

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-and-

VULCAN SOCIETY, INC., for itself and on behalf of its members; MARCUS HAYWOOD, CANDIDO NUNEZ, and ROGER GREGG, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK; THE FIRE DEPARTMENT OF THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; MAYOR MICHAEL BLOOMBERG and NEW YORK CITY FIRE COMMISSIONER NICHOLAS SCOPPETTA, in their individual and official capacities,

Defendants.

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DEFENDANTS' RESPONSE TO PLAINTIFFS-INTERVENORS' STATEMENT OF FACTS PURSUANT TO LOCAL RULE 56.1

Pursuant to Local Rule 56.1 defendants submit the following response to Plaintiff-Intervenors' Statement of Undisputed Facts.

1. Deny the materiality of the assertions of paragraph "1" of plaintiffs-intervenors' 56.1 Statement, but respectfully refer the Court to cases and documents cited therein for a true and complete recitation of their contents.

2. Deny the materiality of the assertions of paragraph "2" of plaintiffs-intervenors' 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

3. Deny the materiality of the assertions of paragraph “3” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

4. Deny the assertions of paragraph “4” of plaintiffs-intervenors’ 56.1 Statement, to the extent it asserts that the EEOC made any conclusions with respect to Exam 7029 in that the EEOC’s determination of the Vulcans’ charge related to the exam given in 2002, i.e., Exam 2043 which the EEOC erroneously referred to as 7029 and deny the materiality of the assertions of paragraph “4” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents. See Report of Drs. Bobko and Schemmer at 26 to 29 annexed to the Declaration of William Fraenkel (“the Fraenkel Declaration”), as Exhibit 1; Declaration of Dr. F. Mark Schemmer at ¶ 3, annexed to the Fraenkel Declaration as Exhibit 2; Declaration of Dr. Catherine Cline at ¶ 7 annexed to the Fraenkel Declaration as Exhibit 3; Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4; Draft Job Analysis and Written Examination Development for the City of New York Firefighter Examination No. 0084, Final Report Part I December 18, 1992 (hereinafter referred to as the “Landy Report”, annexed to the Fraenkel Declaration as Exhibit 5; Deposition of Alberto Johnston, 01/15/08, 103:16-20, annexed to the Fraenkel Declaration as Exhibit 6; and the Deposition of Alberto Johnston, 02/04/08 414:12 to 415:12, 430:12-15 annexed to the Fraenkel Declaration as Exhibit 7.

5. Deny the assertions and the materiality of the assertions of paragraph “5” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

6. Deny the materiality of the assertions of paragraph “6” of plaintiffs-intervenors’ 56.1 Statement, except admit that the EEOC found that Exam 2043 had adverse impact against blacks and was not validated, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

7. Deny the materiality of the assertions of paragraph “7” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to document cited therein for a true and complete recitation of its contents.

8. Deny the materiality of the assertions of paragraph “8” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

9. Deny the materiality of the assertions of paragraph “9” of plaintiffs-intervenors’ 56.1 Statement, but respectfully refer the Court to documents cited therein for a true and complete recitation of their contents.

10. Deny the assertions of the second sentence of paragraph “10” of plaintiffs-intervenors’ 56.1 Statement, to the extent it incorporates the assertions of paragraphs 75 to 78, defendants incorporate by reference defendants responses, appearing hereinafter, to the assertions of paragraphs 75 to 78 of plaintiffs-intervenors’ 56.1 Statement and for purposes of this motion defendants state that it is undisputed that Exams 7029 and 2043 had a written and a physical components which the Notice of Examination indicated would be weighted on a 50/50 basis. See Declaration of Dr. F. Mark Schemmer at ¶¶ 4, 5, annexed to the Fraenkel Declaration as Exhibit 2.

11. Deny the materiality of the assertions of paragraph “11” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “11” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

12. For purposes of this motion, defendants accept the assertions of paragraph “12” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

13. Deny the assertions of paragraph “13” of plaintiffs-intervenors’ 56.1 Statement to the extent it intends to imply an impropriety concerning the cut-off scores for the Exams, but for purposes of this motion, defendants accept as undisputed that the passing score Exam 7029 was 84.705 and that the passing score for the written portion of Exam 2043 was 70.

14. For purposes of this motion, defendants accept the assertions of paragraph “14” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

15. Deny the materiality of the assertions of paragraph “15” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “15” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

16. Deny the materiality of the assertions of paragraph “16” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “16” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

17. Deny the materiality of the assertions of paragraph “17” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “17” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

18. Deny the materiality of the assertions of paragraph “18” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “18” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

19. Deny the materiality of the assertions of paragraph “19” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “19” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

20. Deny the materiality and the assertions of paragraph “20” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that each candidate’s Adjusted Final Average was equal to the candidate’s transformed score plus any applicable Residency, Legacy or Veterans’ points.

21. Deny the materiality and the assertions of paragraph “21” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that candidates Adjusted Final Average was equal to the candidate’s transformed score plus any applicable Residency, Legacy or Veterans’ points and admit that candidates were sent updated Notice of Results after administration of the PPT/

22. Deny the materiality of the assertions of paragraph “22” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “22” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

23. For purposes of this motion, defendants accept the assertions of paragraph “23” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

24. Deny the assertions of paragraph “24” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that CID investigated candidates on certified eligibility lists for, inter alia., character and background, which investigation included examining criminal record, military history, references, educational background, CFR-D certification (when required for appointment), English-speaking ability, citizenship, age, proof of identification and driving record.

25. For purposes of this motion, defendants accept the assertions of paragraph “25” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

26. To the extent that paragraph “26” of plaintiffs-intervenors’ 56.1 Statement purports to contain assertions of law, no response is required and defendants respectfully refer the Court to the case cited in paragraph “26” of plaintiff’s 56.1 Statement for a full and accurate statement of its contents, but for purposes of this motion, defendants admit that research methodologists have generally adopted the dichotomous decision rule in statistical significance testing that if the difference between two subgroups is less than 5% (or 1%) likely to have occurred by chance, then the difference is said to be “statistically significant” and the approximate corresponding values in standard deviations of the foregoing 5% and 1% values is two or three of these standard deviations

27. For purposes of this motion, defendants accept the assertions of paragraph “27” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

28. For purposes of this motion, defendants accept the assertions of paragraph “28” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

29. Deny the materiality of the assertions of paragraph “29” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “29” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

30. For purposes of this motion, defendants accept the assertions of paragraph “30” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

31. Deny the assertions of paragraph “31” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that as a group, black candidates who passed both the written and physical portions of Exam 7029 were ranked lower on the

eligibility list for Exam 7029 than were white candidates who passed both the written and physical components, and that the disparity between the average rank of white candidates and the average rank of black candidates on the eligibility list for Exam 7029 exceeded three (3) units of standard deviation.

