Court has found, Defendants did not demonstrate content validity with respect to either exam or with respect to Defendants’ particular use of either exam. *City of New York*, 2009

U.S. Dist. LEXIS 63153.

62. The *Uniform Guidelines* also require that “[w]here two or more selection procedures are available which serve the user’s legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.” 29 C.F.R. §1607.3B.

63. Here, Defendants made no attempt to use known alternatives for which there was demonstrated validity. See ¶¶ 31-32, *supra*. They chose instead to follow a policy and practice of only testing for cognitive abilities when selecting firefighters, even though it is well known that cognitive-only exams are more likely to have an adverse impact on black applicants. Levy Decl., Ex. WW, Bobko Tr. 121-122; Ex. XX, Alexander Tr. 349-350.

THE EEPC’S FUTILE EFFORT TO COMPEL COMPLIANCE

64. Compliance with the City’s EEO Policy is monitored by the EEPC, a non-mayoral City agency. Levy Decl., Ex. J, May Tr. 14:4-15:17.

65. Pursuant to the New York City Charter, the EEPC has the authority and responsibility, *inter alia*, to “review the uniform standards, procedures, and programs” established by DCAS for the promotion of equal employment opportunity within City agencies; make recommendations to DCAS or city agencies concerning the same; and “audit and evaluate the employment practices and procedures of each city agency and their efforts to ensure fair and effective equal employment opportunity”; and “make such policy, legislative and budgetary recommendations to the mayor, council, the department of citywide administrative services or any city agency as the commission deems necessary to ensure equal employment opportunity.” NYC Charter § 831.

66. The EEPC is further authorized to conduct a “study or investigations and hold such hearings as may be necessary to determine whether agencies are in compliance with the equal employment opportunity requirements” of New York City and recommend corrective actions to bring agencies into compliance. NYC Charter § 832.

67. If an agency refuses to implement a recommendation, the EEPC notifies the Mayor or the Department of Citywide Administrative Services (“DCAS”) and can request their assistance in requiring that the recommended action be undertaken. Levy Decl., Ex. J, May Tr. 15:21-16:25.

68. Because the EEPC has no independent enforcement authority, its only recourse in the face of non-cooperation by a City agency is to request that the Mayor direct the agency to take the recommended action. Levy Decl., Ex. J, May Tr. 85:20-86:2.

69. In or around 1994, the EEPC held public hearings to determine what efforts, if any, the FDNY was taking to comply with the City’s EEO Policy at the time. During these hearings, the FDNY Fire Commissioner, as well as representatives of the Vulcan Society, testified about the measures being undertaken by the agency around recruiting in particular to improve the low levels of minority firefighters. Levy Decl., Ex. J, May Tr. 43:22-45:22.

70. Following these hearings, the EEPC initiated an audit of the FDNY’s recruiting efforts surrounding Exam 0084 (administered in 1992). In a preliminary report sent to then-Fire Commissioner Howard Safir in August 1994, the EEPC noted that the FDNY’s recruitment efforts had actually resulted in *fewer* black candidates taking Exam 0084 (2,009 black test-takers or 6.4% of all examinees) than had taken the prior test, Exam 7022 in 1988 (3,629 black test-takers or 10.8% of all examinees). Levy Decl., Ex. K.

71. The EEPC outlined its preliminary findings about the problems with the Exam 0084

recruitment efforts in this correspondence and followed-up with a formal set of twelve recommended changes in a subsequent report to Commissioner Safir in October 1994. Levy Decl., Ex. K; Ex. L.

72. In the course of investigating the failure of the FDNY's minority recruitment efforts, the EEPC also discovered that the written exams for entry-level firefighter positions had a discriminatory impact on black applicants and were not shown to measure job-related skills. In April 1995, the Vulcan Society sent a letter to the EEPC highlighting that an individual's "position on the [eligibility] list is not a gauge of how good, or bad, a firefighter you will be." Levy Decl., Ex. N.

73. The EEPC's Executive Director, Abraham May, testified that the FDNY had – and still has – the worst minority under-representation of any New York City agency he has seen. Levy Decl., Ex. J, May Tr. 49-51.

74. The EEPC began an audit of firefighter Exam 7029 in August, 1999. Fraenkel Decl, Ex. 3 at EEPC 0349. According to the EEPC's research at that time, which was provided to the FDNY, employment rates of black firefighters were much lower in New York City than in any other major city in America. *Id.* at EEPC 0369.

