No. 10-277

In The Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The Petition seeks review of an interlocutory class certification order that the appeals court affirmed in part, reversed in part, and remanded for reconsideration on two issues central to the questions presented by Petitioner. Class certification orders are inherently provisional, but the two issues still to be resolved render this order particularly ill-suited for certiorari review at this time. As a result, the Petition raises questions that this case does not present – and may never present. The request for review is, thus, premature. There are additional reasons why it should be denied.

The First Question posits the existence of a circuit split as to whether and how "monetary relief" claims may be certified in a Rule 23(b)(2) injunctive class action. While the circuits have treated claims for *legal damages* under Rule 23(b)(2) somewhat differently, there is no circuit split presented by the *en banc* ruling, as the only form of monetary relief that the Ninth Circuit allowed to proceed collectively was *equitable back pay*. All the circuits that have addressed the issue agree that equitable back pay may properly be certified in a Rule 23(b)(2) class action.

The Second Question – an amalgam of purported errors, large and small, based on a host of legal doctrines – makes little pretense of meeting this Court's requirements for certiorari. No circuit split exists as to any of these issues. Instead, the Petition

exhorts this Court to second-guess the case-specific findings of the district court or to adopt, in the first instance, legal theories never accepted by any appellate court.

Petitioner returns repeatedly to the refrain that the certified class is very large, a fact that is indisputably true but legally irrelevant. The class is large because Wal-Mart is the nation's largest employer and manages its operations and employment practices in a highly uniform and centralized manner. The district court was keenly aware of the implications of the class size but ultimately concluded that "Title VII . . . contains no special exception for large employers." App. 165a. The certification decision was firmly grounded in this Court's Title VII class action jurisprudence and "[c]ertification does not become an abuse of discretion merely because the class has 500,000 members." App. 112a (Graber, J., concurring).

STATEMENT OF THE CASE

This class action alleges that Petitioner Wal-Mart Stores discriminates against its female retail store employees with respect to corporate-wide pay and promotion policies and practices. As a consequence, women employed by Wal-Mart "are paid less than men in comparable positions, despite having higher performance ratings and greater seniority" and "receive fewer – and wait longer for – promotions to in-store management positions than men." App. 5a.

Plaintiffs contend that these policies and practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq*. Plaintiffs challenge those national practices under theories of disparate treatment and disparate impact discrimination. The complaint seeks injunctive relief, back pay, and punitive damages; it does not seek compensatory damages or retroactive promotions.

After a year and a half of discovery, including more than 175 lay and expert depositions and production of over one million pages of documents, Plaintiffs sought certification of the class under Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). In support of their certification motion, plaintiffs submitted substantial evidence demonstrating that hourly and salaried retail female employees receive significantly lower pay and fewer advancement opportunities than do their male counterparts; that Wal-Mart has a uniform personnel and management structure across its stores; that Wal-Mart maintains company-wide policies governing pay and promotion decisions within the stores; that these policies uniformly delegate substantial discretion to store and regional managers to make personnel decisions for store employees; and that its Home Office exercises extensive oversight of the stores. The evidence further revealed that these policies, exercised within a strong, centralized corporate culture, adversely affected female employees in every one of the company's 41 domestic regions. The disparate outcomes for men and women were highly statistically significant

such that they were extremely unlikely to result from chance.

The evidence also demonstrated that Wal-Mart senior officials closely monitored pay and promotions in the stores and were aware of the adverse impact of Wal-Mart's policies on female employees, but failed to take steps to eliminate these discriminatory barriers. The Executive Vice President for People regularly reported that Wal-Mart lagged behind its competitors in the advancement of women into management. Several years before this action was filed, he warned that the company was "behind the rest of the world," a conclusion confirmed by plaintiffs' labor economist. District Court Record ("DCR") Webber Decl., Ex. 11; App. 223a-224a.

Plaintiffs presented evidence that Wal-Mart's system fosters gender stereotyping, and scores of class members gave powerful examples of it. App. 193a-194a, 225a-226a. At Sam's Club Home Office executive meetings, senior management often referred to female store associates as "little Janie Qs" and "girls." DCR Webber Decl., Ex. 36. Wal-Mart's Executive Vice President for People saw nothing wrong with a district manager holding his management meetings at Hooters restaurants. *Id.*, Ex. 89. In 1998, a consultant retained by Wal-Mart advised the company that a "glass ceiling is perceived by many women" at Wal-Mart and "some [district managers] . . . do not seem personally comfortable with women in leadership roles." *Id.*, Ex. 88. One former Wal-Mart Vice President described the company's diversity

efforts as "lip service," App. 195a, a conclusion confirmed by a detailed analysis of Wal-Mart's diversity programs. App. 194a-195a.

In an 84-page order, Judge Martin J. Jenkins granted in part and denied in part plaintiffs' class certification motion. The court fully certified the claims for injunctive relief and back pay under Rule 23(b)(2), but limited the promotion class to those class members with objective evidence to confirm their interest in promotion. The court also exercised its discretion to provide notice and an opportunity to opt out to class members for the punitive damages claim. App. 242a-243a.

The district court made extensive findings of fact to support its conclusion that Rule 23 requirements had been met. The Petition largely omits reference to these detailed findings.

Unequal Promotional Opportunities – The district court found that "roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women." App. 176a. When Wal-Mart's representation of women in management was compared to that of its twenty largest competitors, there was a statistically significant shortfall at nearly 80% of the stores. App. 223a. The district court credited plaintiffs' proof of "a statistically significant shortfall of women being promoted into each of the in-store management classifications over the entire class period." This shortfall was "consistent in nearly every geographic region at Wal-Mart." App.

212a. Women also took longer than men to enter management positions. App. 198a. These observed differences existed even though female employees at Wal-Mart generally have more seniority and better performance ratings than do male employees. Appellate Excerpts of Record 173, 175-80.

Unequal Pay – Plaintiffs' statistical regressions for hourly and salaried employees showed that women were paid significantly less than men, and this pay gap increased each year. This pattern was consistent for all store classifications in all regions even when seniority, turnover, store, job performance, job position, part-time or full-time status, and other factors were taken into account. App. 200a, 209a. After careful consideration of the parties' competing analyses, the lower court concluded that plaintiffs' statistical analysis raises "an inference of company-wide discrimination in both pay and promotions." App. 281a.

Uniform Structure and Central Control – The district court found Wal-Mart stores are operated "with a high degree of store-to-store uniformity" and centralized control. App. 190a. "[T]he personnel structure within each store operates in a basically similar fashion using similar job categories, job descriptions and management hierarchies." App. 174a -175a. "[E]ach individual store is subject to oversight from the company's Home Office" that includes "a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and

constant basis." App. 190a, 192a. Wal-Mart has a far higher concentration of its regional and senior management based in its Home Office than its competitors do, further confirming its unusually centralized nature. App. 191a, n.17.

Uniformity of Promotion Policies and Practices – Regional and district managers make promotion decisions for salaried store management positions. App. 181a-182a. The district court found that "[t]he subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities." App. 180a. There was no application process for the vast majority of openings for mid-level and higher level store management positions. As a result, "class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose." App. 182a-183a. Because of Wal-Mart's decision not to post openings, "[m]anagers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." App. 183a.

Uniformity of Compensation Policies and Practices – "All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure." App. 176a. The Home Office establishes minimum starting rates for each hourly job in the retail stores. *Id.* While store managers are granted substantial discretion in making pay decisions for

hourly employees, any pay increase above a certain percentage is automatically reported to higher management and requires special approval. App. 177a.

The compensation system for salaried in-store managers is set by common, company-wide policy. App. 178a. The Home Office sets base pay ranges for each in-store salaried position, and any departures from these pay levels are made "primarily by District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the [Home Office-based] Regional Managers." App. 178a. For both hourly and salaried compensation policies and practices, the district court found that there "is significant uniformity across stores, and that Defendant's policies all contain a common feature of subjectivity." App. 180a. *See also* App. 124a, n.9 (dissenting opinion) ("it is undisputed that Wal-Mart maintains uniform company-wide policies. . . .").

Corporate Culture – The district court concluded that Wal-Mart's unique culture is an additional factor supporting commonality because "it promotes and sustains uniformity of operational and personnel practices" and "guide[s] managers in the exercise of their discretion." App. 188a, 192a. It found "no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture." App. 188a. The court noted that Wal-Mart trains its employees each week, beginning with orientation, in lessons on Wal-Mart culture ("the Wal-Mart Way") and that culture is an integral part of all management training programs.

App. 188a-189a. Wal-Mart's practice of "promoting from within" means that "the culture lessons learned by junior-level employees contribute to building a foundation of common understanding and practice among the management team." App. 189a. Further, the company regularly moves store-level managers across stores, districts, regions, states, and divisions, which "could only be efficient in a company with a high degree of store-to-store uniformity" and "ensure[s] that a uniform Wal-Mart Way culture operates consistently throughout all stores." App. 189a-190a.

* * *

In summary, the district court found that plaintiffs provided "significant evidence of company-wide practices and policies" that "raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner." App. 226a.

Scope of Injunctive Relief Sought – The district court also noted that the broad prospective relief sought would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide" that would benefit current and future female employees. App. 239a.

Back Pay Procedures – The district court found that, if class liability were established, individual hearings would not be required to determine back pay for eligible class members. App. 243a-276a. For the claims of unequal pay, it found there was ample

objective data in Wal-Mart's electronic employee database from which a determination of individual qualifications and lost back pay could be made without individual hearings. App. 261a-262a, 270a-272a. For promotions claims, however, it found there was insufficient data available to determine lost back pay because, for many class members, objective data was not available to document an interest in promotion. App. 267a. Accordingly, it limited the back pay remedy for promotion claims to a subset of the class for which objective data of interest existed. App. 267a-268a. For pay claims, however, where there is no need to document an interest in equal pay, there was sufficient data available to identify "the *actual* victims of any proven discriminatory pay policy." App. 271a (emphasis in original).