32. For purposes of this motion, defendants accept the assertions of paragraph “32” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

33. Deny the assertions of paragraph “33” of plaintiffs-intervenors’ 56.1 Statement. See Plaintiffs-intervenors’ Exhibit O at 135.

34. Deny the materiality of the assertions of paragraph “34” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept as undisputed that defendants’ experts did not dispute the assertions of paragraph “32” of plaintiffs-intervenors’ 56.1 Statement.

35. Deny the materiality of the assertions of paragraph “35” of plaintiffs-intervenors’ 56.1 Statement in that defendants assert that under the EEOC adopted 80% rule no adverse impact is indicated, see the Report of Drs. Bobko and Schemmer at 9 to 11, annexed to the Fraenkel Declaration as Exhibit 1, but for purposes of this motion, defendants accept the assertions of paragraph “35” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

36. Deny the assertions of paragraph “36” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that as a group, black candidates who passed both the written and physical portions of Exam 2043 were ranked lower on the eligibility list for Exam 2043 than were white candidates who passed both the written and physical components, and that the disparity between the average rank of white candidates and the

average rank of black candidates on the eligibility list for Exam 2043 exceeded 2.9 units of standard deviation.

37. For purposes of this motion defendants accept the assertions of paragraph “37” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

38. Deny the assertion paragraph “38” of plaintiffs-intervenors’ 56.1 Statement, but if plaintiffs-intervenors’ premises of black candidates passing the exam at the same rate as white candidates is treated as a hypothetical or presuming each of the two groups were in all regards equally qualified, then for purposes of this motion the premise or assertion of paragraph “38” of plaintiffs-intervenors’ 56.1 Statement is undisputed.

39. Deny the assertion paragraph “39” of plaintiffs-intervenors’ 56.1 Statement, but if plaintiffs-intervenors’ premise of black candidates passing the exam at the same rate as white candidates is treated as a hypothetical or presuming each of the two groups were in all regards equally qualified, then for purposes of this motion the premise or assertion of paragraph “38” of plaintiffs-intervenors’ 56.1 Statement is undisputed.

40. Deny the assertion of paragraph “40” of plaintiffs-intervenors’ 56.1 Statement, on grounds that the cited expert’s report fails to set forth with sufficient specificity the underpinning of the conclusion thereby rendering it incapable of peer evaluation.

41. Deny the assertion of paragraph “41” of plaintiffs-intervenors’ 56.1 Statement, on grounds that the cited expert’s report fails to set forth with sufficient specificity the underpinning of the conclusion thereby rendering it incapable of peer evaluation.

42. Deny the assertion of paragraph “42” of plaintiffs-intervenors’ 56.1 Statement, on grounds that the cited expert’s report fails to set forth with sufficient specificity the underpinning of the conclusion thereby rendering it incapable of peer evaluation, but for

purposes of this motion accept as undisputed that plaintiff Nunez sat for Exam 2043 in December 2002 and was number 5003 on the list of eligibles for Exam 2043 and his list number was not reached until on or about January 2008.

43. Deny the assertions of paragraph “43” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants admit that defendants’ experts contend that with large sample sizes any significance levels of a purported disparity can readily give misleading and exaggerated impressions of the magnitude of such misimpression and this will increase along with any increase in the sample size. See Report of Drs. Bobko and Schemmer at 14 to 15 and Appendix A to the Fraenkel Declaration, annexed to the Fraenkel Declaration as Exhibit 1.

44. For purposes of this motion, defendants accept the assertions of paragraph “44” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

45. To the extent that paragraph “45” of plaintiffs-intervenors’ 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the guidelines cited in paragraph “45” of plaintiffs-intervenors’ 56.1 Statement for a full and accurate statement of its contents, further, for purposes of this motion, defendants accept the assertions of the first sentence of paragraph “45” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

46. Deny the assertions of paragraph “46” of plaintiffs-intervenors’ 56.1 Statement, due to the mischaracterization of both the testimony and the contents of the cited article and respectfully refer the Court to Dr. Bobko’s deposition of July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15, for a true and complete recitation of its contents and to the extent that paragraph “46” of plaintiffs-intervenors’ 56.1 Statement contains assertions of law, no

response is required and defendants respectfully refer the Court to the cases and regulations cited in paragraph “46” of plaintiffs-intervenors’ 56.1 Statement for a full and accurate statement of their contents.

47. Deny the assertions of paragraph “47” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to the Report of Drs. Bobko and Schemmer at 9 to 11, annexed to the Fraenkel Declaration as Exhibit 1, for a full and accurate statement of defendants’ analysis using the 80% rule and further refer the Court to defendants responses to plaintiffs-intervenors’ request for admissions which are not fully or characteristically set forth in paragraph “47” of plaintiffs-intervenors’ 56.1 Statement. See Plaintiffs-intervenors’ Exhibit M.

48. Deny the assertions of paragraph “48” of plaintiffs-intervenors’ 56.1 Statement, but, for purposes of this motion, defendants accept as undisputed that Dr. Bobko testified that, using a test of statistical significance, the pass/fail use of written Exam 7029 can result in a finding of disparate impact for black candidates for entry level position of firefighter. See Deposition of Dr. Philip Bobko dated July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15.

49. Deny the assertions of paragraph “49” of plaintiffs-intervenors’ 56.1 Statement, but, for purposes of this motion, defendants accept as undisputed that Dr. Bobko testified that, using a test of statistical significance, the rank order processing and selection of candidates from Exam 7029 can result in a finding of disparate impact for black candidates for entry level position of firefighter. See Deposition of Dr. Philip Bobko dated July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15.