75. By letter dated May 25, 2000, the EEPC informed Fire Commissioner Von Essen of its Preliminary Determinations in the Exam 7029 audit, which required corrective action "to comply with . . . the mandates of the City's Equal Employment Opportunity Policy (EEOP)" and the *Uniform Guidelines*. Fraenkel Decl., Ex. 3 at EEPC 0354. Citing statistics provided by DCAS, the EEPC reminded the Commissioner that while the pass rate for white test-takers was

91.6%, the pass rate of black candidates was only 61%. *Id.* at EEPC0356.¹

76. The EEPC said that this 91.6% vs. 61% differential fails the 80% rule and “indicate[s] adverse impact.” *Fraenkel Decl.*, Ex. 3 at EEPC 0362. (The City has asserted in this case that violation of the 80% rule is indicative of adverse impact. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *42-44.)

77. Based on these numbers, the EEPC made several recommendations, including that the FDNY conduct an adverse impact study of the written portion of Exam 7029 in light of its disproportionate impact against minority test-takers and, if the “study reveals that the test disproportionately screens out minority or female candidates, FDNY should conduct a validation study in accordance with” the *Uniform Guidelines*. *Fraenkel Decl.*, Ex. 3 at EEPC 0362.

78. The EEPC also recommended an adverse impact study of the FDNY’s new requirement that entry-level firefighters obtain 30 college credits prior to appointment. *Fraenkel Decl.*, Ex. 3 at 0360-61.

79. EEPC Executive Director Abraham May, who was primarily responsible for the FDNY audit, felt resistance from Commissioner Von Essen and Commissioner Scoppetta to his agency’s repeated recommendation that the FDNY study the adverse impact of Exam 7029. *Levy Decl.*, Ex. J, May Tr. 79:17-81:24.

80. On July 14, 2000, Commissioner Von Essen answered the EEPC’s Preliminary Determination letter. *Fraenkel Decl.*, Ex. 3 at EEPC. Von Essen’s letter does not respond to the EEPC’s recommendation to conduct an adverse impact study of the 30 college credit

¹ A later expert analysis revealed a white pass rate of 89.9%, rather than 91.6%, and that is the figure adopted by the Court in its July 22, 2009 liability Order, 2009 U.S. Dist. LEXIS, at *29. Nonetheless, at the time of Defendants’ decision not to investigate the lawfulness of the exams, the information in front of them presented an even more extreme white pass rate of 91.6%.

requirement. *Id.* With respect to studying the impact of the written test, Von Essen states that “It is a DCAS issue.” *Id.*

81. On August 21, 2000, the EEPC wrote to Von Essen, noting that he had “renewed on pledges made on March 10, 2000 to implement certain Commission recommendations.” Fraenkel Decl., Ex. 3 at EEPC 0380-84. The EEPC’s letter to Von Essen was copied to the Mayor’s Office of Operations. *Id.*

82. On September 14, 2000, Commissioner Von Essen submitted another letter to the EEPC in which the FDNY again fails to commit to conducting the recommended adverse impact studies. Fraenkel Decl., Ex. 3 at EEPC 0385.

83. On October 31, 2000, the EEPC sent a letter to Von Essen noting “a number of discrepancies” in Von Essen’s prior communication, specifically that it “is in direct conflict with the City’s Equal Employment Opportunity Policy” which “requires the agency (*i.e.* the FDNY) to conduct the adverse impact study.” Fraenkel Decl., Ex. 3 at EEPC 0392-93.

84. The EEPC then requested a meeting with Von Essen, which was held on December 19, 2000. Fraenkel Decl., Ex. 3 at EEPC 0394-0405. At that meeting, Von Essen finally *agreed* to do an adverse impact study of the college credit requirement. Fraenkel Decl., Ex. 3 at EEPC 0404.

85. On May 9, 2001, the FDNY submitted a compliance report that “once again agreed to conduct an adverse impact study” regarding the college credit requirement and, once again, asserted that it was DCAS, not the FDNY, that was responsible for studying adverse impact on the written exam. Fraenkel Decl., Ex. 3 at 0350.

86. In spite of the FDNY’s claim that the adverse impact study was the obligation of DCAS, neither the FDNY or the Mayor’s Office ever requested that DCAS conduct the study,

and DCAS in fact never conducted one. Levy Decl., Ex. OO, Hirst Tr. 98:4-22, 106:13-107:20, 120:9-121:2.

