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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

WAL-MART STORES, INC.
Defendant.

CASE NO. C-01-2252 MJJ

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Date: July 25, 2003
Time: 10am
Courtroom: 11

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I. Introduction

On one point, the parties agree: this case is large. Very simply, this case is large because Wal-Mart itself is large – the largest private employer in America. The case is also large because Wal-Mart has committed discrimination against its female retail store employees on an unprecedented scale. While Wal-Mart's size gives it extraordinary advantage in the marketplace, its enormity does not give it license to discriminate.

Although large, this case is neither complicated nor unmanageable. The case is brought on behalf of *one* protected group for violation of *one* federal statute. The case challenges only pay and management-track promotion practices, which suffer from *one* well-recognized problem: a system that encourages and permits the use of arbitrary and subjective decision-making. The complaint seeks only relief that could legally be awarded *without* individualized proof. Rule 23 certification of this case falls squarely within established Ninth Circuit and Supreme Court precedent.

Notably, Wal-Mart does not explain to the Court what the alternative is to class treatment for those women whom Wal-Mart itself admits have been underpaid compared to their male counterparts. Indeed, given the astronomical disparity in resources between Wal-Mart and one of its low-wage female workers, this case presents the textbook example of why class actions have historically been – and continue to be – the only viable means of enforcing the civil rights laws to redress systemic discrimination. And Wal-Mart knows that. It knows that if it can defeat class certification, it will not be held accountable for its conduct.

The problem for Wal-Mart is that the evidence – as set forth in plaintiffs' opening brief – plainly establishes the prerequisites for certification of a nationwide class. Faced with this dilemma, Wal-Mart has chosen to base its defense to class certification on evidence recently manufactured at the behest of its lawyers and expert witness *after the discovery cut-off* – using hundreds of witnesses *never* disclosed during discovery.[1] Most remarkably, while Wal-Mart urges the Court to rely on this

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[1] This post-discovery evidence includes its "new" Manager in Training posting system, introduced in January 2003, for which the first round of selections were made after the close of discovery. *See infra* at 15. Wal-Mart has also submitted declarations from 239 Store Managers, only a small portion of whom were identified in Rule 26 disclosures, as part of a post-discovery "survey." *See* Plaintiffs' Motion to Strike Store Manager Declarations and Portions of Declaration of Joan Haworth (hereinafter "Motion to Strike Store Manager Declarations"). Wal-Mart's expert witness, Dr. Joan Haworth, has submitted to the Court numerous brand-new

post hoc evidence to deny class certification, it has prevented plaintiffs from testing the credibility of this evidence by *claiming attorney-client privilege* for much of it.

Even without the benefit of full discovery, Wal-Mart's defense does not stand up to scrutiny. Wal-Mart seeks to portray itself as a decentralized association of thousands of individual stores operated by wholly independent managers. To do so, however, Wal-Mart must disavow the way that it has done business for decades. While Wal-Mart tells this Court that each store is really "eight different businesses," it does not provide the Court with a *single* internal company document that describes Wal-Mart's business in this way. In contrast, plaintiffs have provided the Court with a myriad of Wal-Mart documents which demonstrate that: 1) Wal-Mart is highly centralized with all policy-making and training controlled from its Bentonville headquarters; 2) store operations and staffing patterns are highly uniform; and 3) the stores are subject to extraordinary levels of real-time monitoring conducted electronically and by regular visits from Bentonville-based management. Wal-Mart never attempts to refute – nor does it even mention – this evidence.

So, why the fiction that every Store Manager is making idiosyncratic pay decisions free from any higher-level oversight? The simple answer is statistics – the bedrock of any Title VII class action. Plaintiffs have presented overwhelming statistical evidence that Wal-Mart has discriminated against female employees with respect to pay and management promotions, in every year and in every region across the country. These unprecedented statistical patterns are unlike those seen at any other retailer, yet they are consistent with Wal-Mart's own internal pre-litigation analyses.