Ruling on Expert Evidence – With the class certification order, the district court concurrently issued a separate 18-page order addressing the parties' motions regarding their respective expert witnesses. (That order was not included in the Certiorari Appendix nor discussed in the Petition, but is an Addendum to this Brief.) In that order, the district court addressed and rejected Wal-Mart's challenges to each of plaintiffs' three experts. Addendum at 4-15. The order also granted plaintiffs' motion to strike the foundation for Wal-Mart's expert pay analysis, finding that a survey of store managers conducted by defense counsel was wholly unreliable. Addendum at 17-23; App. 203a-204a.

Proceedings on Appeal – Wal-Mart appealed the class certification order; plaintiffs cross-appealed, challenging the decision to limit the promotion class to those class members with objective evidence of their interest in promotion. A Ninth Circuit panel affirmed the certification in its initial decision and in a modified opinion. Wal-Mart then sought *en banc* review. The Equal Employment Opportunity Commission filed an *amicus* brief urging the *en banc* court to affirm the district court's determination that Title VII did not mandate individual Stage II hearings.

The *en banc* court issued a mixed ruling, affirming the order in part and reversing in part. The court emphasized that district courts must conduct a "rigorous analysis" to ensure that the requisites of Rule 23 have been satisfied. It concurred with the holding of the Second Circuit in *In re Initial Public Offerings Secs. Litig.,* 471 F.3d 24, 40-41 (2d Cir. 2006), that this analysis may properly require the evaluation of evidence that overlaps with the merits. App. 14a, 31a, 39a-40a.

The *en banc* court then affirmed the certification of the pay claim and the limited certification of the promotion claim, rejecting plaintiffs' cross-appeal. It overruled its own prior decision in *Molski v. Gleich,* 318 F.3d 937 (9th Cir. 2003), which had established a standard for certification under Rule 23(b)(2) focused primarily on the subjective intent of the named plaintiffs. It then remanded the issue of whether punitive damages claims can be certified under Rule 23(b)(2) or (b)(3). It also determined that class

members not employed by Wal-Mart on the date that the complaint was filed could not be included in the Rule 23(b)(2) class because they lacked standing to seek injunctive relief. It remanded the issue of whether the claims of these former employees could be certified under Rule 23(b)(3).

REASONS FOR DENYING THE WRIT

I. The Writ Should Be Denied Because the Decision is Interlocutory and Two Fundamental Issues Remain Unresolved

The Petition seeks review of an interlocutory class certification order. This Court does not typically review interlocutory orders, and for good reason. *See Virginia Military Inst. v. United States,* 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of the petition for writ of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Premature review risks wasting the Court's resources because legal issues may change or be mooted by the time of any final judgment. Class certification orders, which may be "altered or amended before final judgment," are especially fluid, further counseling against interlocutory review. Fed. R. Civ. P. 23(c)(1)(C). *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 (1978).

The order in this case is particularly ill-suited for review because even the scope of the class certification remains unsettled. The appeals court remanded:

1) the question of whether and how punitive damages should be certified; and 2) whether to certify the claims of the class members no longer employed when the complaint was filed under Rule 23(b)(3). App. 94a -102a.[1] Even after these remaining questions have been addressed, the scope of any class may be further modified by additional pre-trial proceedings.

Federal Rule of Civil Procedure 23(f) permits discretionary interlocutory appellate review as a safeguard to ensure that class certification orders do not function as a "death knell" to the litigation for either plaintiff or defendant. *Prado-Steiman ex rel. Prado v. Bush,* 221 F.3d 1266, 1274 (11th Cir. 2000). Rule 23(f) appeals are "generally disfavored" because they are "inherently 'disruptive, time-consuming, and expensive.'" *Id.* at 1276 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 294 (1st Cir. 2000)). As a result of this discretionary appeal procedure, Wal-Mart has already been afforded the opportunity for review of the class certification by a three-judge panel and an 11-judge *en banc* court. The *en banc* court accepted some of Petitioner's arguments, rejected others, and limited the class in significant ways, fulfilling the purpose of Rule 23(f) interlocutory review. In the six years that this appeal has been pending (and the litigation stayed), Wal-Mart has never suggested that it will be obliged to

[1] On remand, these issues will be addressed by a different judge, as a result of the resignation of Judge Jenkins in 2008.

settle the case as a result of the certification order. With over $400 billion in sales and $14 billion in profits last year, that is an argument that could not credibly be made. Petitioner offers no reason why the questions presented need additional review at this time, rather than waiting for further development of the record in the courts below.

II. There is No Circuit Split on the First Question

The Petition conflates the treatment of different kinds of "monetary relief" under Rule 23(b)(2) in an attempt to cobble together a circuit split. In fact, no circuit split exists on the only monetary claim – equitable back pay – that may be pursued by the class at this time.

A. The Circuits Agree that the Title VII Back Pay Remedy is Consistent with Certification Under Rule 23(b)(2)

The only monetary remedy certified by the Ninth Circuit in this case is the equitable remedy of back pay.[2] There is no split in the circuits about whether

[2] Back pay is an equitable remedy under Title VII, rather than a form of compensatory damages, and is awarded by the court. 42 U.S.C. § 2000e-5(g); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416-17 (1975). *See Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 423 n.19 (5th Cir. 1998) (back pay is an "equitable remed[y] to which no right to jury trial attaches.") When Congress amended Title VII in 1991 to add compensatory and

(Continued on following page)

back pay in a Title VII class action may properly be certified under Rule 23(b)(2) when it accompanies a claim for injunctive relief. All circuits that have addressed the question agree that back pay may be sought under Rule 23(b)(2). *See Reeb v. Ohio Dep't of Rehab. & Corr.,* 435 F.3d 639, 650 (6th Cir. 2006); *Cooper v. S. Co.,* 390 F.3d 695, 720 (11th Cir. 2004), *overrruled on other grounds, Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457 (2006) (per curiam); *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 169-170 (2d Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.,* 195 F.3d 894, 896 (7th Cir. 1999); *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415-16 (5th Cir. 1998); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 699-700 (8th Cir. 1980); *Pettway v. Am. Cast Iron Pipe Co.,* 494 F.2d 211, 257-58 (5th Cir. 1974); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 802 (4th Cir. 1971). *See also* App. 90a-94a.

This Court has described "[c]ivil rights cases against parties charged with unlawful, class-based discrimination [as] prime examples" of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 614 (1997). These actions invoke the equitable powers of the court to eradicate discriminatory

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punitive damage remedies, it left intact the equitable nature of back pay, explicitly excluding back pay from the definition of compensatory damages. *See* § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)].").

conditions in the workplace. Because back pay is an integral component of the Title VII remedial scheme, *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-21 (1975), courts have routinely certified back pay claims as part of Rule 23(b)(2) injunctive class actions brought to combat systemic employment discrimination. *Jefferson*, 195 F.3d at 895.

Petitioner argues that this circuit consensus should be ignored where the amount of back pay for the class, collectively, could be a very large sum, although for the individual class member the average potential recovery would be a few thousand dollars a year.[3] Title VII places no cap on the equitable powers of the court to award back pay. Where the class is large, the back pay total may also be large. But, the aggregation of back pay resulting from class treatment does not alter the applicable legal principles. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1443 (2010) (opinion of Scalia, J.). At this stage of the case, where the district court has found that the injunctive relief sought would be very significant, and the likely recovery for individual class members small, there is no basis for upsetting the trial court's finding that injunctive relief predominates. *See* App. 89a. Moreover, since it is entirely speculative how the district

[3] The average pay for a full-time hourly position in 2001 was $18,000. App. 177a. Plaintiffs' expert calculated that female employees earned, on average, 5% to 15% less than their male counterparts. App. 200a.

court will exercise its discretion to award back pay in the event of a liability finding, review at this juncture will put this Court in the position of drawing arbitrary lines about how much back pay precludes Rule 23(b)(2) certification.

The Petition, implicitly recognizing that no circuit split is presented on the current record, falls back on a far more radical position – that Rule 23(b)(2) prohibits the certification of *any* claim other than one for injunctive or declaratory relief. There is no split in the circuits on this point, as no court has ever adopted this view. "Rule 23(b)(2), by its own terms, does not preclude all claims for monetary relief." *Allison,* 151 F.3d at 415 (citing *Pettway*, 494 F.2d at 257). The contention also conflicts with the Advisory Committee's note, which expressly allows for certification under Rule 23(b)(2) unless "the appropriate final relief relates *exclusively or predominantly* to money damages." Advisory Committee Note (emphasis added).

Finally, the Petition suggests that injunctive relief nonetheless cannot predominate because "at least two-thirds of the class are former employees who lack standing to secure injunctive or declaratory relief." Pet. at 14-15. There is no evidence in the record to support this assertion. Moreover, Wal-Mart's predominance calculus simply ignores the district court's finding that the injunction sought would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotion decisions." App.

239a. Most important, the Petition fails to identify a circuit split on this factually disputed claim of error.

B. This Case Does Not Present Petitioner's Circuit Conflict Because Plaintiffs Do Not Seek Compensatory Damages

Every appellate decision cited by Petitioner as evidence of a circuit split involved claims for compensatory damages. *Compare Robinson,* 267 F.3d at 155 *with Reeb,* 435 F.3d at 642; *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139,* 216 F.3d 577, 579 (7th Cir. 2000); *Cooper,* 390 F.3d at 702; *Allison,* 151 F.3d at 407. Because compensatory damages typically require individualized proof from class members, they present the greatest tension with the presumption of "cohesiveness" underlying Rule 23(b)(2). *Lemon,* 216 F.3d at 580. This case does *not* present that issue, as plaintiffs have not sought compensatory damages. App. 5a.

C. Whether Punitive Damages May Be Certified Under Rule 23(b)(2) is Not Yet Presented in this Case

This case does not currently present the issue of whether punitive damages were properly certified under Rule 23(b)(2). In its detailed analysis, the *en banc* court *reversed* the district court's certification of punitive damages under Rule 23(b)(2) and overruled prior Ninth Circuit precedent that relied upon plaintiffs' subjective intent in determining whether (b)(2)

certification was warranted. App. 85a-88a. It remanded for reconsideration the issue whether punitive damages may be awarded to a class certified under Rule 23(b)(2), requiring the district court to focus on the practical effect of the monetary relief on the litigation. App. 97a-100a. If the district court finds that punitive damages cannot be certified under Rule 23(b)(2), the appeals court directed that it should consider whether certification of punitive damages under Rule 23(b)(3) is appropriate, a hybrid approach first endorsed by the Seventh Circuit in *Jefferson,* 195 F.3d at 898.