50. Deny the assertions of paragraph “50” of plaintiffs-intervenors’ 56.1 Statement, but, for purposes of this motion, defendants accept as undisputed that, using a test of

statistical significance, the pass/fail use of written Exam 2043 can result in a finding of disparate impact for black candidates for entry level position of firefighter and deny the characterization of Dr. Bobko's testimony respectfully refers the court to the Deposition of Dr. Philip Bobko dated July 1, 2008, annexed to to the Fraenkel Declaration as Exhibit 15.

51. Deny the assertions of paragraph "51" of plaintiffs-intervenors' 56.1 Statement, due to the mischaracterization of the testimony and the contents of the cited article and respectfully refer the Court to Dr. Bobko's deposition of July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15, for a true and complete recitation of its contents.

52. Deny the assertions of paragraph "51" of plaintiffs-intervenors' 56.1 Statement See Report of Drs. Bobko and Schemmer at 9 to 11, annexed to the Fraenkel Declaration as Exhibit 1.

53. To the extent that paragraph "53" of plaintiffs-intervenors' 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the case cited in paragraph "53" of plaintiffs-intervenors' 56.1 Statement for a full and accurate statement of its contents, further, for purposes of this motion, defendants accept the assertions of the first sentence of paragraph "53" of plaintiffs-intervenors' 56.1 Statement as undisputed.

54. For purposes of this motion, defendants accept the assertions of paragraph "54" of plaintiffs-intervenors' 56.1 Statement as undisputed.

55. To the extent that paragraph "55" of plaintiffs-intervenors' 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the case cited in paragraph "55" of plaintiffs-intervenors' 56.1 Statement for a full and accurate statement of its contents.

56. Deny plaintiffs-intervenors' characterization of Dr. Schemmer's testimony as reflected in the first sentence of paragraph "56" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to Dr. Schemmer's deposition of Dr. F. Mark Schemmer, of July 8, 2008, annexed to the Fraenkel Declaration as Exhibit 8, for a true and complete recitation of its contents.

57. Deny the materiality of the assertions of paragraph "57" of plaintiffs-intervenors' 56.1 Statement.

58. Paragraph "58" does not contain an explicit statement of fact which can be admitted or denied, however to the extent the assertions of paragraph "58" of plaintiffs-intervenors' 56.1 Statement, attempt to assert that Exams 7029 and 2043 are not job related and consistent with job necessity, defendants deny the assertion. See Report of Drs. Bobko and Schemmer at 26 to 29 annexed to the Fraenkel Declaration as Exhibit 1; Declaration of Dr. F. Mark Schemmer at ¶ 3, annexed to the Fraenkel Declaration as Exhibit 2; Declaration of Dr. Catherine Cline at ¶ 7 annexed to the Fraenkel Declaration as Exhibit 3; Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4; the "Landy Report", annexed to the Fraenkel Declaration as Exhibit 5; Deposition of Alberto Johnston, 01/15/08, 103:16-20, annexed to the Fraenkel Declaration as Exhibit 6; and the Deposition of Alberto Johnston, 02/04/08 414:12 to 415:12, 430:12-15 annexed to the Fraenkel Declaration as Exhibit 7.

59. For purposes of this motion, defendants accept the assertions of paragraph "59" of plaintiffs-intervenors' 56.1 Statement as undisputed.

60. Deny plaintiffs-intervenors' characterization of Carol Wachter's testimony found in paragraph "60" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the

Court to Ms Wachter's deposition of January 17, 2008, annexed to the Fraenkel Declaration as Exhibit 9 for a true and complete recitation of its contents.

61. Deny plaintiffs-intervenors' characterization of Thomas Patitucci's testimony found in paragraph "61" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to Mr. Patitucci's depositions dated October 9, 2007 and June 25, 2008 annexed to the Fraenkel Declaration respectively as Exhibits 10 and 11, for a true and complete recitation of its contents.

62. Deny the assertions of paragraph "62" of plaintiffs-intervenors' 56.1 Statement, to the extent it attempts to suggest that the Examiners for Exams 7029 and 2043 were the same person, but for purposes of this motion, defendants accept the assertions that the Examiner for Exam 7029 did not conduct an analysis of whether the cutoff score of 84.705 used on Written Exam 7029 corresponded to the level of the tested abilities necessary to perform the firefighter job successfully. See the Deposition of Alberto Johnston, 01/15/08, 17:22 to 18:2 annexed to the Fraenkel Declaration as Exhibit 6.

63. For purposes of this motion, defendants accept as undisputed the assertions of paragraph "63" of plaintiffs-intervenors' 56.1 Statement that the cut-off score for Exam 2043 was set pursuant to DCAS Personnel Rule and Regulation 4.4.9.

64. Deny the assertions of paragraph "64" of plaintiffs-intervenors' 56.1 Statement to the extent they attempt to assert that the pass mark for Exams 7029 and 2043 must be the same and are not consistent with business necessity and respectfully refer the Court to Dr. Bobko's deposition of July 2, 2008, annexed to the Fraenkel Declaration as Exhibit 12 for a true and complete recitation of its contents, but for purposes of this motion, defendants accept as undisputed the assertions that Exams 7029 and 2043 are similar. See Deposition of Dr. David

Jones 09/09/08 at 81:17-21 annexed to the Fraenkel Declaration as Exhibit 13 and the Deposition of Dr. Catherine Cline, 03/24/08 at 458:17 to 459:6 annexed to the Fraenkel Declaration as Exhibit 14 and See Declaration of Dr. F. Mark Schemmer at ¶¶ 9, 14, annexed to the Fraenkel Declaration as Exhibit 2.

65. Deny the materiality of the assertions of, and object to, paragraph “65” of plaintiffs-intervenors’ 56.1 Statement as it not a statement of fact but an argumentative statement in the form of a suggestion of a hypothetical situation.

66. The assertions of paragraph “66” of plaintiffs-intervenors’ 56.1 Statement lack a citation to the record and therefore do not require a response.

67. Deny the assertions of paragraph “67” of plaintiffs-intervenors’ 56.1 Statement, due to the mischaracterization of the testimony and respectfully refer the Court to Dr. Bobko’s deposition of July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15, for a true and complete recitation of its contents, indeed the statements in the deposition reflect the fact that experts’ reports do not establish validity, but validity is established via the evidence reflecting the development and use of the examination. see Declaration of Dr. F. Mark Schemmer at ¶ 8 annexed to the Fraenkel Declaration as Exhibit 2.