Faced with this evidence, Wal-Mart's statistical expert, Dr. Joan Haworth, was forced to resort to a contrived "slice and dice" approach. Rather than analyzing patterns of decision-making within the company, the standard methodology endorsed in Title VII jurisprudence, Dr. Haworth took each individual store and broke it down into multiple sub-units. By subdividing the company into smaller and smaller pieces, Dr. Haworth analyzed sample sizes so small that statistical

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analyses, not the subject of her two earlier reports or deposition. *See* Plaintiffs' Motion to Strike Portions of Haworth Declaration for Failure to Comply with Fed.R.Civ.P. 26(a)(2) (hereinafter "Motion to Strike Haworth"). Finally, Wal-Mart has submitted ten declarations from additional undisclosed witnesses. *See* Plaintiffs' Motion to Strike Declarations of Ten Undisclosed Witnesses. Such post-litigation evidence is inherently suspect. *James v. Stockham Valves,* 559 F.2d 310, 325 and n.18 (5th Cir. 1977); *Stender v. Lucky Stores*, 1991 U.S. Dist. LEXIS 16316, *10 (N.D. Cal. Apr. 4, 1991).

significance could not be detected except in the most egregious cases. However, to justify her reductive approach, Dr. Haworth needed evidence to contradict existing proof that Wal-Mart's personnel practices are implemented consistently across the company. Accordingly, Wal-Mart's counsel administered a post-discovery "survey" of Store Managers designed to generate such data. The final product was so wholly unscientific that even Dr. Haworth disclaimed it. *See* Motion to Strike Store Manager Declarations. Dr. Haworth's analysis nonetheless relies on this – and other equally suspect – bases for what Wal-Mart repeatedly mischaracterizes as her "store-by-store regressions." Opp. at 6.

Similarly unavailing are Wal-Mart's entirely predictable and time-worn attacks on the class representatives. The Ninth Circuit does not require plaintiffs to have a class representative for every job position and decision at issue. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Nor is there any conflict of interest between the very small number of class members in Store Manager positions and the rest of the class.

Plaintiffs have met all of the Rule 23 requirements and have proposed a workable trial plan that will protect the rights of both the class members and of Wal-Mart. In the event of a liability finding, the finder of fact may use a formulaic approach to award back pay and, if appropriate, punitive damages. Accordingly, the Court should certify the proposed class.

II. Argument

In struggling to portray the proposed class as unwieldy and unique, Wal-Mart neither distinguishes nor acknowledges most of the governing cases in this circuit and instead resorts to cases from other jurisdictions. Wal-Mart claims it can ignore governing case law because this case would involve more employees than in prior actions. Opp. at 1. However, there is no exception either in Title VII or in Rule 23 for large employers. Merely because Wal-Mart is large and has committed discrimination against a large group of workers does not exempt it from the same laws that apply to other employers. *See In re Memorex Sec. Litig.* 61 F.R.D. 88, 103 (N.D. Cal. 1973) (denying certification because "computation of damages might render the case unmanageable would encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat the class action."); *see also Frank v. Capital Cities Communications, Inc.,* No. 80 CIV. 3188-CSH, 1983 WL 643, *2 (S.D.N.Y. Oct. 11, 1983).

A. Plaintiffs Have Met All Rule 23(a) Requirements

Wal-Mart incorrectly asserts that class certification requires proof that "discrimination is Wal-Mart's standard operating procedure."[2] This is simply false. Wal-Mart has confused the class certification standard with the standard for proving *liability*. *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 336 (1977). Evaluating the merits at the class certification stage is prohibited. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Instead, plaintiffs must demonstrate *only* that they meet the Rule 23 criteria. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

1. Plaintiffs Have Established Commonality

a. Wal-Mart Follows Common Policies in All Stores

Rule 23(a)(2) governs commonality and is to be construed permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Plaintiffs need only show one common issue to satisfy this prong. *Id.* Wal-Mart contends that its stores so differ in business, management, and salary structure as to defeat a finding of commonality. This argument is specious.

Each of Wal-Mart's 3,244 facilities – Discount, Supercenter, Neighborhood Market, and Sam's Clubs – has a virtually identical staffing structure and is engaged in the same business of selling discount retail merchandise. Motion at 4. Store Managers in Wal-Mart stores and General Managers in Sam's Clubs have virtually identical duties. Motion at 6; Burner Dep. at 144:16-24, Ex. 5. Although the number of employees varies with the size of the store, each store and division has the same job categories, job descriptions and management hierarchy. *Id.*

There also is remarkable uniformity within Wal-Mart's personnel policies, which are promulgated centrally.[3] Motion at 9. Wal-Mart's "tap on the shoulder" promotion system exemplifies this uniformity. *Id.* at 21. Throughout the liability period, it was Wal-Mart's policy not to require the regular posting of Manager-in-Training, Assistant Manager and Co-Manager vacancies. *Id.* at 24; Opp. at 11. In practice, Wal-Mart has not posted most Support Manager

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[2] *See* Opp. at 6:16-18 ("The issue at the class certification stage is whether discrimination is Wal-Mart's standard operating procedure – whether there is a pattern showing that women are adversely affected through Wal-Mart's stores."); Opp. at 21:17-18 ("Plaintiffs' burden at class certification is to submit reliable statistics from which a reasonable finder of fact could conclude that there is a 'pattern or practice' of discrimination.").