87. Once Scoppetta became Fire Commissioner in January 2002, the FDNY again refused to adopt the EEPC's recommended corrective actions concerning either adverse impact study. Levy Decl., Ex. J, May Tr. 80:24-81:24.

88. In March 2002, the EEPC wrote to Douglas White, Deputy Fire Commissioner for Administration, again asking the FDNY to conduct an adverse impact analysis of the written exam and noting the FDNY's continued failure to take such action or offer an alternative course. Levy Decl., Ex. U.

89. On September 13, 2002, the FDNY submitted a letter to the EEPC stating that it was "unwilling to remove' the college credit requirement and it would take 'under advisement' the Commission's recommendation that the FDNY should conduct an adverse impact study based on the results of the written examination." Fraenkel Decl., Ex. 3 at 0351.

90. By letter dated October 25, 2002, Commissioner Scoppetta again told the EEPC that the FDNY was "giving the recommendation of conducting an adverse impact study ongoing consideration." Fraenkel Decl., Ex. 0351.

91. On December 10, 2002, the EEPC issued a report summarizing its compliance efforts vis-à-vis the FDNY. Levy Decl., Ex. TT. The report notes that five of its "required actions" were not completed, including the conduct of the two recommended adverse impact studies. *Id.*

92. On December 11, 2002, the EEPC issued a Final Determination letter to the FDNY, detailing the Department's failure to implement five of the EEPC's recommended corrective actions, including the recommendations to conduct adverse impact studies on the 30 college

credit requirement and the written exam “in accordance with the federal government’s ‘Uniform Guidelines on Employee Selection Procedures.’” Fraenkel Decl., Ex. 3 at EEPC 0406-11; Levy Decl., Ex. J, May Tr. 157:18-159:14.

93. The FDNY responded on January 14, 2003 by saying that it had “not yet made a final determination concerning” whether to conduct the recommended adverse impact studies. Fraenkel Decl., Ex. 3 at EEPC 0413-15.

94. Ultimately, the FDNY never conducted an adverse impact analysis of the college credit requirement or the written portion of Exam 7029, Levy Decl., Ex. J, May Tr. 78:1-82:10, and it never asked DCAS to conduct one. Levy Decl., Ex. HH, Scoppetta Tr. 56.

95. On April 3, 2003 the EEPC informed the FDNY that it had “voted unanimously to issue a Report to the Mayor pursuant to the failure of the New York Fire Department to take certain appropriate and effective corrective actions.” Fraenkel Decl., Ex. 3 at EEPC 0444.

96. Only twice in EEPC’s history of conducting approximately 200 agency audits has an agency resisted implementing the recommended corrective actions, necessitating a Report to the Mayor. Levy Decl., Ex. J, May Tr. 82:11-84:7.

97. Aside from the FDNY, the only other agency to refuse compliance with the City’s EEO Policy was the Administration for Children’s Services (“ACS”). Levy Decl., Ex. J, May Tr. 82:11-85:5.

98. Commissioner Scoppetta was the head of ACS from 1996-2001, while that agency was engaging in conduct that ultimately led the EEPC to seek Mayoral intervention, and he was the head of the FDNY during the time that the FDNY’s refusal to comply with recommended corrective actions led the EEPC to issue a Report to the Mayor. Levy Decl., Ex. HH, Scoppetta Tr. 20:16-25; Ex. X; Fraenkel Decl., Ex. 3.

99. The EEPC found that ACS failed to comply with the City's EEO Policy from July 1, 1997 to December 31, 1999, during the time that Scoppetta was Commissioner of ACS. Levy Decl., Ex. X, "Report to the Mayor Pursuant to the Failure of the New York City Administration for Children's Services to Comply With Certain Equal Employment Opportunity Requirements of Chapter 36 of the New York City Charter" at p. 1.

100. In the Spring of 2003, the EEPC asked Mayor Bloomberg to direct both ACS and the FDNY to comply with the requirements of the City Charter. Levy Decl., Ex. J, May Tr. 84:15-85:5; Levy Decl., Ex. X; Fraenkel Decl., Ex. 3.

101. With respect to the FDNY, the EEPC requested that Mayor Bloomberg enforce its recommendations, including requiring the FDNY to conduct an adverse impact study of Exam 7029. *Id.*; Fraenkel Decl., Ex. 3.