While it "decline[d] to pre-judge" the issue, the *en banc* court identified three factors that would militate *against* certification of punitive damages under Rule 23(b)(2). App. 97a-99a. Thus, this case may *never* present the punitive damages issue framed by the Petition.

Notably, no court has yet applied these standards for Rule 23(b)(2) treatment of damages claims. App. 88a. How their application will vary, if at all, from the approach used by other circuits remains unknown. As such, the question falls far short of a mature circuit split.

Whether and how the district court certifies the punitive damages claims will also implicate the question of notice and opt-out rights. If a class is certified under Rule 23(b)(3), notice and opt-out rights will be mandatory. App. 99a-100a. If instead the district court certifies under Rule 23(b)(2), it may

choose to order discretionary notice and opt-out rights under Rule 23(c)(2), as Judge Jenkins did. App. 242a-243a. *See In re Monumental Life Ins. Co.,* 365 F.3d 408, 417 (5th Cir. 2004); *Eubanks v. Billington,* 110 F.3d 87, 94 (D.C. Cir. 1997) (authorizing notice and opt-out rights under Rule 23(c)(2)). While the Petition advances the counter-intuitive proposition that Rule 23 forbids providing these additional due process protections to members of a Rule 23(b)(2) class – the same protections which this Court had held the Constitution requires states to provide in class actions for money damages, *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12 (1985) – there is no need to address that proposition now, as this case may never present that question.

The Petition argues that this case offers the opportunity for the Court to address an issue that it wanted to reach – but could not – in *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117 (1994) (certiorari dismissed as improvidently granted), and *Adams v. Robertson,* 520 U.S. 83 (1997) (same). Pet. at 10. *Ticor* and *Adams* involved collateral attacks on mandatory class action settlements of *damage* claims in which absent class members were *not* provided with notice and opportunity to opt out. By contrast, in this case, there are no damage claims currently certified and, with respect to the now-remanded punitive damages, the district court *did* require notice and opt-out rights. If anything, *Ticor* and *Adams* underscore that certiorari should not be granted for questions that are merely hypothetical. *See Ticor,* 511 U.S. at 118;

Adams, 520 U.S. at 92 n.6 ("by 'adher[ing] scrupulously to the customary limitations on our discretion' regardless of the significance of the underlying issue, 'we promote respect . . . for the Court's adjudicatory process.'") (quoting *Illinois v. Gates,* 462 U.S. 213, 224 (1983)).

III. The Writ Should be Denied Because the Second Question Does Not Meet this Court's Requirements for Certiorari

Wal-Mart uses its omnibus Second Question to raise, in scattershot fashion, at least a dozen separate objections to the district court's application of Rule 23 to the substantial evidentiary record. This Court is not the appropriate forum for the correction of claimed errors, particularly in a heavily fact-bound interlocutory order such as this. Supreme Court Rule 10. Petitioner urges this Court to delve into the very extensive and complex factual record in this case and conduct, in effect, a *de novo* review of the district court's factual determinations. *See Coopers*, 437 U.S. at 469; Sup. Ct. R. 10.

Although the number and variety of issues itself reveals the unsuitability of this case for review, Respondents nonetheless address briefly the major issues encompassed within Petitioner's Second Question.

A. Certiorari is Not Warranted to Review Petitioner's Objections to the Certification of a Challenge to Subjective Employment Practices

The Petition raises a laundry list of issues in an effort to challenge the determination below that plaintiffs established the presence of "common questions of law or fact" as required by Rule 23(a)(2). No circuit conflict is presented by these contentions. This Court has affirmed that subjective decision-making practices can be challenged under both disparate treatment and disparate impact analysis. *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 989-91 (1988). Such practices, while not themselves unlawful, can "provide a ready mechanism for discrimination." *United States v. City of Northlake, Ill.*, 942 F.2d 1164, 1169 (7th Cir. 1991). Systemic challenges to subjective employment practices have been certified as class actions, where plaintiffs offer a sufficient factual record. *See, e.g., McClain v. Lufkin Indus.*, 519 F.3d 264, 276-77 (5th Cir. 2008) (affirming class-wide liability for disparate impact based upon subjective practices); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326, 333 (4th Cir. 1983).

Employment Policy – The Petition claims that plaintiffs failed to identify and challenge a specific employment policy as the cause of the statistically significant disparities in outcomes for female employees, characterizing the case as involving "millions of pay and promotion decisions made by tens of

thousands of Wal-Mart managers." Pet. at 19. To the contrary, the district court found that Wal-Mart, a highly-centralized employer, operates through *common* pay and promotion policies that managers (many above the store level) implement. Those policies offer managers extensive discretion for some decisions, subject to a common system of oversight. *See supra* at pp. 6-9. *See Bazemore v. Friday,* 478 U.S. 385, 406 n.17 (1986) (Brennan, J., concurring, joined by all justices) (rejecting the claim that salaries paid in different counties across the state by an employer were reached "in any 'autonomous' fashion.").

Nor did the district court rely solely on "excessive subjectivity." Instead, it found that commonality was satisfied "where, as here, such subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination." App. 184a. That a company like Wal-Mart operates with a set of related practices – rather than just a single written policy in a personnel manual – is entirely predictable. Significantly, however, the district court expressly found that the plaintiffs had established a sufficient nexus between the challenged practices and the adverse outcomes for women. App. at 186a; App. 77a-78a.

Falcon Footnote – The Petition asserts that a class action challenging subjective employment practices is subject to a heightened standard of proof, based on language in footnote 15 of *General Telephone of Southwest v. Falcon,* 457 U.S. 147, 159 n.15 (1982). Pet. at 20-22. The *en banc* court persuasively

explained why that argument fails. App. 41a-47a. The *Falcon* footnote, read in context, sets forth a hypothetical scenario under which *applicants and employees* could be included within the same certified class. *See, e.g., Griffin v. Dugger*, 823 F.2d 1476, 1487 (11th Cir. 1987) ("The situations the Supreme Court identified in footnote fifteen can be thought of as exceptions to the general rule that applicants and incumbent employees cannot share the same class."). The hypothetical was not intended to create a new requirement that plaintiffs *prove* intentional discrimination at the certification stage. App. 43a. Indeed, Petitioner's "heightened standard" for just one kind of employment practice is at odds with the central holding of *Falcon* that there are no special class certification rules for certain kinds of cases. *Falcon* at 161 ("a Title VII class action, *like any other class action*, may only be certified if . . . the prerequisites of Rule 23(a) have been satisfied.") (emphasis added).

More importantly, there is no split in the circuits on this issue. There is consensus among the circuits that district courts are required to conduct a "rigorous analysis" of compliance with Rule 23, even when it overlaps with the merits. App. 10a-40a. Petitioner's assertion that the Ninth Circuit opinion conflicts with those of other circuits because it failed to apply *Falcon*'s "significant proof" standard to claims of "excessive subjectivity" – an assertion that even the dissent in this case does not make – is unpersuasive. *See* Pet. at 20-21. Where the cases cited by Wal-Mart address *Falcon*'s footnote at all, they do so consistently

with the *en banc* court's analysis, applying it to "across the board" or generalized claims where a plaintiff with one type of claim seeks to represent a class with different claims. *See, e.g., Griffin*, 823 F.2d at 1487 (employee asserts testing claims of non-employee applicants); *Reeb*, 435 F.3d at 644 (only generalized claim made, no evidence of what plaintiffs or class were seeking); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122 (3d Cir. 1985) (across the board allegations); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (plaintiff with transfer claim seeks to represent class with promotion and training claims). Other cases cited by the Petition in support of its contention that a conflict exists make no reference to the *Falcon* "significant proof" standard at all. *See Garcia v. Johanns*, 444 F.3d 625, 631-632 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723, 729-30 (D.C. Cir. 2006); *Cooper*, 390 F.3d at 716.

Even if a heightened standard were required, it would not change the outcome here, because the record demonstrates that Petitioner's proposed "significant proof" standard was met. The district court expressly found, in more than 24 pages of findings, that plaintiffs had offered "significant evidence" that raised an inference of class-wide discriminatory pay and promotion practices. App. 226a. These findings are plainly sufficient to meet any heightened showing of "significant proof" of discrimination. App. 46a-47a.

Ultimately, whether a challenge to subjective decision-making presents common questions of law or fact for Rule 23(a)(3) is a fact-specific inquiry. That

various circuits cited by Wal-Mart have reached different results based on differing factual records, or an insufficient statistical showing, does not constitute a circuit split. *See, e.g.*, *Reeb*, 435 F.3d at 644-45; *Garcia*, 444 F.3d at 634-35; *Love*, 439 F.3d at 729; *Cooper*, 390 F.3d at 716-17. Nor is review warranted because Petitioner and the dissent would appraise the evidence in this case differently than the trial court did. The trial court's class certification order and its factual findings are subject to review based upon an abuse of discretion standard. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008).

The Petition also faults the decisions below on a series of related points, which individually and collectively fail to meet the prerequisites for a grant of certiorari.

Intent Element of Disparate Treatment – Wal-Mart criticizes the courts' failure to address the "intent" element of plaintiffs' disparate treatment claim, quoting this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007), an individual employment case litigated under the *McDonnell-Douglas* framework. Pet. at 23. Petitioner ignores the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. . . ." *Cooper v. Federal Reserve Bank of*

Richmond, 467 U.S. 867, 876 (1984).[4] This Court's decision in *Teamsters* established that a "pattern or practice" case uses a different method of proof than the *McDonnell-Douglas* burden-shifting model for individual discrimination cases. Plaintiffs must demonstrate that the discrimination was the employer's "standard operating procedure." *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). *Cooper*, 467 U.S. at 875-76, n.9 (stating *Teamsters* standards to private class actions).[5] The district court's decision includes an extensive analysis of the liability phase of plaintiffs' systemic disparate treatment claim. App. 245a-247a.