[3] Mandatory training regularly given to all Wal-Mart managers further belies the company's claim that each store is independent and autonomous. *See* Motion at n.8.

vacancies either. Drogin Rebuttal Decl. at ¶ 6. Wal-Mart has neither denied the existence of these policies nor explained its failure to post most management job vacancies.

Wal-Mart's compensation policy is approved at the executive level and then disseminated to field managers for implementation. Crawford Dep. at 78:14-19, Ex.127.[4] A common compensation policy applies to all Wal-Mart Stores, including the Supercenters and Specialty Divisions. *See* Motion at 16-19. Wal-Mart's own witness confirms the uniformity of its compensation policies and practices. In her second declaration, Sandra Jean Ellison, a District Manager, stated that when a pay rate for a particular employee is entered into the computerized payroll system and it is inconsistent with company policy, a "pop up" warning appears on the screen which only the Store Manager can override. The computer then compiles an "exception report" of non-conforming entries which is sent automatically to the District Manager, identifying the employee, store and job classification. Ellison Decl. at ¶¶ 1-3, Ex. 128. The Exception Reports demonstrate the power Wal-Mart's Home Office has to review Store Managers' compensation decisions; Yet, as a matter of practice, this power has not been exercised. *See* Motion at 17.

Wal-Mart's policy of entrusting local Store Managers with discretion to make subjective pay and promotion decisions is readily susceptible to challenge under Title VII. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 998 (1988) (subjective decision- making is a "practice" subject to challenge under Title VII).[5] It also plainly may be challenged on a class-wide basis. *Staton*, 327 F.3d at 956 ("The unsurprising fact that some employment decisions are made locally does not allow

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[4] References to exhibits numbered 1-126 refer to Exhibits to the Declaration of Christine Webber, submitted with Plaintiffs' opening brief. References to exhibits numbered 127 and higher refer to Exhibits to the Supplemental Declaration of Christine Webber, submitted in support of this Reply. For convenience, references to deposition testimony in this brief are abbreviated as [Witness' Last Name] Dep. Plaintiffs use a similar system for declarations. Declaration of Betty Dukes is abbreviated as "Dukes Decl."

[5] Invoking *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000) and *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000), Wal-Mart asserts that plaintiffs may not challenge its subjective pay practices under a disparate impact theory. Opp. at 32. *Coleman* and *Chapman* were both individual disparate treatment cases. *Coleman* simply held that subjective decision making is not *per se* illegal, and is only weak evidence of intent to discriminate. *Coleman*, 232 F.3d at 1285. Of course, intent is not an element of plaintiffs' disparate impact claim. The Supreme Court has unequivocally held that the use of subjective decisionmaking may be challenged under disparate impact as well as disparate treatment theories of discrimination. *Watson*, 487 U.S. at 990.

a company to evade responsibility for its policies"). Decisions abound from cases in which subjective employment policies, much like those at issue here, were challenged on a class-wide basis under both disparate impact and disparate treatment theories.[6]

b. The Statistical Evidence and the Competing Expert Opinions Present Common Questions of Law and Fact

Wal-Mart mistakenly has sought to argue the merits of the approaches adopted by the competing statistical experts. At class certification, however, the Court should not determine which expert's opinion ultimately is more credible. Such "statistical dueling" and any "weighing of the evidence is not appropriate at this stage in the litigation." *Caridad*, 191 F.3d at 293. The conflicting approaches adopted by the statistical experts do underscore the existence of common questions of law and fact.[7] Regardless of which analytical approach is ultimately accepted at trial, the approach employed by plaintiffs' experts is sound and satisfies the commonality requirement of Rule 23 (a).