68. To the extent that paragraph “68” of plaintiffs-intervenors’ 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the case cited paragraph “68” of plaintiffs-intervenors’ 56.1 Statement for a full and accurate statement of its contents, and further deny the assertions of paragraph “68” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. F. Mark Schemmer at ¶¶ 11-14 annexed to the Fraenkel Declaration as Exhibit 2.

69. Deny the assertions of the last sentence of paragraph “69” of plaintiffs-intervenors’ 56.1 Statement, see Declaration of Dr. F. Mark Schemmer at ¶¶ 11-14 annexed to the Fraenkel Declaration as Exhibit 2; Deposition of Dr. David Jones Dep 09/09/08 at 161:2-9, annexed to the Fraenkel Declaration as Exhibit 13, but for purposes of this motion, defendants accept as undisputed the remaining assertions of paragraph “69” of plaintiffs-intervenors’ 56.1 Statement.

70. To the extent that paragraph “70” of plaintiffs-intervenors’ 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the case cited paragraph “70” of plaintiffs-intervenors’ 56.1 Statement for a full and accurate statement of its contents, and further deny the assertions contained in paragraph “70” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Mr. Patitucci’s deposition dated October 9, 2007 annexed to the Fraenkel Declaration as Exhibit 10 and to Item Analysis for Exam 7029 and 2043 annexed to the Fraenkel Declaration as Exhibit 30.

71. Deny the assertions contained in final sentence of paragraph “71” of plaintiffs-intervenors’ 56.1 Statement and assert that differences in results are the likely result that the exams, although similar are not identical and differences in results are also likely due to changes in the abilities and preparedness of candidates whose taking of Exams 7029 and 2043 were separated by a period of years, and, for purposes of this motion, defendants accept the remaining assertions of paragraph “71” of plaintiffs-intervenors’ 56.1 Statement as undisputed. See Declaration of Dr. F. Mark Schemmer at ¶ 10 annexed to the Fraenkel Declaration as Exhibit 2; Declaration of Dr. Catherine Cline at ¶ 5 annexed to the Fraenkel Declaration as Exhibit 3.

72. Deny the materiality of the assertions of paragraph “72” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “72” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

73. Deny the materiality of the assertions of paragraph “73” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “73” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

74. Deny the materiality of the assertions of, and object to, paragraph “74” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs.

75. Deny the assertions of the second sentence of paragraph “75” of plaintiffs-intervenors’ 56.1 Statement, as the cited materials do not support the assertion and deny the materiality of the assertions of paragraph “75” of plaintiffs-intervenors’ 56.1 Statement.

76. Deny the assertions of paragraph “76” of plaintiffs-intervenors’ 56.1 Statement, and assert that City used a process for combining the written and physical scores consistent with standard statistical methods for equally weighting two measures from overlapping populations. Plaintiffs-intervenors’ challenge to the City’s approach are for effects that essentially do not have any pragmatic application, moreover, plaintiffs-intervenors’ experts Wiesen and Siskin disagree with regard to the direction of the alleged less than equal weighting. See Declaration of Dr. F. Mark Schemmer at ¶¶ 4, 5 annexed to the Fraenkel Declaration as Exhibit 2.

77. Deny plaintiffs-intervenors’ characterization of Dr. Cline’s testimony found in paragraph “77” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the

Court to Dr. Cline's deposition of February 21, 2008, annexed to the Fraenkel Declaration as Exhibit 16, for a true and complete recitation of its contents.

78. Deny the assertions of paragraph "78" of plaintiffs-intervenors' 56.1 Statement. See Declaration of Dr. F. Mark Schemmer at ¶¶ 6, 7 annexed to the Fraenkel Declaration as Exhibit 2.

79. To the extent that paragraph "79" of plaintiffs-intervenors' 56.1 Statement purports to contain assertions of law, no response is required and defendants respectfully refer the Court to the guidelines cited in paragraph "79" of plaintiffs-intervenors' 56.1 Statement for a full and accurate statement of their contents.

80. To the extent that paragraph "80" of plaintiffs-intervenors' 56.1 Statement purports to contain assertions of law, no response is required and defendants respectfully refer the Court to the guidelines cited paragraph "80" of plaintiffs-intervenors' 56.1 Statement for a full and accurate statement of their contents.

81. Deny the assertions of paragraph "81" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to Report of Drs. Bobko and Schemmer at 26 to 29 annexed to the Fraenkel Declaration as Exhibit 1.

82. Deny the materiality of the assertions of paragraph "82" of plaintiffs-intervenors' 56.1 Statement.

83. Deny the assertions of paragraph "83" of plaintiffs-intervenors' 56.1 Statement to the extent it suggests that the Exam 7029 was not valid or validated but accept as uncontested that Matthew Morrongiello did not term his report a validity study. See See Declaration of Dr. F. Mark Schemmer at ¶ 3, annexed to the Fraenkel Declaration as Exhibit 2; Declaration of Dr. Catherine Cline at ¶¶ 7, 14 annexed to the Fraenkel Declaration as Exhibit 3;

Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4; the “Landy Report”, annexed to the Fraenkel Declaration as Exhibit 5.

84. For purposes of this motion, defendants accept the assertions of paragraph “84” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

85. For purposes of this motion, defendants accept the assertions of paragraph “85” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

86. Deny the assertions of paragraph “86” of plaintiffs-intervenors’ 56.1 Statement to the extent it fails to acknowledge that during the development of Exam 2043 steps were taken to verify the continued applicability of the prior job analysis. See Deposition of Alberto Johnston, 01/15/08, 19:2-12, annexed to the Fraenkel Declaration as Exhibit 6.

87. Deny the assertions of paragraph “87” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello and further respectfully refer the Court to the “Landy Report”, annexed to the Fraenkel Declaration as Exhibit 5.

88. Deny the assertions of paragraph “88” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello.

89. Deny the assertions of paragraph “89” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello.

90. Deny the assertions of paragraph “90” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello.

91. To the extent that paragraph “91” of plaintiffs-intervenors’ 56.1 Statement contains assertions of law, no response is required and defendants respectfully refer the Court to the regulations cited paragraph “91” of plaintiffs-intervenors’ 56.1 Statement for a full and accurate statement of its contents and deny the assertions of paragraph “91” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents.