Multi-Facility Certification – Wal-Mart faults the certification of a multi-facility class challenging a

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[4] Petitioner also ignores plaintiffs' adverse impact claim, which requires no proof of intent. *Lewis v. City of Chicago,* ___ U.S. ___, 130 S. Ct. 2191, 2199 (2010).

[5] Casting about for a circuit conflict, the Petition claims that the decision is inconsistent with *Hohider v. UPS, Inc.*, 574 F.3d 169, 184 (3d Cir. 2009). Pet. at 24. *Hohider* did not address the elements of a Title VII pattern-or-practice case. *Hohider,* a case brought under the Americans with Disabilities Act, addressed only the issue of whether individual class member qualifications must be proven to establish liability under the ADA. The decision expressly distinguished the requirements for proof of liability in an ADA pattern-or-practice case from those required for cases under Title VII. *Id.* at 184-85. Similarly off the mark is Petitioner's reliance on *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 223-26 (2d Cir. 2008), which addressed whether a civil RICO action could properly be certified under Rule 23(b)(3), where individual reliance was an element of liability.

policy of subjective decision-making, pointing to cases where other courts – based on different factual records – chose not to certify a class. Pet. at 23-24. The district court found that Wal-Mart's policies, administered through a highly centralized system, applied uniformly across all stores and regions. App. 192a. It found statistical patterns of discrimination were consistent across the 41 regions and that significant portions of the decision-making process occurred *above* the store level. App. 200a; 177a-178a; 181a.

Neither Title VII nor Rule 23 limits class certification to single facilities. *See, e.g., Bazemore,* 478 U.S. at 389, 405-06 & n.17 (reversing failure to certify pay and promotion class of black employees of Extension Service with facilities in 100 counties); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999), *overruled on other grounds by In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-42 (2d Cir. 2006) (certifying class of all African Americans employed throughout commuter railroad); *Velez v. Novartis Pharm. Corp.,* 244 F.R.D. 243, 262-63 (S.D.N.Y. 2007) (certifying class challenging subjective practices used to manage national sales force in multiple sales positions); *McReynolds v. Sodexho Marriot Servs., Inc.,* 208 F.R.D. 428, 431 (D.D.C. 2002) (certifying class of African Americans challenging managerial promotion process across company with six divisions nationally and 5000 worksites). Under Petitioner's approach, large companies would never be subject to class actions challenging company-wide pay or promotion practices since personnel

policies must, at least to some degree, be implemented by local managers. *See, e.g., McReynolds*, 208 F.R.D. at 432 ("Sodexho is a corporate giant, and as a result, its personnel decisions are largely decentralized").

Finally, the Petition incorrectly refers to the class certified by the district court as an "across-the-board" class. Pet. at 26. As this Court explained in *Falcon,* an "across-the-board" class includes both applicants and employees and challenges a broad range of employment practices in one suit. *Falcon,* 457 U.S. at 151-52 (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969)). In contrast, the instant class includes only incumbent retail employees and challenges only two practices (pay and promotion). *See* App. 166a, n.4.

Plaintiffs' Expert – Wal-Mart questions the admission of expert testimony on stereotyping, similar to the testimony approved by this Court in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 235-36, 255-56 (1989). Pet. at 24-25. The district court conducted an extensive analysis of Wal-Mart's motions to exclude all of plaintiffs' expert evidence. Addendum at 4-15. The Ninth Circuit determined that it did not need to reach the question of whether *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592-93 (1993), applies at class certification because the district court made findings sufficient to satisfy *Daubert*'s reliability and relevance benchmarks. App. 57a, n.22. (Addendum at 5-6). Again, the record here presents no question on which there is a circuit conflict.

Use of Regional Statistics – Wal-Mart criticizes the district court for permitting plaintiffs to use regional statistical data to demonstrate the presence of common questions of law or fact, rather than the highly disaggregated statistical methods used by its own expert. Pet. at 26. This contention, fully aired both at the district court and before the court of appeals, similarly presents no circuit split or legal issue worthy of review. Here, the district court made extensive findings that supported the use of regional statistics for class certification purposes. App. 202a-208a. In contrast, Wal-Mart's disaggregated statistical analysis was based on survey evidence that the district court struck as unreliable. App. 203a-204a.

B. Objections to the District Court's Tentative Trial Plan Do Not Warrant Granting Certiorari

The Petition also seeks certiorari on the question of whether the district court's *tentative* trial plan violates Wal-Mart's statutory and constitutional rights. Wal-Mart's novel argument is that it has the right to insist on individual adjudication of each class member's claim, a position no appellate court has ever adopted. Pet. at 27-33.

First, the record demonstrates that the district court carefully considered the appropriate parameters of the trial plan and fully evaluated Wal-Mart's arguments. App. 243a-280a. The *en banc* court declined to reach Petitioner's constitutional and

statutory objections to the trial plan because of its tentative nature, but found that there was a "range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process. . . ." App. 105a. Furthermore, the questions remanded by the *en banc* court may result in modifications to the trial plan, making premature a review of the tentative plan at this juncture.

Second, Petitioner's contentions rest on the novel proposition that Title VII and the Constitution guarantee Petitioner the substantive right to defend each class member's claim individually. Pet. at 28 ("An employer has a statutory, as well as a constitutional, right to an individualized defense."). The logical consequence of this argument, if accepted, is that no class of any kind larger than a few dozen class members would practicably be manageable. Petitioner cites no case authority to support the proposition, much less provide a basis to conclude a circuit split exists for this Court to resolve. In any event, the district court found that Wal-Mart's extensive electronic data could be used to identify and compensate the actual victims of Wal-Mart's discriminatory practices. App. 261a, 267a-268a, 271a-276a. *See In re Monumental Life,* 365 F.3d at 418 (back pay is a "remedy readily calculable on a class-wide basis").

Statutory Theories – Wal-Mart seeks first to locate "its right to an individualized defense" in language in Title VII that describes remedies available for an "individual." Pet. at 28. This Court has held

that the use of the term "individual" in a statute does not preclude class treatment of claims. *Califano v. Yamasaki,* 442 U.S. 682, 698-701 (1979). Moreover, this Court has long approved Title VII pattern-or-practice actions despite the fact that Title VII uses the term "individual" and similar terms to describe theories of liability and remedies. *See* 42 U.S.C 2000e-2(a) ("any individual"), 2000e-5(f)(1) ("person aggrieved"). *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 426 (1971); *Gen. Tel. of the Nw., Inc. v. EEOC,* 446 U.S. 318, 324 (1980).

Petitioner also argues that Title VII guarantees it the right to present a "mixed motive" defense, even though this defense is not applicable to any claim in the case. Pet. at 28. Title VII provides distinct methods of proving discrimination: plaintiffs may establish intentional discrimination either by proof of disparate treatment or by the "mixed motive" provisions of Title VII, added by the Civil Rights Act of 1991. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003). Plaintiffs may also avail themselves of the disparate impact theory to prove a violation of Title VII. 42 U.S.C. § 2000e-2(k). As this Court observed last Term, Title VII's methods of proof are not "coextensive." *Lewis*, 130 S. Ct. at 2199 (defense to disparate treatment claim inapplicable to disparate impact claim).

The D.C. Circuit has held that a mixed motive defense may not be used to rebut a single motive disparate treatment claim. *Fogg v. Gonzales,* 492 F.3d 447, 454 (D.C. Cir. 2007). No circuit has held otherwise.

See also Amicus Curiae Brief of the Equal Employment Opportunity Commission in Support of Plaintiffs on Rehearing En Banc, at 30 (statutory language of Title VII limits mixed motive defense to claims brought under a mixed motive theory; defense inapplicable to a pattern-or-practice case). App. Docket No. 251.

Petitioner also tethers its argument to language from *Teamsters*, in which this Court articulated the standards for bifurcated litigation of Title VII pattern-or-practice cases. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. 431 U.S. at 361. No court has read this language to *require* individualized hearings in *every* case. Instead, *Teamsters* vested trial courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Id.* at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Seven circuits have concluded that individual Stage II remedies hearings may be unnecessary or even inappropriate when the employer's practices and recordkeeping make it difficult to replicate which claimants would have been selected absent discrimination.[6] No circuit has ruled to the contrary. If "the

[6] *See McClain v. Lufkin Industries,* 519 F.3d 264, 281 (5th Cir. 2008); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pettway*, 494 F.2d at 261-263; *Pettway v. Am. Cast*

(Continued on following page)

class is large, the promotion or hiring practices are ambiguous, or the illegal practices continued over an extended period of time, a class-wide approach to the measure of back pay may be necessary." *McClain,* 519 F.3d at 281 (citing *Pettway*, 494 F.2d at 261). Here, the district court made specific findings based on substantial evidence that supported its conclusion that individual hearings were not warranted. App. 256a-276a.

Constitutional Theories – The Petition rests its constitutional Due Process claim on a similarly insubstantial foundation. Pet. at 30. The Petition cites two cases for the general proposition that the Due Process Clause allows a party to present its "available defenses." *Id.*, *Lindsey v. Normet,* 405 U.S. 56, 64 (1972) (state statute requiring trial within six days in landlord-tenant actions does not violate Due Process Clause); *United States v. Armour & Co.,* 402 U.S. 673, 680-82 (1971) (Meatpackers Consent Decree of 1920 did not prohibit acquisition of company engaged in activities prohibited by decree). But this maxim does not create a constitutional right to present one's defense using *particular* forms and methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appellate review after final judgment. *See, e.g.,* Fed. R.

Iron Pipe Co., 681 F.2d 1259, 1266 (11th Cir. 1982); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union No. 396*, 637 F.2d 506, 520-21 (8th Cir. 1980); *Stewart v. GM Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976).