102. Bloomberg spoke to Commissioner Scoppetta and Deputy Mayor for Legal Affairs Carol Robles-Roman before deciding to support the FDNY's refusal to adopt the EEPC's recommendations. Levy Decl., Ex. Z. The Mayor also supported ACB in its refusal to comply with the EEPC. Levy Decl., Ex. J, May Tr. 86:3-11; Levy Decl., Ex. Y.

**DCAS WAS AWARE OF THE LIKELY
DISCRIMINATORY IMPACT OF EXAMS 7029 AND 2043**

DCAS Knew The Pass Mark On Exam 7029 Would Have An Adverse Impact

103. Shortly after administering Exam 7029, the City completed an analysis of test-takers' scores, specifically looking at how various potential pass marks would impact different racial groups. Levy Decl., Ex. O. This analysis showed that setting the pass mark at 84.705 resulted in a 89.84% pass-rate for white test-takers but only a 61.19% pass-rate for black test-takers. *Id.*

104. Carol Wachter, DCAS's Assistant Commissioner for Examinations at the time that Exam 7029 was developed, testified that the City set the pass mark for Exam 7029 at 84.705 after she had seen the City's statistical analysis of pass rates by race. Levy Decl., Ex. P, Wachter Tr. 165:14-166:7. Wachter spoke to Thomas Patitucci, her successor as DCAS Assistant Commissioner for Examinations, about the adverse impact evidenced by the 89.8%-61.2% differential for white versus black firefighter candidates. *Id.*

105. Assistant Commissioner Wachter also testified that, by setting the pass mark at 84.705, qualified candidates were eliminated from the eligibility list. Levy Decl., Ex. P, Wachter Tr. 178:13-180:17.

DCAS Believed The College Credit Requirement Would Have An Adverse Impact

106. The FDNY's requirement that candidates complete 30 college credits prior to appointment was instituted for the first time for Exam 7029, at the insistence of then- Fire Commissioner Von Essen. Levy Decl., at Ex. P, Wachter Tr. 148:25-149:7.

107. Assistant Commissioner Wachter and Patitucci vocally opposed the 30 college credit requirement because they "didn't see a specific justification for it" and because they "were concerned about its effect on increasing adverse impact." Levy Decl., at Ex. P, Wachter Tr. at 150:19-151:18.

108. Despite these objections, the 30 college credit requirement was imposed because, as Wachter testified, "what Commissioner Von Essen wants, Commissioner Von Essen gets." Levy Decl., at Ex. P, Wachter Tr. at 149:15-16.

109. Prior to his appointment as Fire Commissioner by Mayor Giuliani in 1996, Von Essen was the president of the Uniformed Firefighters Association from 1993 to 1996.

110. As noted above, Commissioner Von Essen agreed to conduct an adverse impact

study of the college credit requirement but then changed position and failed to complete such a study. Levy Decl., Ex. J, May Tr. 80:18-82:10; Fraenkel Decl., Ex. 3.

111. Plaintiffs-Intervenors expert, Dr. Joel Weisen, found that the college credit requirement did have an adverse impact. Levy Decl., Ex. RR, Wiesen Report I at 60-61. Wiesen used census data to compare 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.* Dr. Wiesen found that blacks meet this requirement at only 61% the rate of whites. This discrepancy fails the 80% rule and is highly statistically significant. *Id.*

112. The college credit requirement was also never validated for Exam 7029 or Exam 2043, even though the *Uniform Guidelines* make it clear that educational requirements must be validated according to the same standards as other selection devices such as written tests. 29 C.F.R. §1607.16.Q.

113. When DCAS finally hired a professional psychometrician, Dr. Catherine Cline, to help develop Exam 6019, she concluded that the college credit requirement should be modified, so that a high school diploma and six months of work experience would be an acceptable alternative. Levy Decl., Ex. ZZ.

114. In fact, Dr. Cline opined that construction experience would likely be a more useful background for firefighting than college courses. Levy Decl., Ex. II, Cline Tr. at 464:20-465:16.

