

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

07 CV 2067

(NGG)(RLM)

-and-

VULCAN SOCIETY, INC., for itself and on behalf of its members, JAMES NICHOLSON and RUSEBELL WILSON, Individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief; and ROGER GREGG, MARCUS HAYWOOD, and KEVIN WALKER, individually and on behalf of a subclass of all other non-hire victims similarly situated; and CANDIDO NUNEZ and KEVIN SIMPKINS, individually and on behalf of a subclass of all other delayed-hire victims similarly situated,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK,

Defendant.

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**DEFENDANT'S MEMORANDUM OF LAW
WITH RESPECT TO LATE CLAIM FORMS**

Preliminary Statement

Defendant City of New York submits this Memorandum of Law in response to the Special Masters' letter, dated May 10, 2013 requesting guidance on how to handle recently submitted claim forms (Dkt. 1113). The City maintains that, in accordance with the Court's April 20, 2012 Order, (Dkt. 860) no claim forms should be accepted without a showing of good cause why the claimant was

not able to submit a claim form by the June 18, 2012 deadline. Although defendant has not objected to the acceptance of late claims before recently, now that the deadline is almost 10 months past, an individual attempting to submit a claim form should be required to submit an affidavit explaining in detail why s/he was not been able to submit a claim form at any time in the last 10 months. Further, in no event should a late claim form seeking priority hiring relief be accepted. Finally, the City agrees with the Special Masters' recommendation that no claim should be accepted after June 10, 2013 under any circumstances.

STATEMENT OF RELEVANT FACTS

The Court addressed how late claims should be handled in its Order dated April 20, 2012 (Dkt. 860), which states:

5. In order to be eligible for individual relief, applicants must submit a completed claim form to the United States no later than forty-five (45) days after the City's deadline for mailing the notice documents pursuant to Paragraph 1 of this Order. Any applicant who does not timely submit a claim form, absent a showing of good cause, shall be deemed to have waived any right to be considered for individual relief.

Dkt. 860 at 5, ¶ 5.

On May 3, 2013, the City completed mailing of the notice documents, including the claim forms to each black or Hispanic applicant who took Written Exam 7029 and/or 2043. The deadline for returning the completed claim forms

was set as June 18, 2012. As the Court may recall, the first page of the notice documents included a shaded box labeled “Important Deadlines” and instructed “All Applicants” that by June 18, 2012 they must “mail in the **Claim Form** to be considered for money, a firefighter job or seniority.” The shaded box included the warning that, “If you **do not mail** in the Claim Form by June 18, 2012, you may not be considered for money or any other award.” A copy of the first page of the notice documents is attached for the Court’s convenience.

The Court required the City to keep copies of all notice documents that were returned as undeliverable and provide the United States with lists of all individuals whose notice documents were returned, as well as with copies or scanned images of the mailing envelopes that were returned. (Dkt. 860, ¶ 3). In addition, if the United States or counsel for Plaintiffs-Intervenors provided the City with an alternative address for any individual whose notice documents were returned as undeliverable, the City was required to re-mailed the notice documents. (Dkt. 860, ¶4). The parties, therefore, have records of everyone whose notice documents were returned as undeliverable. In addition to the direct mailing to all black or Hispanic applicants who took Written Exam 7029 and/or 2043, the Court required the City to distribute notice by publication and broadcast. The City published a notice, approved by the Court, once a week in each of 13 newspapers for five weeks, (Dkt. 860 ¶11 and Appendices A and B). In addition, an

advertisement was broadcast five times daily for five weeks on each of six radio stations. (Dkt. 860 ¶12 and Appendices C and D). The newspaper and radio advertisements provided the URL for the Department of Justice's webpage for this case from which a claim form could be downloaded, as well as the telephone numbers designated by the Department of Justice and counsel for Plaintiffs-Intervenors for calls related to this case.¹ More than 1000 individuals who did not take either Exam 7029 or 2043 submitted timely claim forms that they presumably downloaded from the Department of Justice's website.

In late July 2012, the City mailed notice of the fairness hearing on the then-Proposed Relief Order to all black and Hispanic applicants who took Written Exams 7029 and 2043. Therefore, potential claimants received another direct mailing about the lawsuit and relief process.² (Dkt. 917). In addition, this case has been the focus of some media attention. In October 2012 when the Court held the fairness hearings on the relief order, a number of newspapers covered the proceedings. *See e.g.* <http://www.nydailynews.com/new-york/fdny-hiring-sparks-protests-brooklyn-federal-court-article-1.1172257> ,

¹ The Spanish-language radio and print ads did not include the telephone number provided by counsel for Plaintiffs-Intervenors.

² In addition, the fairness hearing notice documents were mailed to all applicants who took Written Exam 2000 or 2500 who had not provided an email address, and were sent via email to all black and Hispanic applicants who took Written Exam 2000 or 2500 who had provided email

http://www.nytimes.com/2012/10/02/nyregion/a-day-to-speak-out-on-new-york-fire-department-bias-case.html?_r=0 ,

http://www.qchron.com/editions/queenswide/fdny-fairness-hearing-draws-protesters/article_9e4351d0-ff2d-5a28-8b54-cb68fd632f34.html.

ARGUMENT

GOOD CAUSE MUST BE SHOWN FOR ANY LATE CLAIMS, NO PRIORITY HIRE CLAIMS SHOULD BE ACCEPTED AND A FIRM DEADLINE OF JUNE 10, 2013 MUST BE ENFORCED.