Civ. P. 16(c)(2) (listing range of pre-trial and trial management decisions for which trial court may "take appropriate action"); Manual for Complex Litigation (Fourth) § 11.64. No court has adopted Petitioner's overarching due process theory and, thus, no circuit conflict or conflict with this Court's decisions exists.

The Petition also asserts that the employer has the right to litigate punitive damages individual-by-individual. Pet. at 30-31. To the contrary, punitive damages are not intended to compensate the victim for her injuries (as are compensatory damages) but to "punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The focus of the punitive damages inquiry is defendant's state of mind and conduct. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1999) (Title VII). In this case, plaintiffs' claim for punitive damages would rest not on the actions of individual employees but instead on evidence involving top executives, evidence that is common to all class members. *See* App. 98a.

As punitive damages claims may never actually be certified in this case, certiorari is premature at best. *Nike Inc. v. Kasky,* 539 U.S. 654, 663 (2003) (Stevens, J., concurring in the dismissal of certiorari as improvidently granted, "the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it") (citation omitted).

C. The Size of the Class and Similar Concerns Do Not Justify a Grant of Certiorari

Petitioner and its *amici* focus much attention on the size of the class, arguing that this alone justifies a grant of certiorari. Courts have certified larger classes than this one, including one in which Wal-Mart was itself the lead plaintiff. *In re VISA Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other grounds by In re Initial Pub. Offering Sec. Litig.,* 471 F.3d 24 (2d Cir. 2006).[7] Rejecting the same "too big" argument raised by the defendant against certification of Wal-Mart's proposed class, then-Judge Sotomayor noted:

> The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification . . . While both the district court and this Court have acknowledged that difficulties in managing this large class action may arise, these problems pale in

[7] The certified class for which Wal-Mart was the lead plaintiff included 8 million merchants, with an estimated $8 billion in damages. *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 105 n.10 (2d Cir. 2005) and *In re VISA Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 89 (E.D.N.Y. 2000). *See also In re Diet Drugs,* 582 F.3d 524, 542 (3d Cir. 2009) (6 million class members); *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions,* 148 F.3d 283, 294-95 (3d Cir. 1998) (8 million class members).

> comparison to the burden on the courts that would result from trying the cases individually.

Id. at 145.

This Court has recognized that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano*, 442 U.S. at 701. The greater the size of the proposed class, "the more likely a class action is to yield substantial economies in litigation," making class certification particularly appropriate. *See Carnegie v Household Int'l, Inc.*, 376 F.3d 656, 660 (7th Cir. 2004). Here, class litigation may be the only means of obtaining the broad injunctive relief necessary to address the allegedly discriminatory policies challenged. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 969 (11th Cir. 2008); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766 (4th Cir. 1998), *vacated on other grounds,* 527 U.S. 1031 (1999); *United States v. City of New York*, 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009). Moreover, aggregation of claims will be particularly important because the back pay awards will, in most cases, be far too small to justify individual federal lawsuits, especially against a corporate giant like Wal-Mart. The average Wal-Mart worker simply does not have the capacity to pursue a discrimination lawsuit against her employer.

Petitioner also raises the specter that, if the Petition is not granted, "virtually every employer in

the land could be subject to a similar suit," Pet. at 33, all to be filed in the forum of choice, the Ninth Circuit. *Id.* at 17. In fact, in the nearly four years since the Ninth Circuit first affirmed *Dukes* in February 2007, not a single Title VII class action – small or large – has been certified within the Ninth Circuit. In the same four-year time period, nine Title VII class actions have been certified in the federal courts across the entire country – *about two cases a year*.[8] Only four of these cases involved private corporate employers. This threatened landslide of class action litigation has not materialized and cannot support the grant of certiorari.

The very small number of Title VII class action cases certified in the recent past underscores another important point regarding certiorari. It highlights how different Wal-Mart is from the typical employer. Wal-Mart is a uniquely large and unusually uniform and centralized company. Perhaps no other employer presents a factual predicate to support class certification

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[8] *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D.N.Y. 2010); *Easterling v. Connecticut,* 265 F.R.D. 45 (D. Conn. 2010); *United States (and Vulcan Society) v. City of New York*, 258 F.R.D. 47 (E.D.N.Y. 2009); *NAACP v. N. Hudson Reg'l Fire*, 255 F.R.D. 374 (D.N.J. 2009); *Walker v. East Allen Cty. Sch.*, 2008 WL 4367579 (N.D. Ind. Sept. 19, 2008); *Velez*, 244 F.R.D. 243; *Taylor v. D.C. Water & Sewer Auth.*, 241 F.R.D. 22 (D.D.C. 2007); *Nelson v. Wal-Mart Stores*, 245 F.R.D. 358 (E.D. Ark. 2007); *Olvera-Morales v. Int'l Labor Mgmt. Corp*., 246 F.R.D. 250 (M.D.N.C. 2007). *See also Brown v. Nucor Corp.,* 576 F.3d 149, 160 (4th Cir. 2009) (appeals court reversed denial of class certification in race discrimination class action).

similar to the record upon which the district court based its detailed and rigorous fact finding. This Court should be cautious about extending certiorari review to a defendant and a case that are, in many respects, *sui generis*.

CONCLUSION

Accordingly, Respondents respectfully request that the court deny the Petition.

Respectfully submitted,

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October 21, 2010

ADDENDUM

222 F.R.D. 189

United States District Court,
N.D. California.

Betty DUKES, Patricia Surgeson, Cleo Page, Deborah Gunter, Karen Williamson, Christine Kwapnoski, and Edith Arana, on behalf of themselves and all others similarly situated, et al., Plaintiffs,

v.

WAL-MART, INC., Defendant.

No. C01-02252 MJJ.

June 21, 2004.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND DEFENDANT'S MOTIONS TO STRIKE EXPERT AND NON-EXPERT TESTIMONY

JENKINS, District Judge.

INTRODUCTION

In conjunction with the Motion for Class Certification, both parties have filed a number of motions to strike particular portions of the evidence. With respect to the expert testimony, Defendant moves to strike the declarations of William Bielby and Marc Bendick in their entirety, and a small portion of the declaration of Richard Drogin. Plaintiffs move to strike portions of the declaration of Joan Haworth. With respect to the non-expert testimony, Defendant moves to strike portions of the declarations of the named plaintiffs and designated class members while

Plaintiffs move to strike declarations filed by store managers. The Court discusses each motion in turn.

DISCUSSION

I. MOTIONS TO STRIKE EXPERT TESTIMONY

A. *Legal Standard*

As discussed in the Court's Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, filed simultaneously herewith ("Class Certification Order"), arguments on the merits are improper at this stage of the proceedings. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Selzer v. Bd. of Educ. of City of New York,* 112 F.R.D. 176, 178 (S.D.N.Y. 1986) ("[a] motion for class certification is not the occasion for a mini-hearing on the merits"). Accordingly, courts should avoid resolving "the battle of the experts." *See Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 292-93 (2d Cir. 1999) (district court may not weigh conflicting expert evidence or engage in "statistical dueling" of experts). Indeed, courts should not even apply the full *Daubert* "gatekeeper" standard at this stage. *See Daubert v. Merrell Dow Pharms. Inc.,*

509 U.S. 579 (1993).[1] Rather, "[i]t is clear to the Court that a lower *Daubert* standard should be employed at this [class certification] stage of the proceedings." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.,* 209 F.R.D. 159, 162-63 (C.D. Cal. 2002); *see also O'Connor v. Boeing North American, Inc.,* 184 F.R.D. 311, 321 n.7 (C.D. Cal. 1998) (*Daubert* inquiry inappropriate at class certification stage).

This does not mean, however, that courts must uncritically accept all expert evidence that is offered in support of, or against, class certification. Rather, the question is whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met. *See In re Polypropylene Carpet Antitrust Litigation,* 996 F.Supp. 18, 26 (N.D. Ga. 1997) (at class certification stage court only examined whether the expert's methodology will (a) comport with basic principles, (b) have any probative value, and (c) primarily use

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[1] In *Daubert,* the Court charged trial judges with the responsibility of acting as gatekeepers at trial to "'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" 509 U.S. at 589 (citation omitted). In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147-48 (1999), the Court clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. As the Ninth Circuit has explained, the district court's role under *Daubert* is to separate inadmissible opinions based on "junk science" from those based on scientific method. *Lust v. Merrell Dow Pharmaceuticals, Inc.,* 89 F.3d 594, 597 (9th Cir. 1996).

evidence that is common to all members of the proposed class); *Bacon v. Honda of America Mfg., Inc.,* 205 F.R.D. 466, 470-71 (S.D. Ohio 2001) ("'For common questions to exist, plaintiffs' statistical evidence must logically support the inference of discrimination against the class asserted.'") (citation omitted); *see also Dean v. The Boeing Co.,* 2003 U.S. Dist. LEXIS 8787 at *33-35 (D. Kansas) (at class certification stage, court should only determine whether expert testimony is so fatally flawed as to be inadmissible as a matter of law). It is with these principles in mind that the Court considers the parties' respective motions.

B. *Defendant's Motion to Strike Declaration of William Bielby*

As discussed in the Class Certification Order, Dr. Bielby conducted a "social framework analysis" by combining an extensive review of documents and deposition testimony regarding Wal-Mart's culture and practices with his knowledge of the professional research and literature in the field. This is an acceptable social science methodology. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 235-36, 255 (1989) (considering similar evidence by an expert social psychologist); Fed. R. Evid. 702 (referring to "scientific, technical, or other specialized knowledge"). Dr. Bielby's testimony on sex stereotyping also has been admitted in prior cases in this district. *See Butler v. Home Depot, Inc.,* 984 F. Supp. 1257, 1265

(N.D. Cal. 1997); *Stender v. Lucky Stores, Inc.,* 803 F. Supp. 259, 301-03, 327 (N.D. Cal. 1992).[2]

Defendant raises a plethora of challenges to Dr. Bielby's opinions. Having reviewed them, the Court concludes that they are of the type that go to the weight, rather than the admissibility, of the evidence. The most significant criticism is that Dr. Bielby cannot determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition, for example, Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking. *See* Def.'s Mtn. to Strike re Bielby at 9 (citing Bielby Depo. at 87-88, 161-62, 370-71). While this could present a difficulty for Plaintiffs at trial, the question here is whether Dr. Bielby's opinion is so flawed that it lacks sufficient probative value to be considered in assessing commonality.