It bears special note that much of the analysis presented by plaintiffs' expert went unchallenged. Dr. Drogin presented a lengthy statistical analysis of Wal-Mart's workforce, which Wal-Mart's expert does not contest. Thus, Wal-Mart has not disputed that women are paid less than men in every region of Wal-Mart, that these pay disparities exist in nearly every job, that there is a

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[6] *See e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 286 (2d Cir. 1999); *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1996 U.S. Dist. LEXIS 3370, at *8 (N.D. Cal. Jan. 24, 1996); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 336 (N.D. Cal. 1992); *Dean v. Boeing Co.*, No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787 (D. Kan. April 24, 2003); *McReynolds v. Sodexho Marriott Servs., Inc.*, 208 F.R.D. 428, 441 (D. D.C. 2002); *Gutierrez v. Johnson & Johnson, Inc.*, Civ. A. No. 01-5302 (WHW), 2002 U.S. Dist. LEXIS 15418, *17-18 (D. N.J. Aug. 12, 2002); *Daniels v. Fed. Reserve Bank of Chicago*, 194 F.R.D. 609, 615 (N.D. Ill. 2000); *Shepherd v. Babcock & Wilcox of Ohio*, No. C-3-98-391, 2000 WL 987830, at * 3-4 (S.D. Ohio Mar. 3, 2000); *Wagner v. Nutrasweet Co.*, 170 F.R.D. 448, 451 (N.D. Ill. 1997); *Morgan v. United Parcel Service of America Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Shores v. Publix Super Market, Inc.*, No. 95-1162-Civ-T-25, 1996 WL 407850, at *6 (M.D. Fla. Mar. 12 1996); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622 (N.D. Ill. 1989); *Cook v. Billington*, Civ. A. No. 82-0400, 1988 WL 142376 at *3 (D. D.C. 1988); *Allen v. Isaac*, 99 F.R.D. 45, 54 (N.D. Ill. 1983).

[7] The points of dispute between the experts also present common questions for Rule 23(a): 1) What is the appropriate statistical methodology for analyzing pay and promotion disparities? 2) What is an appropriate benchmark for comparison? 3) What are the appropriate pools for promotion analysis? 4) What variables should be considered in any model? 5) What is the appropriate level of aggregation for analysis? 6) Are promotion disparities the result of different levels of interest in advancement between men and women?

widening salary gap between men and women hired at the same time into the same jobs, that women take longer than men to enter management positions, (even though they receive higher performance ratings), and that there is a "gender hierarchy" at Wal-Mart in which women hold a smaller proportion of positions as they progress higher in the corporate organization. *See* Drogin Decl. at 5:21-23:13; Haworth Dep. at 67:18-68:9, 68:14-22, 69:16-70:4, 76:3-11, Ex. 129.

Wal-Mart's criticisms of plaintiffs' statistical evidence boil down to two points. First, Wal-Mart claims that Dr. Drogin's pay analysis failed to account for store level differences. It argues that store-by-store pay analyses, including a wide range of variables, are the proper approach because of variations among Store Managers and the so-called "Chow" tests. Second, Wal-Mart criticizes Dr. Drogin's promotion analysis because it does not rely on applicant flow data. As demonstrated below, Wal-Mart's arguments – and its own expert's analysis – are flatly wrong. These disputes only strengthen the evidence that common questions exist.

c. Dr. Drogin's Analysis Accounts for Variations by Job and by Store

Wal-Mart contends that Dr. Drogin only examined the company as a whole and failed to account for variations due to job position or store location. Opp. at 28. Wal-Mart is wrong. Dr. Drogin studied the company's entire workforce, as Wal-Mart's centralized policies would require. But, in every regression model he developed, Dr. Drogin included a variable for the store to capture differences in pay scale at each store, the type of store, and the store's profitability. Drogin Dep. at 276:9-277:1; 293:19-294:2; 456:4-10, Ex. 130. Most of his models also included a variable for "job held," which captures alleged differences in pay group level, pay plans and job qualifications. Drogin Decl. at ¶¶72, 75. He examined both employee gross earnings and, for hourly employees, their pay rate. *Id.* He examined pay patterns every year since 1996; Dr. Haworth, on the other hand, inexplicably limited her pay analysis to the post-litigation time-frame after October 2001. Haworth Dep. at 162:15-163:9, Ex. 129. Having considered the potential for variation within multiple dimensions of Wal-Mart's organization over six years, Dr. Drogin's conclusions are all the more striking: in every model, in every region of Wal-Mart, women have been paid less than men. Drogin Decl. at 44:7-10. His conclusions aptly demonstrate commonality.[8]