92. Deny the assertions of paragraph “92” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents.

93. Deny the assertions of paragraph “93” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello.

94. Deny the assertions of paragraph “94” of plaintiffs-intervenors’ 56.1 Statement and respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents.

95. For purposes of this motion, defendants accept the assertions of paragraph “95” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

96. Deny the materiality of the assertions of paragraph “96” of plaintiffs-intervenors’ 56.1 Statement as plaintiffs-intervenors’ own experts and the panel members have testified that over time a person’s view of what is important in a job may change and plaintiff’s expert, Dr. Jones, testified that if after a period of time a person’s changes their answer to a question concerning the importance of particular tasks the new answer does not necessarily call into question the validity of the first answer given some time before and further assert that one of the deponents whose testimony is cited by plaintiffs was not competent to testify. See Deposition of Dr. David Jones Dep 09/09/08 at 107:5-17 annexed to the Fraenkel Declaration as annexed to the Fraenkel Declaration as Exhibit 13; Deposition of Dr. Leaetta Hough, 09/11/08 at 132:18 to 133:8 annexed to the Fraenkel Declaration as Exhibit 17; deposition of Dr. Joel Wiesen, 09/03/08 at 102:14-21, annexed to the Fraenkel Declaration as Exhibit 18; deposition of Naim Vata 02/27/08 at 35:9-24 annexed to the Fraenkel Declaration as Exhibit 19, deposition of Steven Barretta 02/27/08 at 130:6 to 131:22 annexed to the Fraenkel Declaration as Exhibit 20; Deposition of Lorraine Cziko, 03/11/08 at 7:7 to 8:7, annexed to the Fraenkel Declaration as Exhibit 21.

97. Deny plaintiffs-intervenors’ characterization of Mr. Morrongiello’s testimony as reflected in the second sentence of paragraph “97” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Mr. Morrongiello’s deposition of January 29, 2008, annexed to the Fraenkel Declaration as Exhibit 22, for a true and complete recitation of its contents, particularly Mr. Morrongiello testified in terms of possibilities and stated that the linking panel members would have to be asked what they were thinking when they answered the questions, but defendants note plaintiffs’ own experts and the panel members have testified that over time a person’s view of what is important in a job may change and plaintiff’s expert, Dr.

Jones, testified that if after a period of time a persons changes their answer to a question concerning the importance of particular tasks the new answer does not necessarily call into question the validity of the first answer given some time before. See Deposition of Dr. David Jones Dep 09/09/08 at 107:5-17 annexed to the Fraenkel Declaration as annexed to the Fraenkel Declaration as Exhibit 13; Deposition of Dr. Leaetta Hough, 09/11/08 at 132:18 to 133:8 annexed to the Fraenkel Declaration as Exhibit 17; deposition of Dr. Joel Wiesen, 09/03/08 at 102:14-21, annexed to the Fraenkel Declaration as Exhibit 18; deposition of Naim Vata 02/27/08 at 35:9-24 annexed to the Fraenkel Declaration as Exhibit 19, deposition of Steven Barretta 02/27/08 at 130:6 to 131:22 annexed to the Fraenkel Declaration as Exhibit 20; Deposition of Lorraine Cziko, 03/11/08 at 7:7 to 8:7, annexed to the Fraenkel Declaration as Exhibit 21.

98. Deny plaintiffs-intervenors' characterization of Mr. Morrongiello's testimony as reflected in paragraph "98" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to Mr. Morrongiello's deposition of January 29, 2008, annexed to the Fraenkel Declaration as Exhibit 22 for a true and complete recitation of its contents.

99. Deny the assertions of paragraph "99" of plaintiffs-intervenors' 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 15 annexed to the Fraenkel Declaration as Exhibit 3. Defendants further respectfully refer the Court to Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4 for a full and accurate statement of its contents and the steps taken by Mr. Morrongiello.

100. Deny the assertions of paragraph "100" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to pages 26 to 29 of Defendants' Experts' report and note the statement on page 27 wherein the experts state that "we were also asked to comment on the issues of job relatedness and business necessity regarding exams #7029 and #2043. We do

so briefly here....” and deny plaintiffs-intervenors’ characterization of Dr. Bobko’s testimony and respectfully refer the Court to Dr. Bobko’s deposition of July 2, 2008, annexed to the Fraenkel Declaration as Exhibit 12 for a true and complete recitation of its contents.

101. Deny the materiality of the assertions of, and object to, paragraph “101” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs, but for purposes of this motion, defendants accept as undisputed that plaintiffs’ experts contest the validity of defendants exams and defendants reiterate and assert that defendants’ experts and witnesses maintain that Exams 7029 and 2043 were valid selection devices.

102. Deny the assertions of paragraph “102” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶¶ 7, 10, 11, 17 annexed to the Fraenkel Declaration as Exhibit 3.

103. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “103” of plaintiffs-intervenors’ 56.1 Statement.

104. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “104” of plaintiffs-intervenors’ 56.1 Statement.

105. Deny the assertions of paragraph “105” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept as undisputed that for Exams 7029 and 2043 it was only feasible to test for nine abilities including Written Comprehension, Written Expression, memorization, Problem Sensitivity, Deductive Reasoning, Inductive Reasoning, Information Ordering, Spatial Orientation and Visualization. See Deposition of Matthew Morrongiello, 01/29/08 at 322:22 to 323:4 annexed to the Fraenkel Declaration as Exhibit 22.

106. Deny the assertions of paragraph “106” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept as undisputed that at the time Exams 7029 and 2043 were designed it was deemed impractical for DCAS to test for some of the abilities which were identified as relevant to the job of entry level New York City firefighter and that these abilities that were impractical for which to test included oral comprehension and oral expression. See Declaration of Dr. Catherine Cline at ¶¶ 8, 9, 10, 17 annexed to the Fraenkel Declaration as Exhibit 3; Deposition of William Klimowicz 06/27/08 at 346:15 to 347:7 annexed to the Fraenkel Declaration as exhibit 23; and deposition of Thomas Patitucci Dep, 06/25/08 at 131:21 to 132:13, 274:24 to 275:23 annexed to the Fraenkel Declaration as exhibit 11.

107. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “107” of plaintiffs-intervenors’ 56.1 Statement.