Plaintiffs concede that Dr. Bielby cannot quantify the degree of gender stereotyping at Wal-Mart, but argue that such quantification is not necessary.[3] *See*

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[2] Defendant does not challenge Dr. Bielby's qualifications as an expert.

[3] Plaintiffs further argue that the impact of even small decisions accumulates over the course of employees' careers. But this argument misses the mark. Defendant's point is that there may be a very small *total* number of decisions affected by sex stereotyping, not that there are numerous decisions that are qualitatively too insignificant to matter.

Pls.' Opp. re Motion to Strike re Bielby at 11. They point to *Price Waterhouse,* in which the trial court relied on a social psychologist's testimony that the defendant was "likely influenced by sex stereotyping," even though the expert "admitted that she could not say with certainty whether any particular comment was the result of stereotyping." *Price Waterhouse,* 490 U.S. at 235-36; *cf. Costa v. Desert Palace, Inc.,* 299 F.3d 838, 861 (9th Cir. 2002), *aff'd,* 539 U.S. 90 (2003) (recognizing relevance of lay testimony regarding gender stereotyping).

The Court is further guided by *Daubert v. Merrell Dow Pharm., Inc. (Daubert II),* 43 F.3d 1311, 1316 (9th Cir. 1995), in which the Ninth Circuit stated that scientific knowledge "does not mean absolute certainty," and that expert testimony should be admitted when "the proffered testimony is 'based on scientifically valid principles.'" *Id.,* quoting *Daubert I,* 509 U.S. 579. The Ninth Circuit continued: "Our task, then, is to analyze not what the experts say, but what basis they have for saying it." *Daubert II,* 43 F.3d at 1316. The Court is satisfied that Dr. Bielby's opinion – while subject to critique – is based on valid principles. Thus, it is sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case. Accordingly, Defendant's motion to strike Dr. Bielby's declaration is denied.

C. *Defendant's Motion to Strike Declaration of Marc Bendick*

Defendant moves to strike the entire declaration of Plaintiffs' expert labor economist, Dr. Marc Bendick on the grounds that (1) Plaintiffs should not be allowed to profit from Dr. Bendick's alleged misuse of Equal Employment Opportunity Commission ("EEOC") confidential material, and (2) Dr. Bendick's testimony should be rejected on the merits.

1. *Dr. Bendick's Use of EEO-1 Data*

As discussed in the Class Certification Order, Dr. Bendick performed a benchmarking analysis to compare Wal-Mart's female promotion rates into salaried in-store management positions with that of similarly situated companies. He derived the data on the comparator companies mostly from the EEOC in the form of "EEO-1" reports. Defendant contends that the EEO-1 data is confidential, that Dr. Bendick obtained it through false pretenses, that his use of the data in this litigation is a crime, and that Plaintiffs failed to fully produce the EEO-1 data in discovery. The Court concludes, after fully considering Defendant's objections, that there is no basis to strike the declaration.

a. *Whether Dr. Bendick Violated EEOC Regulations*

Under authority granted by Title VII, the EEOC collects statistics on the gender and racial composition

of the workforce for all employers with 100 or more employees. 42 U.S.C. § 2000e-8(c)(3). Companies are required to submit this data – referred to as EEO-1 reports – on an annual basis. 29 C.F.R. § 1602.7; 41 C.F.R. § 60-1.7. The EEOC assembles this wealth of data and generally aggregates it into groupings of at least three responding entities per data set, without revealing the identities of the entities in order to preserve a level of confidentiality for the reporting companies. *See* 29 C.F.R. § 1610.18(a). EEOC officials are barred from breaching the confidentiality of reporting entities. 42 U.S.C. § 2000e-8(c)(3) & § 2000e-8(e). Notably, the regulations do not explicitly apply to anyone other than the EEOC.

Dr. Bendick received EEO-1 data in anonymous *disaggregated* form (i.e. the data is separately reported for each individual, albeit unidentified, company) from EEOC officials for research in connection with a foundation grant. EEOC staff have submitted declarations stating that they produced the EEO-1 data to Dr. Bendick in disaggregated form on the understanding that it would be used exclusively for research and not for litigation, and consider Dr. Bendick's use of the data in this case to be a breach of good faith. *See* Neckere Decl. ¶¶5, 12; Edwards Decl. Dr. Bendick, in contrast, has testified in deposition that he apprised the EEOC that he would use the data for more than just research. The Court need not resolve this credibility contest, because, as discussed below, defendant has failed to identify any law or regulation that would create a use-limitation duty for Dr. Bendick.

First, the applicable regulation, which provides that the EEOC routinely will make available aggregated EEO-1 data, does not bar the EEOC from ever releasing disaggregated data, just so long as confidentiality is protected. *See* 29 C.F.R. § 1610.18(a). Indeed, in this instance the EEOC officials presumably were following their own understanding of the law when providing Dr. Bendick with the information in the first place, and Mr. Neckere states that disaggregated, anonymous EEO-1 data has been provided to other individuals "a couple of other times in the past several years." *See* Neckere Decl. ¶10. Moreover, even if the regulation strictly forbade disclosure of all disaggregated data, it still does not appear to apply to private individuals, but rather governs only the EEOC's actions.

Second, while Defendant criticizes Dr. Bendick for figuring out the identities of some of the reporting companies in the EEO-1 reports, there does not appear to be any law or regulation prohibiting a private individual from making such assessments. Moreover, Dr. Bendick obtained Wal-Mart's EEO-1 reporting number legitimately through discovery in this litigation. He determined Target's EEO-1 identity because the company volunteered the information to Plaintiffs. For the other companies, Dr. Bendick has only determined that, taken as a group, the largest sets of data belong to well known large retailers (such as Costco and J.C. Penny) but he cannot (and does not) identify which company matches which particular data set. Bendick Decl. ¶¶21-23. Accordingly,

Defendant has failed to establish that Dr. Bendick breached any confidentiality obligation. At worst, Dr. Bendick may have misled the EEOC with respect to the purposes for which the data would be used. But this interpretation of the facts is open to question. Regardless, the Court is not persuaded that legal or other grounds justify sanctioning Plaintiffs by striking Dr. Bendick's declaration.

b. *Production of the Full EEO-1 Data*

Defendant also complains that Plaintiffs produced in discovery only the EEO-1 data that Dr. Bendick *used* from the companies he selected, rather than producing the entire database received from the EEOC. *See* Def.'s Motion to Strike re Bendick at 8; Haworth Decl. ¶309. Thus, Defendant contends that it is limited in its ability to challenge Dr. Bendick's conclusions by analyzing the full data set in its own manner. Defendant presents this argument as "a matter of equity." Def.'s Motion at 8. However, it is clear that Defendant never properly requested the entire data file. Its deposition subpoena demanded "all of the data on which he [Dr. Bendick] relied for his opinions in this case." Defendant did not ask for the entire data set that Dr. Bendick received from the EEOC. It is telling that Defendant did not move to compel further production at the time, and it is far too late now to attempt the equivalent in the context of these proceedings.

Furthermore, it appears that the data produced by Dr. Bendick included all EEO-1 reports for all companies of all sizes in every industrial category comparable to Wal-Mart. Upon review of Dr. Haworth's analysis of the benchmarking issue, the Court observes that she had access to a wide range of data that goes well beyond just the twenty comparator companies that Dr. Bendick selected. In fact, she did an extensive analysis of all companies reporting to the EEOC in seven general industrial groupings, which was sufficient data for her to draw her own conclusion in opposition to Dr. Bendick. *See* Haworth Decl. ¶310. Thus, Defendant's argument that all it could do was to "check Bendick's math on his self-defined 20 'comparators'" is not supported by the record. *See* Def.'s Reply re Motion to Strike Bendick at 5. Further, while Defendant argues that it *might* have been able to find something in the full data set to support its position, it fails to show that there are any industry categories missing from the data that are comparable to Wal-Mart.

2. *Defendant's Arguments on the Merits*

Besides its evidentiary objections to the use of the EEO-1 data, defendant raises various challenges to Dr. Bendick's expert opinion on the merits, none of which justify striking the declaration under the standards set forth above. First, Defendant argues that Dr. Bendick's analysis is flawed because he did not base his analysis on Wal-Mart's limited internal applicant flow data. As discussed in the Class

Certification Order, however, this objection is an insufficient basis for striking Dr. Bendick's declaration. *See* Class Certification Order, section I.B.2.b(3). Rather, where, as here, actual applicant flow data is very limited, alternative means of determining whether a promotion shortfall exists for women are appropriate, including the benchmarking method. *Id.*

Second, Defendant argues that Dr. Bendick "'cherry-picked' his comparators from a few, narrow lines of business, such as traditional department and general discount stores, where managers historically are largely female." Def.'s Motion to Strike re Bendick at 14. Again, as explained in the Class Certification Order, the record does not support this contention. Further, Defendant's criticism of Dr. Bendick's benchmarking analysis is of the type that clearly goes to the weight, rather than the admissibility, of the evidence.

Third, Defendant contends that Dr. Bendick's choice of comparators is flawed because Wal-Mart, in contrast to other retailers, does not include its Department Managers (the lowest hourly management position), which are 75 percent female, in its EEO-1 managers category. Inclusion of this category would raise Wal-Mart's representation of women among all in-store managers from 34.5 percent to 63 percent, making their representation in management better rather than worse than the comparators. Defendant's argument, however, is based on speculation, and is not supported by any evidence in the record. Moreover, Dr. Bendick tested Wal-Mart's hypothesis in a

number of ways and concluded that it was extremely unlikely that Wal-Mart and the comparators had significantly different managerial reporting protocols.[4] Although Defendant had the opportunity to respond to these tests, it failed even to mention them. Accordingly, the Court finds Dr. Bendick's opinion sufficiently probative to assist the Court in evaluating the class certification requirements at issue in this case, and therefore declines to strike Dr. Bendick's declaration.[5]

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[4] Dr. Bendick calculated the average number of managers per store in both Wal-Mart and the comparators, and he arrived at essentially the same number for both. He also did a more specific test by comparing the number of female managers at Wal-Mart with the number of female managers at the comparator firms with essentially the same number of managers per store. This refined comparison *increased* the disparity between Wal-Mart and the comparators in the proportion of women in management. Bendick Decl. ¶¶36-41.