Any applicant who was mailed the notice form and whose initial mailing or subsequent mailing was not returned as undeliverable should be required to present a very compelling explanation as to why s/he was unable to submit a claim form until recently. Simply submitting the form without even attempting an excuse or stating that s/he did not open the mail or did not understand there was a deadline or a form to submit should not be accepted as “good cause.” *Morangelli v. Chemed*, 275 F.R.D. 99 (E.D.N.Y. 2011)(requiring good cause be shown by detailed affidavits explaining the reasons why opt-in forms submitted five months past deadline were not submitted earlier); *Ayers v. Ferry*, 2007 U.S. Dist. Lexis 76539 (S.D.N.Y. 2007)(requiring affidavits offering

addresses. The firefighters and fire officers unions, as well as the United Women Firefighters were also mailed notice of the fairness hearing. Dkt. 917.

good cause for untimely filing of consent forms in FLSA collective action). In light of the direct mailings, the radio and television advertisements, notice of the fairness hearings on the relief order, the fairness hearings themselves and attendant media coverage, anyone who lived in the New York metropolitan area who seeks to file a late claim form must be required to submit an affidavit credibly demonstrating that they had no way of knowing about the claims process until very recently and immediately took action to obtain and submit a claim form.

No additional claims seeking priority hiring relief should be accepted, regardless of whether good cause can be shown because allowing additional priority hire claims at this time would interfere with the progress of the litigation. As of April 30, 2013, the Special Masters had completed submission of their Reports and Recommendations for all individual who requested Priority Hiring Relief, except one.³ (Dkt. 1105, §I). The Court is presently making final determinations with respect to those Reports and Recommendations. *See e.g.* Dkts. 1106 and 1112. The City intends to appoint Priority Hire claimants to the probationary class scheduled to enter the Fire Academy on July 29, 2013 from among those that the Court finds eligible for priority hiring relief. The

³ The outstanding claim form was submitted on April 16, 2013. The individual has been given at least two opportunities to submit an explanation for his lateness. In the City's view, neither of the explanations provided demonstrate good cause as the individual admits that he knew about the lawsuit and, at best, describes desultory efforts to make a claim.

management of a complex action and claims process requires that appropriate deadlines be clear and enforced. In order to keep the relief stage moving forward and allowing the parties and Special Masters to efficiently plan and schedule the remaining phases of the claims process, there must be deadlines that the parties and the Special Masters can rely on. *See In re Worldcom*, 237 F.R.D. 541, 544 (S.D.N.Y. 2006).

In any event, no claim forms, regardless of excuse, should be accepted after June 10, 2013 so that the Special Masters can complete their eligibility recommendations by June 17, 2013. The parties have been planning and scheduling further steps in Phase IV of the relief process, including discovery from the claimants with respect to mitigation, damages for lost fringe benefits, and noneconomic damages, and calculation of awards. Dkt. 11-5 and 1105-1. In order to efficiently conduct such discovery and move through additional steps towards the conclusion of the relief stage, the parties and Special Masters must know the universe of eligible claimants. Knowing the universe of eligible claimants is necessary, for example, to proceed in an organized manner with discovery requests. Further, knowing number of eligible Nonhire and Delayed-Hire claimants is a prerequisite to the United States' ability to make preliminary back pay calculations. Courts have fixed deadlines and refused to allow exceptions, even for good cause, under circumstances where allowing additional claims would

impede the progress of the litigation. See *EEOC v. Woolworth, Co.*, 2001 U.S. Dist. LEXIS 2506 *21-23 (S.D.N.Y. 2001). Strictly enforcing a June 10, 2013 deadline would enable the Special Masters to finalize all their eligibility Reports and Recommendations by the June 17, 2013 date that they have set for themselves.

CONCLUSION

For the foregoing reasons, any individual seeking to submit a late claim form should be required to submit an affidavit detailing the reasons why s/he did not submit a claim form by the June 18, 2012 deadline or at any time in the intervening months and demonstrating that s/he immediately took reasonable steps to submit a claim form upon learning of the claims process. The Special Masters should issue a report and recommendation as to whether good cause has been shown. No claims seeking priority hiring relief should be accepted regardless of whether good cause can be shown and a deadline of June 10, 2013 for all other claims should be strictly enforced.

Dated: New York, New York
May 14, 2013

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By: 
MICHAEL A. CARDOZO

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

A court approved this notice. This is not an advertisement from a lawyer.

If you are black or Hispanic and took a written exam to become a NYC firefighter between 1999 and 2006, you must act now to protect your rights in a lawsuit.

You may be eligible for money, a firefighter job, and seniority, but you must act now to be considered.

- In a lawsuit filed by the United States, a federal court has ruled that the City of New York discriminated against blacks and Hispanics who took written exams for firefighter jobs between 1999 and 2006.
- The Vulcan Society and seven black applicants who took the 1999 or 2002 firefighter tests filed class action claims on behalf of black applicants as part of the lawsuit.
- **Please read this notice carefully**, as City records show that you may have taken one of the discriminatory written exams between 1999 and 2006. Your rights and options are explained in this notice.

IMPORTANT DEADLINE

All Applicants

By JUNE 18, 2012:

- ✓ You must mail in the **Claim Form** to be considered for money, a firefighter job, or seniority.
- X If you **do not mail** in the Claim Form by June 18, 2012, you may not be considered for money or any other award.

Black Applicants Only

If you are black, please read the document named "Additional Information for All Black Applicants."

Any questions? Read the following notice and visit www.justice.gov/fdnycase