108. Deny plaintiffs-intervenors’ characterization of Dr. Cline’s testimony found in paragraph “108” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Dr. Cline’s deposition of February 21, 2008, annexed to the Fraenkel Declaration as Exhibit 16 for a true and complete recitation of its contents and assert that Dr. Cline hold the opinion that testing for oral comprehension would have been cost prohibited and impractical. See Declaration of Dr. Catherine Cline at ¶¶ 8, 9, 17, annexed to the Fraenkel Declaration as Exhibit 3.

109. Deny the assertions in paragraph “109” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants assert that years after the development of Exams 7029 and 2043, Dr. Cline determined that, for the most recent entry level New York City firefighter examination, the state of the art in testing had developed to the point that it was not feasible and practical to test for several of the abilities for which had not been able to be included

in Exams 7029 and 2043. See Declaration of Dr. Catherine Cline at ¶¶ 10, 11, 17, annexed to the Fraenkel Declaration as Exhibit 3.

110. Deny the assertions in paragraph “110” of plaintiffs-intervenors’ 56.1 Statement, and assert that the cited testimony does not support the assertions in paragraph “110” of plaintiffs-intervenors’ 56.1 Statement.

111. Deny the materiality of the assertions of, and object to, paragraph “111” of plaintiffs-intervenors’ 56.1 Statement as it not a statement of fact but an argumentative statement in the form of a suggestion that certain abilities may not be the most important but plaintiffs fail to cite any evidence in support of this assertion, to the extent that paragraph “111” of plaintiffs-intervenors’ 56.1 Statement asserts that Exams 7029 and 2043 lacked validity because they did not test for mechanical ability defendants deny the assertion. See Declaration of Dr. F. Mark Schemmer at ¶¶ 15, 16 annexed to the Fraenkel Declaration as Exhibit 2.

112. Deny the assertions in paragraph “112” of plaintiffs-intervenors’ 56.1 Statement, (as the term “personal attributes,” which does not appear in the Exam 6019 Job Analysis Report), but for purposes of this motion, assert that Dr. Cline concluded that the position of entry level firefighter remained largely unchanged between Exams 7029 and 2043 and her development of exam 6019 and that Exams 7029 and 2043 tested for cognitive abilities and that Dr. Cline in preparing the subsequent examination 6019, identified non-cognitive abilities as also important for the job of entry level firefighter and defendants assert that years after the development of Exams 7029 and 2043, Dr. Cline determined that, for the most recent entry level New York City firefighter examination, the state of the art in testing had developed to the point that it was not feasible and practical to test for several of the abilities which had not

been able to be included in Exams 7029 and 2043. See Declaration of Dr. Catherine Cline at ¶¶ 10, 11 annexed to the Fraenkel Declaration as Exhibit 3.

113. Deny plaintiffs-intervenors' characterization of Dr. Schemmer's testimony found in paragraph "113" of plaintiffs-intervenors' 56.1 Statement, and respectfully refer the Court to Dr. Schemmer's deposition of July 8, 2008, annexed to the Fraenkel Declaration as Exhibit 8 for a true and complete recitation of its contents.

114. For purposes of this motion, defendants accept as undisputed the assertions of paragraph "114" of plaintiffs-intervenors' 56.1 Statement.

115. Deny the assertions in paragraph "115" of plaintiffs-intervenors' 56.1 Statement, as those assertions mischaracterize defendants' responses to certain requests for admissions, and assert that the KSAC's listed in paragraph "114" of plaintiffs-intervenors' 56.1 Statement have, disjunctively, been, on occasion, found to be important to the job of firefighter and respectfully refer the Court to defendants' responses and objections to the requests for admission for a true and complete recitation of their contents. See Plaintiffs-intervenors' Exhibit CC.

116. For purposes of this motion, defendants accept as undisputed the assertions of paragraph "116" of plaintiffs-intervenors' 56.1 Statement.

117. Deny the materiality of the assertions of paragraph "117" of plaintiffs-intervenors' 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph "117" of plaintiffs-intervenors' 56.1 Statement as undisputed.

118. For purposes of this motion, defendants accept as undisputed the assertions of paragraph "118" of plaintiffs-intervenors' 56.1 Statement, but assert that testing for non-cognitive abilities was not considered feasible at that time and therefore non-cognitive

abilities did not need to be included. See Deposition of Matthew Morrongiello, 01/29/08, at 322:22 to 323:4 annexed to the Fraenkel Declaration as Exhibit 22; Declaration of Dr. Catherine Cline at ¶¶ 10, 11, 17, annexed to the Fraenkel Declaration as Exhibit 3.

119. Deny the assertions in paragraph “119” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 12 annexed to the Fraenkel Declaration as Exhibit 3.

120. Paragraph “120” of plaintiffs-intervenors’ 56.1 Statement is not a statement of fact, to the extent it incorporates the assertions of paragraphs 159 to 163, defendants incorporate by reference defendants responses, appearing hereinafter, to the assertions of paragraphs 159 to 163 of plaintiffs-intervenors’ 56.1 Statement.

121. Deny the assertions in paragraph “121” of plaintiffs-intervenors’ 56.1 Statement as the cited materials do not support the assertions and the assertions are in contradiction to other admissible evidence. See e.g., Report of Drs. Bobko and Schemmer at 26 to 29 annexed to the Fraenkel Declaration as Exhibit 1; Declaration of Dr. F. Mark Schemmer at ¶ 4 annexed to the Fraenkel Declaration as Exhibit 2; Declaration of Dr. Catherine Cline at ¶ 7 annexed to the Fraenkel Declaration as Exhibit 3; Firefighter Exam. No. 7029 Test Development Report annexed here as Exhibit 4; the “Landy Report”, annexed to the Fraenkel Declaration as Exhibit 5; Deposition of Alberto Johnston, 01/15/08, 103:16-20, annexed to the Fraenkel Declaration as Exhibit 6; and the Deposition of Alberto Johnston, 02/04/08 414:12 to 415:12, 430:12-15 annexed to the Fraenkel Declaration as Exhibit 7.

122. Deny the materiality of the assertions of, and object to, paragraph “122” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs and to the extent that paragraph

“122” of plaintiffs-intervenors’ 56.1 Statement purports contains assertions of law, no response is required.

123. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “123” of plaintiffs-intervenors’ 56.1 Statement.