[5] Defendant also notes that Dr. Bendick's testimony has been rejected by the Sixth and Eleventh Circuits. *See Middleton v. City of Flint,* 92 F.3d 396, 406 (6th Cir. 1996); *United States v. City of Miami,* 115 F.3d 870, 872 (11th Cir. 1997). However, those cases are readily distinguishable. In *Middleton,* Dr. Bendick used the city's general labor pool as the relevant population for comparison, and in *City of Miami* he used general census data. The courts generally are skeptical of using such generalized sources because census and general population data are likely to contain many people who would not be qualified or interested in the particular jobs at issue in a given case. Here, in contrast, Dr. Bendick corrected for that problem by using a far more narrowly focused source for comparison, i.e. female retail employees at large chain stores. This methodology comports with general benchmarking practices and is similar to comparisons that have been generally accepted by the courts. *See, e.g.,*

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D. *Defendant's Motion to Strike Portion of Declaration of Richard Drogin*

Defendant moves to strike a minor portion of the declaration of Plaintiffs' statistician, Dr. Richard Drogin, due to an error in one of his computations. This motion was filed after Plaintiffs' class certification reply brief was filed. While it would be appropriate for the Court to deny this motion as untimely, the Court exercises its discretion to address the merits of the motion. As discussed more fully in the Class Certification Order, Drs. Drogin and Haworth conducted separate regression analyses to determine whether Wal-Mart has engaged in gender discrimination with respect to pay. Each expert used different approaches – Dr. Drogin analyzed the data at the regional level, and Dr. Haworth analyzed the data at the store sub-unit level. After Dr. Haworth submitted her store sub-unit regression analyses, Dr. Drogin took all of Dr. Haworth's sub-unit analyses and aggregated the results. Based on this calculation, he reported that even Defendant's methodology shows an average pay shortfall for women of 12 cents per hour. Defendant subsequently pointed out that Dr. Drogin had double-counted certain data, and that the 12 cents differential should be reduced to nine cents,

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International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 337 n.17 (1977). Furthermore, the Court notes that Dr. Bendick's testimony has been accepted by courts in well over a dozen cases. *See, e.g., Butler v. Home Depot,* 1997 WL 605754 at *5 (N.D. Cal. Aug. 29, 1997).

a point which Dr. Drogin concedes. Suppl. Drogin Decl. in Support of Plaintiffs' Reply re Motion for Class Certification ¶5. Accordingly, Defendant's motion is granted. The Court, notes, however, that this ruling does not affect the Court's determination of the class certification issues since this correction does not pertain to the inference of discrimination that arises from Dr. Drogin's own regression analyses.

E. *Plaintiffs' Motions to Strike Portions of Declaration of Joan Haworth*

1. *Motion to Strike re Regression Analyses*

Plaintiffs move to strike twelve separate portions of the declaration of Defendant's statistical expert, Dr. Joan Haworth, as a sanction under Federal Rule of Civil Procedure 37(c)(1) because Dr. Haworth did not timely disclose the full extent of her expert testimony pursuant to Federal Rule of Civil Procedure 26(a)(2).[6]

In order to exclude evidence under Rule 37(c)(1), the Court must find that the Rule 26(a) violation was both unjustified and prejudicial to plaintiffs:

> A party that *without substantial justification* fails to disclose information required by Rule

[6] Federal Rule of Civil Procedure 26(a)(2) provides that parties must make an initial disclosure of each expert who may appear at trial, and that the disclosure must be accompanied by a written report containing a complete statement of all opinions to be expressed by the expert.

> 26(a) . . . is not, *unless such failure is harmless,* permitted to use as evidence . . . on a motion . . . information not so disclosed.

Fed. R. Civ. Proc. 37(c)(1) (emphasis added); *Salgado v. General Motors Corp.,* 150 F.3d 735, 742 (7th Cir. 1998).

The parties stipulated to an expert discovery schedule. *See* Stipulation and Order Regarding Discovery and Class Certification Deadlines and Other Matters, filed November 26, 2002. Dr. Haworth timely filed her report, then amended it three days before her deposition, and provided a new disk with back-up data supporting her analyses at her deposition. Subsequently, Dr. Haworth submitted a declaration in support of Defendant's opposition to class certification, which contains a number of changes from her original report. As one measure of the difference, her original report is 118 pages long, while her declaration is 178 pages long. The declaration substantively differs from the original report by responding to certain assertions in Dr. Drogin's rebuttal expert report, by summarizing information that was included in tables or in cursory fashion in the report, and by expanding on her earlier tests.

While Defendant's justifications for these changes vary, the Court need not address them in detail because Plaintiffs fail to establish sufficient prejudice. The only issue of prejudice worthy of discussion here is in regard to the "Chow" test. As discussed in the Class Certification Order, Defendant argues that

Dr. Drogin's approach is flawed because he failed to apply the Chow test prior to aggregating his data on the regional level. In her report, Dr. Haworth stated that she conducted a Chow test and "found that it was statistically inappropriate to pool all . . . hourly associates in one regression model" as Dr. Drogin did. Haworth Report at 106 (Suppl. Seligman Decl. re Motion to Strike Haworth, Ex. 3). Plaintiffs argue that the Chow test referenced in the report was conducted on her *own* model, and that she never said that she had conducted a Chow test on Dr. Drogin's model until submitting her declaration; thus, using the Chow test to directly attack Dr. Drogin is untimely. *See* Haworth Decl. ¶183. Neither party, however, has provided sufficient details of how the Chow test is actually performed to enable the Court to satisfactorily assess the import of whose model is subjected to the Chow test. Accordingly, Plaintiffs have not met their burden of demonstrating prejudice.

2. *Motion to Strike References to Store Manager Survey*

Dr. Haworth's declaration relies in part on a survey undertaken by Defendant of a number of its store managers. Plaintiffs contend that the survey is so inherently flawed and biased that it does not meet the standards of Federal Rules of Evidence ("FRE") 702 and 703. Accordingly, Plaintiffs move to strike those portions of her declaration which discuss the survey.

FRE 702 provides that an expert's testimony must be "the product of reliable principles and methods." FRE 703 provides that the facts or data relied upon by an expert need not be independently admissible so long as the evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The party proffering the expert has the burden of showing that the requirements for admissibility of the expert's testimony have been satisfied. *See Lust by and through Lust v. Merrill Dow Pharmaceuticals, Inc.,* 89 F.3d 594, 598 (9th Cir. 1996); *Bennett v. PRC Public Sector, Inc.,* 931 F. Supp. 484, 489-90 (S.D. Tex. 1996).

The survey at issue consists of declarations obtained from 239 Wal-Mart store managers randomly selected by Defendant. Each store manager was asked a series of identical questions about a number of issues, including the factors they use to set pay rates and make job placement decisions. The answers from each store manager were recorded in declaration form, the store manager signed the declarations, and the results were tallied. *See* Seligman Decl. in Support of Pls.' Motion to Strike Store Manager Declarations, Ex. 4 (sample declaration). Dr. Haworth relies on the survey results to (1) challenge Dr. Drogin's decision to aggregate and analyze data at the regional level, and (2) support her own decision to disaggregate and analyze data on a store sub-unit by sub-unit basis.

It is undisputed that Defendant's counsel and Defendant developed and prepared the survey instrument and administered the survey. *See, e.g.,* Haworth Depo. at 255:13-22 (Seligman Decl. Ex. 6). ("My understanding is the attorneys recorded the information that the store managers were giving them"). Indeed, Defendant refused to respond to Plaintiffs' discovery requests regarding the design and administration of the survey on grounds of attorney-client privilege. In addition, Defendant does not dispute that the surveyed managers knew that the surveys were being utilized in connection with this litigation. Dr. Haworth also is on record as stating that she told a least one lawyer for Defendant that having the attorneys conduct the survey was not a good idea because "typically it's difficult for an attorney to collect the information in a neutral environment so that they truly get a neutral set of information back." Haworth Depo. at 254:14-17.

The survey instrument in this case also is biased on its face. For example, instead of asking Store Managers opened-ended questions, such as "what factors do you rely upon in setting individual pay rates?" the survey provided Store Managers with a set list of over 100 suggestive factors, with the chance to add additional factors tacked on at the very end. *See* Seligman Decl., Ex. 4 at ¶13. The sex of the employee was never identified as a possible factor. Another question was based on the express assumption that the Store Manager encouraged women to

apply for the management trainee program. *Id.* at ¶16.

In sum, the record demonstrates that the survey was designed and administered by counsel in the midst of litigation, the interviewees knew the survey was related to the litigation, and the survey instrument exhibits bias on its face. Taken together, these factors plainly demonstrate that the results from the survey are not the "product of reliable principles and methods," and therefore are not the type of evidence that would be "reasonably relied upon by experts." Fed. R. Evid. 702, 703. Even Dr. Haworth conceded, after Plaintiffs obtained an opinion from an expert in survey methods, that the declarations do not qualify as a valid survey because the data was not collected in "an anonymous and neutral setting." Haworth Decl. at 93, n.114; Seligman Decl., Ex. 7; Presser Decl. (expert opinion that "the survey of Wal-Mart managers does not meet generally accepted standards for the conduct and reporting of surveys").