115. Scoppetta himself had no evidence that those with college credits make better firefighters. Levy Decl., Ex. HH, Scoppetta Tr. at 57-59. Despite this, Commissioner Scoppetta opposed dropping the college credit requirement. *Id.*

The City Continued to Use Exam 7029, and Chose to Use the Virtually-Identical Exam 2043, With Knowledge of the Ongoing Discrimination and In Violation of City Policy

116. In spite of its apparent adverse impact, Defendants continued to use the Exam 7029 eligibility list to select entry-level firefighters through the end of December 2004 – three years after Bloomberg first took office.

117. When Defendants began creating Exam 2043, they used the same development and test-construction process they had used to create Exam 7029, resulting in essentially the same test. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *66, *81-81, *142-43; Levy Decl., Ex. OO, Hirst Tr. 94:19-95:24.

118. 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. Levy Decl., Ex. UU at 5-6.

119. Exam 2043 was first given in 2002 and its resulting eligibility list was used to make entry-level appointments to the FDNY until at least January 2008. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *22.

THE EEOC'S PROBABLE CAUSE FINDINGS

120. 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 also alleging intentional discrimination. Levy Decl., Ex. W.

121. In the EEOC’s June 2004 Determination of the Vulcan Society charge of discrimination, it 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). Levy Decl., Ex. X.

122. Despite the findings of the EEOC, the City of New York refused to conciliate the charges or remedy the problems identified by the EEOC. Levy Decl., Ex. GG.

123. Three additional charges of discrimination were filed by Marcus Haywood, Roger Gregg and Candido Nuñez on February 24, 2005 concerning Exam 2043 (Levy Decl., Ex. AA), and the EEOC's Determinations of those charges found that Exam 2043 also had adverse impact and was not validated. Levy Decl., Ex. BB.

**DEFENDANT SCOPPETTA'S KNOWLEDGE
AND PARTICIPATION IN DISCRIMINATION**

124. Nicholas Scoppetta, an attorney by training, became Fire Commissioner in January 2002, after serving as Commissioner of the Administration for Children's Services. Levy Decl., Ex. HH, Scoppetta Tr. 7, 12, 20, 23-24. Scoppetta was aware of the lack of diversity in the FDNY long before he became Fire Commissioner. Between 1996 and January 2002, Scoppetta attended town hall meetings with Mayor Giuliani at which the issue of minority underrepresentation in the FDNY was raised. Levy Decl., Ex. HH, Scoppetta Tr. at 16-17.

125. In February 2002, Sherry Ann Kavalier, then-Assistant Commissioner for Human Resources for the FDNY, sent a letter to Deputy Commissioner of DCAS asking which agency would determine the validity of the written exam that would be administered that year since "some questions have been raised about its fairness/bias." Levy Decl., Ex. T. The letter was copied to, among others, Commissioner Scoppetta and DCAS Commissioner Hirst. *Id.*

126. Commissioner Scoppetta testified that he participated in a meeting with Mayor Bloomberg and Paul Washington regarding the problem of diversity in the Fire Department in

April 2002, Levy Decl., Ex. HH, Scoppetta Tr. 116:3-117:12; Ex. E, and he had additional meetings with representatives of the Vulcan Society concerning the same issue. Levy Decl., Ex. DD, Washington Tr. 117:11-25.

127. 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.

128. Yet, as noted above, Commissioner Scoppetta refused to conduct the adverse impact studies required by the City’s EEO Policy and recommended by the EEPC, and he supported the continuation of the 30 college credit requirement over the expert opinion of a psychometrician. Levy Decl., Ex. HH, Scoppetta Tr. 57:19-58:17.

**DEFENDANT BLOOMBERG’S KNOWLEDGE
AND PARTICIPATION IN DISCRIMINATION**

129. Mayor Bloomberg took office in January 2002. He became aware of the lack of racial diversity in the FDNY at some point early in his administration through personal observation and professional dealings with the FDNY. Specifically, he realized that its workforce “was heavily weighted towards White males”. Levy Decl., Ex. H, Bloomberg Tr. 26:24-28:9.

130. Mayor Bloomberg spoke to FDNY Commissioner Scoppetta about the diversity problem and discussed “how to get a broader range of people applying for the job.” Levy Decl., Ex. H, Bloomberg Tr. 28:10-29:4.

131. In April 2002, Mayor Bloomberg had a meeting with, among others, then-President of the Vulcan Society, Lieutenant (now Captain) Paul Washington. Levy Decl., Ex. E.