124. Deny the materiality of the assertions of paragraph “124” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “124” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

125. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “125” of plaintiffs-intervenors’ 56.1 Statement.

126. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “126” of plaintiffs-intervenors’ 56.1 Statement.

127. Deny the assertions of paragraph “127” of plaintiffs-intervenors’ 56.1 Statement but accept as undisputed that Dr. Wiesen conducted a reading analysis of the exams. See Declaration of Dr. F. Mark Schemmer at ¶ 17 annexed to the Fraenkel Declaration as Exhibit 2.

128. Deny the materiality of the assertions of paragraph “128” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “128” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

129. Deny the assertions of, and object to, paragraph “129” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs and to the extent that paragraph “129” of plaintiffs-intervenors’ 56.1 Statement purports contains assertions of law, no response is

required. See Declaration of Dr. F. Mark Schemmer at ¶ 17 annexed to the Fraenkel Declaration as Exhibit 2.

130. Deny the assertions in paragraph “130” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

131. Deny the assertions in paragraph “131” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

132. Deny the assertions in paragraph “132” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

133. Deny the assertions in paragraph “133” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

134. Deny the assertions in paragraph “134” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

135. Deny the assertions of, and object to, paragraph “135” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs and to the extent that paragraph “135” of plaintiffs-intervenors’ 56.1 Statement purports contains assertions of law, no response is required, but see the Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3 refuting these assertions.

required. See Declaration of Dr. F. Mark Schemmer at ¶ 17 annexed to the Fraenkel Declaration as Exhibit 2.

130. Deny the assertions in paragraph “130” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

131. Deny the assertions in paragraph “131” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

132. Deny the assertions in paragraph “132” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

133. Deny the assertions in paragraph “133” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

134. Deny the assertions in paragraph “134” of plaintiffs-intervenors’ 56.1 Statement. See Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3.

135. Deny the assertions of, and object to, paragraph “135” of plaintiffs-intervenors’ 56.1 Statement noting that the scheduling order in this matter did not contemplate rebuttal reports of the report cited by plaintiffs and to the extent that paragraph “135” of plaintiffs-intervenors’ 56.1 Statement purports contains assertions of law, no response is required, but see the Declaration of Dr. Catherine Cline at ¶ 13 annexed to the Fraenkel Declaration as Exhibit 3 refuting these assertions.

136. Deny for the reasons set forth above the assertions that “flaws” existed, defendants further deny the materiality of the assertions of the first two sentences of paragraph “136” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of the final sentence of paragraph “136” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

137. For purposes of this motion, defendants accept the assertions of paragraph “137” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

138. Deny the materiality of the assertions of paragraph “138” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “138” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

139. Deny the materiality of the assertions of paragraph “139” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “139” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

140. Deny the materiality of the assertions of paragraph “140” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “140” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

141. Deny the materiality of the assertions of paragraph “141” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “141” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

142. Deny the materiality of the assertions of paragraph “142” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “142” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

143. Deny the assertions and materiality of the assertions of paragraph “143” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept as undisputed that the Barrett meta-analysis did not included the four studies set forth in paragraph “143” of plaintiffs-intervenors’ 56.1 Statement.

144. Deny the materiality of the assertions of paragraph “144” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “144” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

145. Deny the materiality of the assertions of paragraph “145” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “145” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

146. Deny the assertions of paragraph “146” of plaintiffs-intervenors’ 56.1 Statement in that the cited materials do not refute the ability of validity generalization to support Exams 7029 and 2043, but simply challenge the use of one specific validity generalization study.

147. Deny the materiality of the assertions of paragraph “147” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “147” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

148. Deny the assertions of paragraph “148” of plaintiffs-intervenors’ 56.1 Statement. See the Declaration of Dr. Catherine Cline at ¶¶ 6 to 11 & 17 annexed to the Fraenkel Declaration as Exhibit 3.

149. Deny the materiality of the assertions of paragraph “149” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “149” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

150. Deny the materiality of the assertions of paragraph “150” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “150” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

151. Deny the materiality of the assertions of paragraph “151” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “151” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

152. Deny plaintiffs-intervenors’ characterization of Dr. Cline’s testimony found in paragraph “152” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Dr. Cline’s deposition of March 24, 2008, annexed to the Fraenkel Declaration as Exhibit 14 for a true and complete recitation of its contents.

153. Deny the materiality and the assertions in paragraph “153” of plaintiffs-intervenors’ 56.1 Statement, insofar as the term “personal attributes,” does not appear in the Exam 6019 Job Analysis Report, but for purposes of this motion defendants accept as undisputed, that Written Exam 6019 seeks to measure, inter alia, Adaptability, Tenacity, Integrity, Work Standards, Resilience, Coordination, and Establishing and Maintaining Interpersonal Relationships. See Notice of Examination for Exam 6019 page 2, annexed to the Fraenkel Declaration as Exhibit 24.

154. Deny the assertions found in the second sentence of paragraph “154” of plaintiffs-intervenors’ 56.1 Statement, and state that Dr. Cline testified that she wrote situational judgment questions for the custodians examination over a period of time beginning in December of 2001 until December 2002 and respectfully refer the Court to Dr. Cline’s deposition of February 21, 2008, annexed to the Fraenkel Declaration as Exhibit 16 for a true and complete

recitation of its contents and see the Declaration of Dr. Catherine Cline at ¶ 11, annexed to the Fraenkel Declaration as Exhibit 3.

155. Deny the assertions found in paragraph “155” of plaintiffs-intervenors’ 56.1 Statement due to the mischaracterization of Dr. Cline’s testimony and respectfully refer the Court to Dr. Cline’s deposition of March 24, 2008, annexed to the Fraenkel Declaration as Exhibit 14 for a true and complete recitation of its contents and state that Dr. Cline asserts that although SJE’s existed prior to 1999 many in the field still thought them experimental or not sufficiently proven and, at the time Exams 7029 and 2043 were developed, she would not have considered using some of them for examinations with a candidate pool as large as entry level New York City firefighter. See the Declaration of Dr. Catherine Cline at ¶¶ 10, 11, 17 annexed to the Fraenkel Declaration as Exhibit 3.

156. Deny plaintiffs-intervenors’ characterization of Dr. Bobko’s testimony found in paragraph “156” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Dr. Bobko’s deposition of July 1, 2008, annexed to the Fraenkel Declaration as Exhibit 15 for a true and complete recitation of its contents.