Not surprisingly, courts have refused to allow surveys made under such circumstances, usually rejecting them on grounds of being unreliable hearsay. *See, e.g., Pittsburgh Press Club v. United States,* 579 F.2d 751, 756-57 (3rd Cir. 1978) (survey must be conducted independently of attorneys involved in the litigation and respondents should not be aware of purpose of the survey); *Yapp v. Union Pacific Railroad Co.,* 301 F.Supp.2d 1030, 1037 (E.D. Mo. 2004) (rejecting experts' survey where there was "heavy involvement of defense counsel in [its] design

and conduct"); *Gibson v. County of Riverside,* 181 F. Supp.2d 1057, 1067-68 (C.D. Cal. 2002) (same); *Delgado v. McTighe,* 91 F.R.D. 76, 80-81 (E.D. Pa. 1981) (same).[7]

Defendant responds that basic survey standards should not apply here because the declarations were never intended to be a "scientific survey;" rather, they are just a collection of declarations. Dr. Haworth repeatedly referred to and treated the 239 declarations as a "survey," in both her deposition and expert report. *See, e.g.,* Haworth Expert Report at 42-45 (Seligman Decl. Ex. 1); Haworth Depo. at 176, 238-243, 247-252 (Seligman Decl., Ex. 6). The Court flatly rejects Defendant's disingenuous effort to re-characterize the survey at the eleventh hour as simply a collection of declarations.[8]

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[7] It is also worth noting that the fact that questionnaire responses were collected in a declaration format does not assist Defendant. In both *Pittsburgh* and *Gibson,* cited above, the information also was obtained in declaration form. This did nothing to dissuade the courts from finding that the declarations constituted improperly conducted surveys.

[8] Indeed, given Haworth's consistent references to the Store Manager survey in her deposition and expert report, her sudden abandonment of this terminology in her declaration filed in opposition to plaintiffs' motion for class certification rings hollow. *See, e.g.,* Haworth Decl. ¶20 (referring instead to "declarations signed under oath by Store Managers who were randomly selected (according to scientifically accepted statistical methods)"). Nor can Defendant meet its Federal Rule of Evidence 703 burden simply by pointing to Dr. Haworth's wholly conclusory assertion that the store manager declarations "are an

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Defendant also argues that it is reasonable and customary for experts to rely on the statements of others, including the declarations of others. While this general proposition is true, it is only "reasonable" for an expert to rely on the statements of others if the statements or declarations were collected through methods calculated to elicit reliable information. Notably, the cases cited by Defendant involved instances in which *the expert* interviewed certain agents of the party, and the courts, after undertaking a Federal Rule of Evidence 702/703 analysis, concluded that it was reasonable for the experts to rely on the statements obtained under those circumstances. *See, e.g., Int'l Adhesive Coating Co. v. Bolton Emerson Int'l Inc.,* 851 F.2d 540, 545 (1st Cir. 1988); *United States v. Affleck,* 776 F.2d 1451, 1457 (10th Cir. 1985). None of Defendant's authorities permit an expert to rely on responses to questionnaires designed and administered by the party's counsel during litigation.

Accordingly, the Court grants Plaintiffs' motion and strikes references to the Store Manager survey from Dr. Haworth's declaration. The Court notes, however, that this ruling does not mean that Dr. Haworth's statistical analysis or results are excluded.

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appropriate source to support a regression model." Haworth Decl. ¶186, n.114. An expert's conclusory assertion that his or her testimony is based on a type of data upon which experts reasonably rely is not sufficient to survive a Rule 703 challenge. *In re Paoli R.R Yard PCB Litigation,* 35 F.3d 717, 747-48 (3rd Cir. 1994); *Yapp,* 301 F. Supp. 2d at 1035-36.

It only means that she cannot rely upon the survey of store managers to attack Dr. Drogin's aggregated analysis or as support for her decision to conduct a disaggregated analysis.[9]

II. MOTIONS TO STRIKE NON-EXPERT TESTIMONY

A. *Defendant's Motion to Strike Portions of the Declarations of the Named Plaintiffs and Designated Class Members*

In support of their Motion for Class Certification, Plaintiffs filed 114 declarations from the named plaintiffs and selected class members around the country. Defendant moves to strike portions of each declaration on various evidentiary grounds. All told, defendant has raised hundreds, if not thousands, of objections.

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[9] The Court further notes that granting this motion does not have a material impact on the class certification decision. At most, the survey results, if admitted, would merely support Dr. Haworth's disaggregated analysis as *one* possible way of analyzing the data. The survey would not provide sufficient additional weight to Defendant's challenge to Dr. Drogin's analysis to sway the Court from its conclusion that his testimony supports an inference of discrimination, and thus the existence of substantial questions common to the class. *See* Order re Class Certification, section I.B.2.a.(2)(a) (discussing Dr. Drogin's statistical analysis); *see also* Haworth Decl., Appendix Vol. 2, Tab 16 (tabulation of survey results showing that the majority of the pay rate factors were only considered by a very small percentage of Store Managers).

Defendant fails, however, to *discuss* any of the objections individually. Rather, defendant merely highlights multiple portions of each declaration (each portion ranging from a few isolated words to over a paragraph) using six different colors to correspond to different generic objections (e.g. blue for hearsay, gray for best evidence rule, yellow for relevance) and asserts that "[n]early all objections are obvious on their face." Def.'s Reply to Mtn to Strike Declarations of Named Plaintiffs at 1; Berry Decl., Vols. I - IV.

First, one of the colors used (pink) can apply to any one of five objections (lack of personal knowledge, no foundation, conclusory, speculative or inadmissible opinion). Thus, Defendant has failed even to identify the generic objection at issue in many cases. Second, it is not obvious why many objections have been asserted and it is not the Court's role to divine Defendant's arguments. Third, Defendant appears to have made indiscriminate blanket objections. For example, Defendant appears to object to virtually all out-of-court statements as hearsay without making any effort to assess whether the statement is submitted for the truth of the matter asserted or whether the statement falls within a hearsay exception.[10]

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[10] The Court also notes that Defendant wrongly asserts that any testimony regarding events that occurred prior to the class period (i.e. pre-dating October 1997) is irrelevant. Even though such incidents are not independently actionable, such evidence still may be admitted as relevant background evidence supporting Plaintiffs' claims. *See Nat'l R.R. Passenger Corp. v. Morgan,*

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As Plaintiffs correctly object, Defendant's attempt to assert these objections without providing any individualized discussion is procedurally defective. The objections therefore merit summary denial on the ground that they are unduly vague. Indeed, Defendant's grossly overbroad approach is more suggestive of an intent to harass than a good faith effort to address genuine objections. Additionally, the Court's review of a portion of the objections indicates that they are largely without merit.[11] Finally, even were the Court to exclude some limited portion of some class declarations, the Court is satisfied that it would have no bearing on the outcome of Plaintiffs' motion for class certification. Accordingly, Defendant's motion is denied.

B. *Plaintiffs' Motion to Strike Store Manager Declarations*

As discussed above, the Court grants Plaintiffs' motion to strike references to the store manager survey from Dr. Haworth's declaration. Defendant has, as a separate matter, also individually filed each of the 239 store manager declarations as anecdotal, percipient witness evidence. Plaintiffs move to strike

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536 U.S. 101, 113 (2002); *Bouman v. Block,* 940 F.2d 1211, 1218 (9th Cir. 1991).

[11] The Court, for example, has reviewed the objections to the named plaintiffs' declarations and concludes that the objections typically overreach and at best go to the weight of the evidence rather than its admissibility.

these declarations as a sanction under Federal Rule of Civil Procedure 37(c)(1) because Defendant did not timely disclose 215 of the 239 store managers pursuant to Rule 26(a)(1).[12] Plaintiffs also seek to recover their fees and expenses incurred in bringing this motion. Defendant responds that Plaintiffs have failed to meet the standard for demonstrating that the declarations should be excluded under Rule 37(c)(1).

As discussed above, in order to exclude evidence under Rule 37(c)(1), the court must find that the Rule 26(a) violation was both unjustified *and* prejudicial to plaintiffs. *See* Rule 37(c)(1); *Salgado,* 150 F.3d at 742. Defendant does not advance any grounds justifying its failure to disclose the information. Plaintiffs, however, fail to establish sufficient prejudice. In Plaintiffs' opening brief they did not even assert that they suffered actual prejudice from the violation. In Plaintiffs' reply, they argue that they were prejudiced because they were prohibited, under the Court's Case Management Order, from taking the depositions of any store managers (other than those who supervised the named plaintiffs); they do not indicate, however, that they would have actually deposed any of the 215 managers even if given the opportunity. Nor do they explain how the

[12] Fed. R. Civ. Proc. 26(a)(1) provides that parties must make an initial disclosure of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses.

inability to depose the store managers has harmed them. Since the Court does not find both lack of justification and prejudice, Plaintiffs' motion is denied.

CONCLUSION

For the reasons set forth above, and good cause appearing, it is HEREBY ORDERED as follows consistent with the above:

Plaintiffs' Motions

1. Motion to Strike Portions of Declaration of Joan Haworth for Failure to Comply with Fed. R. Civ. P. 26(a)(2) is DENIED.

2. Motion to Strike Portions of Declaration of Joan Haworth (Re Store Manager Survey) is GRANTED. The following portions of Dr. Haworth's Declaration shall be stricken (references are to pages and lines): 12:7-17; 14:11-12; 29:10-14; 36:17-18 & n.42; 83:9-12 & n.98; 83:20 to 84:1 & n.100; 93:3 to 99:4; 141:14-16 & n.246; 142:16-17 & n.249; 174:20 to 175:2.

3. Motion to Strike Store Manager Declarations is DENIED.

Defendant's Motions

1. Motion to Strike Declaration, Opinion, and Testimony of Plaintiffs' Expert William T. Bielby is DENIED.

2. Motion to Strike Declaration of Mark Bendick is DENIED.

3. Motion to Strike Portions of Declaration of Richard Drogin is GRANTED.

4. Motion to Strike Portions of the Declarations of Named Plaintiffs and Designated Class Members is DENIED.[13]

IT IS SO ORDERED.

[13] For the record, the Court notes that at a July 25, 2003 status conference, this Court also denied Plaintiffs' Motion to Strike Declarations of 10 Undisclosed Witnesses. It also granted Defendants' motion for leave to file a surreply in opposition to the Plaintiff's Motion for Class Certification given that Defendant had already filed the surreply. The Court noted, however, that the filing of the surreply was not justified and deserved little or no weight.