132. Bloomberg recalls discussing the issues in this case with the Vulcans, including

their charge that the written exam was biased, though not the specifics of any particular meeting or discussion. Levy Decl., Ex. H, Bloomberg Tr. 20:9-26:22.

133. Captain Washington recalls that in the meeting with Mayor Bloomberg he “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. We raised with the Mayor our [the Vulcan Society’s] belief that the exams are a poor indicator of one’s ability to do the job. Unfortunately, no progress came out of that meeting and the Vulcans continued to face resistance to any of the initiatives that we believed would increase the hiring of black firefighters.” Levy Decl., Ex. M, Washington Aff. ¶ 19.

134. FDNY Deputy Commissioner for Administration Douglas White had numerous conversations in early 2002 with members of the Vulcan Society about the negative impact of the tests on minority hiring. Levy Decl., Ex. R, White Tr. 37:15-38:5; 89:25-91:7. White recalls being present with Mayor Bloomberg and members of the Vulcan Society and recalls that Captain Washington raised concerns about the FDNY’s recruitment efforts and proposed alternatives to the existing exam selection procedures. Levy Decl., Ex. R, White Tr. 193:17-195:10; Levy Decl., Ex. V.

135. Deputy Commissioner White was aware for a long time that various concerns had been raised to the FDNY about the fairness of the entry-level exams. Levy Decl., Ex. R, White Tr. 133:19-137:23.

136. During an August 2002 meeting of the Advisory Committee attended by Mr. White, the FDNY Director of Diversity Initiatives Tarece Johnson, FDNY Chief Recruiter Philip Parr, and representatives of various fraternal organizations, Captain Washington discussed the unfairness of the written exams, stressing that “you don’t need to score 85 or above to be a good

firefighter.” Levy Decl., Ex. V, at EEP 0320. At this meeting, White himself noted that “Paul Washington had [previously] made those arguments to the Commissioner, Nicholas Scoppetta and the Mayor, Michael R. Bloomberg.” *Id.*

137. In responses to Interrogatories, Bloomberg said that he agreed with Commissioner Scoppetta’s statement, as quoted in the NEW YORK DAILY NEWS in September 2002, that “the Fire Department is 93% white and male – there’s something seriously wrong with that picture.” Levy Decl., Ex. JJ, Responses to Interrogatories No. 23-25.

138. Mayor Bloomberg stated that, in light of his understanding of the FDNY’s lack of racial diversity, he spoke to the FDNY about expanding outreach and recruitment efforts. However, he admits that in the case of a biased exam, no change in recruitment would result in improved test results. Levy Decl., Ex. H, Bloomberg Tr. 81:9-19.

139. Bloomberg testified that early in his administration he had conversations with FDNY Commissioner, FDNY Chief and others about whether the written entrance exam was discriminatory. Levy Decl., Ex. H, Bloomberg Tr. 29:16-30:24. “I asked everybody from the Commissioner on down, and I had nobody tell me that they thought the test was biased, other than if the Vulcan Society sued us and alleged it, I guess they *did*. And if Paul said it in a meeting, I guess he *did*. I have no recollection of a specific conversation.” Levy Decl., Ex. H, Bloomberg Tr. 76:18-77:2.

140. Bloomberg claims to have relied on the anecdotal responses of these firefighters and fire officers concerning the fairness of the exam even though the overwhelming majority of those he spoke to, as a statistical matter, were white and all of them had personally passed the exams. Levy Decl., Ex. H, Bloomberg Tr. 61:22-63:3; 90:13-92:8.

141. While Bloomberg now asserts that he spoke to firefighters and fire officers

regarding the fairness of the written test, he made no mention of such conversations in his responses to Interrogatories, which specifically asked Bloomberg to identify any communications he had regarding the FDNY's entry-level exams. Levy Decl., Ex. JJ, Responses to Interrogatories No. 39, 65.

142. Contrary to Mayor Bloomberg's claims that "nobody ever alleged that the [written] test was biased," Bloomberg testified that he "would have been informed essentially right away" about the EEOC charge filed by the Vulcan Society in August 2002. Levy Decl., Ex. H, Bloomberg Tr. 64:15, 74:23-75:22.

143. In April 2003, the EEPCC sent to Mayor Bloomberg a Report recounting the history of its audit, its statistical findings of disparate pass rates between white and black candidates (including the 91.6%-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. Fraenkel Decl., Ex. 3.