157. For purposes of this motion, defendants accept as undisputed the assertions of paragraph “157” of plaintiffs-intervenors’ 56.1 Statement.

158. Deny plaintiffs-intervenors’ characterization of Robert Alexander’s testimony found in paragraph “158” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Mr. Alexander deposition of dated June 13, 2008, annexed to the Fraenkel Declaration as Exhibit 25 for a true and complete recitation of its contents.

159. Deny the materiality of the assertions of paragraph “159” of plaintiffs-intervenors’ 56.1 Statement and the materiality of those assertions insofar they are not support by

the material cited. The cited materials do not indicate the results of any empirical study identifying the abilities considered most important for the job of firefighter. Rather, the cited materials identify the weight to be given on a single examination, in a jurisdiction other than New York, 33 years ago. See also the Declaration of Dr. F. Mark Schemmer at ¶ 15 annexed to the Fraenkel Declaration as Exhibit 2.

160. Deny the materiality of the assertions of paragraph “160” of plaintiffs-intervenors’ 56.1 Statement as defendants assert that the report which was compiled at least 23 years prior to Exam 7029, which did not examine the conditions unique to the City of New York but related to a far smaller jurisdiction with dramatically different forms of construction, but for purposes of this motion, defendants accept the assertions of paragraph “160” of plaintiffs-intervenors’ 56.1 Statement as undisputed but deny any implication that Exams 7029 and 2043 were not valid due to the quantity and nature of abilities tested. See the Declaration of Dr. Catherine Cline at annexed to defendants’ opposition to plaintiffs-intervenors’ 56.1 statement of facts as Exhibit 3 at ¶ 7; the Declaration of Dr. F. Mark Schemmer at ¶ 15 annexed to the Fraenkel Declaration as Exhibit 2.

161. Deny the materiality of the assertions of paragraph “161” of plaintiffs-intervenors’ 56.1 Statement as defendants assert that the examination to which plaintiffs refer would not have been practical to administer in the City of New York. See the Declaration of Dr. Catherine Cline at annexed to defendants’ opposition to plaintiffs-intervenors’ 56.1 statement of facts as Exhibit 3 at ¶¶ 8 , 9, 10, 11, 17.

162. Deny the assertion of in paragraph “162” of plaintiffs-intervenors’ 56.1 Statement due to the mischaracterization of Dr. Schemmer’s testimony and respectfully refer the Court to Dr. Schemmer’s deposition of Dr. F. Mark Schemmer, of July 8, 2008, annexed to the

Fraenkel Declaration as Exhibit 8, for a true and complete recitation of its contents which does not suggest even the possibility of feasibly testing entry level New York City firefighter candidates for the stated abilities at the time Exams 7029 and 2043 were underdevelopment.

163. Deny the materiality of the assertions of paragraph “163” of plaintiffs-intervenors’ 56.1 Statement as the O*Net on-line system does not purport to be an accurate inventory of the abilities needed for, nor does it purport to identify the abilities most important for, the job of entry level firefighter in a particular jurisdiction and is not intended for evaluation of the validity of a specific selection process, but for purposes of this motion, defendants accept the assertions of paragraph “163” of plaintiffs-intervenors’ 56.1 Statement as undisputed but deny any implication that Exams 7029 and 2043 were not valid due to the quantity and nature of abilities tested. See the Declaration of Dr. Catherine Cline at annexed to defendants’ opposition to plaintiffs-intervenors’ 56.1 statement of facts as Exhibit 3 at ¶ 7 and Declaration of Dr. F. Mark Schemmer at ¶¶ 3, 15 annexed to the Fraenkel Declaration as Exhibit 2.

164. Deny the materiality of the assertions of paragraph “164” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “164” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

165. Deny plaintiffs-intervenors’ characterization of Dr. Schemmer’s testimony found in paragraph “165” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Dr. Schemmer’s deposition of Dr. F. Mark Schemmer, of July 8, 2008, annexed to the Fraenkel Declaration as Exhibit 8, for a true and complete recitation of its contents which does not suggest even the possibility of feasibly testing entry level New York City firefighter candidates for the stated abilities at the time Exams 7029 and 2043 were underdevelopment.

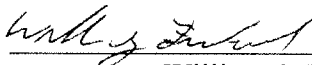
166. Deny the materiality of the assertions of paragraph “166” of plaintiffs-intervenors’ 56.1 Statement, but for purposes of this motion, defendants accept the assertions of paragraph “166” of plaintiffs-intervenors’ 56.1 Statement as undisputed.

167. Deny plaintiffs-intervenors’ characterization of Dr. Schemmer’s testimony found in paragraph “167” of plaintiffs-intervenors’ 56.1 Statement, and respectfully refer the Court to Dr. Schemmer’s deposition of Dr. F. Mark Schemmer, of July 8, 2008, annexed to the Fraenkel Declaration as Exhibit 8, for a true and complete recitation of its contents which does not suggest even the possibility of feasibly testing entry level New York City firefighter candidates for the stated abilities at the time Exams 7029 and 2043 were underdevelopment.

Dated: New York, New York
February 22, 2009

Respectfully Submitted,

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By: 

William S.J. Fraenkel
Assistant Corporation Counsel

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

VULCAN SOCIETY, INC., for itself and on behalf of its members;
MARCUS HAYWOOD, CANDIDO NUNEZ, and ROGER
GREGG, individually and on behalf of a class of all others similarly
situated,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK; THE FIRE DEPARTMENT OF THE CITY
OF NEW YORK; NEW YORK CITY DEPARTMENT OF
CITYWIDE ADMINISTRATIVE SERVICES; MAYOR MICHAEL
BLOOMBERG and NEW YORK CITY FIRE COMMISSIONER
NICHOLAS SCOPPETTA, in their individual and official capacities,

Defendants

**DEFENDANTS' RESPONSE TO
PLAINTIFFS-INTERVENORS' STATEMENT OF
FACTS PURSUANT TO LOCAL RULE 56.1**

MICHAEL A. CARDOZO

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*Of Counsel: William S.J. Fraenkel
Tel: (212) 788-1247
Law Dept. No. 2007-017441-LE*

Due and timely service is hereby admitted.

New York, N.Y., 200...

..... Esq.

Attorney for.....