144. Six months later, in October 2003, Mayor Bloomberg refused to issue any such order. Levy Decl., Ex. Z.

145. At deposition, Bloomberg maintained that he has no recollection of the EEPCC Report or his response to it, but he never denied receiving the report and never denied having rejected its recommendation. Levy Decl., Ex. H, Bloomberg Tr. 110:10-15, 112:14-113:6.

146. In response to Interrogatories, Bloomberg confirms that "Other than through distribution of the Citywide EEO policy on January 31, 2005, 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, Response to Interrogatory No. 50.

147. Mayor Bloomberg declined to require that these studies be conducted because

“[a]fter talking with the Fire Commissioner, it seemed best to spend public resources to move forward with *new exams* and new recruitment strategies rather than spending scarce public money to study past exams.” Levy Decl., Ex. JJ, Response to Interrogatory No. 50 (emphasis added).

148. Yet, at the time of the EEPC’s Report, the “new” exam that the City was about to begin hiring from was Exam 2043, which was discriminatory in the same ways and for the same reasons as the virtually identical “old” Exam 7029.

149. Although Mayor Bloomberg testimony and responses to Interrogatories focus on the FDNY’s recruitment efforts as a method for improving its low numbers of black firefighters, even he conceded that, if the entrance exam was biased, he did not know that recruiting would solve the problem. Levy Decl., Ex. H, Bloomberg Tr. 79:25-81:22; Ex. JJ, Response to Interrogatory No. 50.

150. In February 2005, then-City Councilmember Yvette Clarke wrote to Mayor Bloomberg saying that the FDNY entry-level exam could be revised so that it was more job-related. Levy Decl., Ex. CC.

151. In March 2005 the New York Daily News reported that “the FDNY has the widest racial divide by far in city government.” Levy Decl., Ex. MM.

152. That same year – a campaign year – Bloomberg called Captain Washington, president of the Vulcan Society at the time, and acknowledged his own failure to increase the number of black firefighters, saying words to the effect of, “I know I haven’t been good on this issue.” Levy Decl., Ex. DD, Washington Tr. 149:17-150:11.

153. In 2006, Councilman Charles Barron, then-State Senator David Paterson, and other government officials wrote to Mayor Bloomberg once again raising concerns about the

disproportionately low percentage of minorities in the FDNY. Levy Decl., Ex. EE.

154. Around this same time, U.S. Congressman Charles Rangel 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. Levy Decl., Ex. FF.

155. Captain 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 exam. Mayor Bloomberg responded that he was looking into these possibilities and that DCAS was looking into changing the test procedure. Levy Decl., Ex. DD, Washington Tr. 115:5-116:3; 148:18-149:16.

156. Ultimately, during Mayor Bloomberg's administration and Commissioner Scoppetta's tenure, the percentage of black firefighters in the FDNY was lower than what it had been during the 1990s:

Year	Total Firefighters	Number of Black Firefighters	% of Total Firefighters
2006	8,989	298	3.31%
2005	8,850	284	3.20%
2004	8,765	261	2.97%
2003	8,624	254	2.94%
2002	8,184	226	2.76%
2001	8,509	245	2.87%
2000	8,655	263	3.03%
1999	8,710	258	2.96%
1998	8,720	273	3.13%
1997	8,425	279	3.31%
1996	8,627	295	3.41%
1995	8,667	304	3.50%
1994	8,655	315	3.63%
1993	8,603	320	3.71%
1992	8,646	335	3.87%
1991	8,682	336	3.87%

Levy Decl., Ex. A.

157. When shown Exhibit A and asked why the proportion of black firefighters fell during his administration compared to the early 1990s, Mayor Bloomberg responded, “It doesn’t appear to me that you are using the numbers correctly. Statistically there doesn’t seem to be a difference in the percentage, according to these documents, that the number of Black firefighters compared to total firefighters is roughly the same.” Levy Decl., Ex. H, Bloomberg Tr. 36:10-39:9.

158. In a document released by the City this year, the black firefighter incumbency rate as of May 31, 2009 was reported to be 3.14%. Levy Decl., Ex. VV; Meanwhile, black residents made up 25% of the City of New York as of 2002. *City of New York*, 2009 U.S. Dist. LEXIS 63153, at *3.

RESPONSE TO DEFENDANTS’ RULE 56.1 STATEMENT

159. Plaintiffs-Intervenors accept the assertions in paragraph “1” and assert that Exam 2043 was not administered until December 2002 and that the eligibility list resulting from Exam 2043 was not used for hiring purposes until May 2004.

160. Plaintiffs-Intervenors deny the assertions in paragraph “2” and assert that the EEPC’s 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 recommends, as a corrective action, that the FDNY “conduct an adverse impact study based on the results of the written examination” and “[i]f the Department’s study reveals that the test disproportionately screens out minority or female candidates, FDNY should conduct a validation study in accordance with the federal government’s ‘Uniform Guidelines on Employment Selection Procedures.’” Plaintiffs-Intervenors assert that this strongly suggests that

Exam 7029 not only failed the 80% Rule (which was clear from the pass rates) but had also not been validated, i.e., if it had been validated, the apparent adverse impact may not have been an issue.

161. Plaintiffs-Intervenors accept the assertions in paragraph “3” but do not accept any implication that Defendants did not know, or should not have known, prior to the EEOC’s June 24, 2004 probable cause finding, that written Exam 7029 had an adverse impact against black applicants and was not validated according to professional standards.

162. In response to paragraph “4,” Plaintiffs-Intervenors do not know if Bloomberg spoke to various FDNY employees and received comments supportive of the firefighter exams that are responsible for providing those individuals their jobs. Plaintiffs-Intervenors assert that the Court should judicially note that this method of assessing bias is absurd and no reasonable public official would use such a method, particularly when he could make inquiry of DCAS testing specialists (who minutely record race outcomes) or the EEPC specialists, who are the City’s professionals in auditing EEO issues. In this light, and noting that this explanation was not forthcoming in response to earlier answers to Interrogatories on the issue, the explanation is apparently recently contrived and is pretextual. Levy Decl., Ex. JJ, Responses to Interrogatories No. 39, 65. Moreover, Plaintiffs-Intervenors assert that this method of gathering information regarding the “bias” of the exam was neither consistent with local or federal law nor designed to elicit accurate information concerning the exam. Plaintiffs-Intervenors also assert that members of the Vulcan Society gave Defendant Bloomberg directly contrary assessments of the exam during the same time period (Levy Decl., Ex. E, Ex. V, Ex. M, Washington Aff. ¶ 19), as did the EEPC (Fraenkel Decl., Ex. 3) and the EEOC (Levy Decl., Ex. BB).


163. In response to paragraph “5,” Plaintiffs-Intervenors do not dispute that Defendant

Bloomberg gave the testimony annexed to the Declaration of Mr. Fraenkel. However, Plaintiffs-Intervenors deny the truth of the testimony cited and assert that, among other individuals, members of the Vulcan Society, including former president Paul Washington told Bloomberg that the test was biased (Levy Decl., Ex. V, Ex. H, Bloomberg Tr. 76:18-77:2 (“if Paul said it in a meeting, I guess he did”), Ex. M, Washington Aff. ¶ 19) as did the EEPC in its April 2003 Report to the Mayor (Fraenkel Decl., Ex. 3). It is also incredible that counsels and advisors representing the Mayor would not have told him of the allegations, given that one basis for the lawsuit against him were allegations of bias.

164. In response to paragraph “6,” Plaintiffs-Intervenors do not know if Bloomberg spoke to various FDNY employees and received comments supportive of the firefighter exams which they passed in order to get their jobs. Plaintiffs-Intervenors assert that the Court should judicially note that this method of assessing bias is absurd and no reasonable public official would use such a method, particularly when he could make inquiry of DCAS testing specialists (who minutely record race outcomes) or the EEPC specialists, who are the City’s professionals in auditing EEO issues. In this light, and noting that this explanation was not forthcoming in response to earlier answers to Interrogatories on the issue, the explanation is apparently recently contrived and is pretextual. Levy Decl., Ex. JJ, Responses to Interrogatories No. 39, 65. Moreover, Plaintiffs-Intervenors assert that this method of gathering information regarding the “bias” of the exam was neither consistent with local or federal law nor designed to elicit accurate information concerning the exam. Plaintiffs-Intervenors also assert that members of the Vulcan Society gave Defendant Bloomberg directly contrary assessments of the exam during the same time period (Levy Decl., Ex. E, Ex. V, Ex. M, Washington Aff. ¶ 19), as did the EEPC (Fraenkel Decl., Ex. 3) and the EEOC (Levy Decl., Ex. BB).

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