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[8] These statistical conclusions are also sufficient to satisfy even Wal-Mart's erroneously high standard of establishing a *prima facie* case of pay discrimination, even if other variables might theoretically be included. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986); *Hemmings v.*

d. Dr. Haworth's Pay Regressions Do Not Undermine Commonality

Wal-Mart asserts that its own expert conducted a proper, store-by-store analysis, which showed a "random pattern with respect to hourly pay" in 90% of the stores. Opp. at 6:20-24. In fact, not one of Dr. Haworth's regressions – neither her original, "amended" nor "corrected" version – included a store-by-store regression analysis.[9] Rather, she contrived a model that broke each store into artificial sub-units and separately analyzed each sub-unit. The Ninth Circuit has recently criticized this kind of broad disaggregation of the workforce data. *Paige v. California*, 291 F.3d 1141, 1148 *as amended by* No-0155212, 2002 U.S. App. LEXIS 14463(9th Cir. 2002), *cert. denied,* __ U.S. __, 123 S.Ct. 1256 (2003). Further, Wal-Mart may not argue that a store-by-store analysis is more appropriate if it did not actually apply that model in its own analysis. *See EEOC v. Gen. Tel. Co. of the Northwest,* 885 F.2d 575, 579-82 (9th Cir. 1989).

(1) *There is No Factual or Legal Support for Dr. Haworth's Analysis of Stores Sub-Unit by Sub-Unit*

Dr. Haworth divided the store data into as many as eight separate sub-units: grocery, non-grocery, and each "specialty" department: jewelry, shoes, optical, pharmacy, TLE, and photo. Haworth Dep. at 154:13-17, 156:11-15, Ex. 129; Drogin Rebuttal Decl. at ¶ 22. As a result, Dr. Haworth performed nearly 7700 regressions in each of her three models. Drogin Rebuttal Decl. at 12 and n. 24; Haworth Dep. at 172:15-173:9, Ex. 129. Dr. Haworth conceded that she has never relied on this many separate regressions in any other case.[10] Haworth Dep. at 174:1-13, Ex. 129.

Tidyman's Inc., 285 F.3d 1174, 1189 (9th Cir. 2002), *cert. denied,* 123 S.Ct. 854 (2003).

[9] Dr. Haworth's result-oriented approach required three iterations and included numerous computing errors. Her first model, in her initial report, mistakenly left out 622 stores and misidentified Sam's Club employees as Supercenter employees. Haworth Dep. at 13:15-14:13; 17:21-18:11; 20:15-24; 153:8-16, Ex. 129. Her second model, in her "Amended Report," mistakenly excluded 60,000 hourly department heads – the highest paid hourly positions. Drogin Rebuttal Decl. at ¶¶ 32-33. She allegedly "fixed" this error for the third analysis, presented in her declaration. Safely insulated from discovery, she now asserts that these errors had "very little effect on the conclusion. . . ." Haworth Decl. at 111:15. Plaintiffs have moved to strike these and numerous other post-Report analyses by Dr. Haworth for failure to comply with Fed. R. Civ. Pro. 26(a)(2). *See infra* at n.1.

[10] Wal-Mart's assertion that women are favored in pay in four of the six plaintiffs' stores (Opp. at 26) is likewise not based on an analysis of all employees in the stores. Rather, the data cited is from Haworth's regressions and is limited to the non-grocery, non-speciality "sub-unit" of each store.

By breaking stores into so many sub-units, Dr. Haworth accomplished two objectives: 1) she reduced the number of employees in each regression, thus decreasing the likelihood that differences in pay in each sub-unit of each store would be statistically significant;[11] and 2) she separated the sub-units so that an employee's pay in one sub-unit could not be compared to the pay of employees in other sub-units. Thus, grocery employees were not compared with non-grocery employees, and employees in each specialty unit were not compared with employees in other units. Haworth Dep. at 214:8-22, Ex. 129.

. The flaw in this analysis is illustrated by Dr. Haworth's regressions of the jewelry department, a "specialty" department. While the composition of this department is overwhelmingly female (97.3%), Drogin Decl. at 20:12, Dr. Haworth's approach only permits a comparison of the pay for women within this department, foreclosing any comparison with other departments even though jewelry department employees perform the same kind of sales work as employees in other departments. Based on Dr. Haworth's artificially-narrow model, statistically significant pay differences were rarely observed. Haworth Dep. at 215:1-12, Ex. 129.

The factual record does not support Dr. Haworth's disaggregation of the data to the store sub-unit level. For example, Dr. Haworth claims that there are different "compensation structures" in her eight sub-units. *See* Haworth Decl. at 99:10-15. Yet, she conceded at her deposition that there is only *one* pay policy for Wal-Mart stores that applies equally to all jobs, regardless of department. Haworth Dep. at 81:14-82:8; 198:13-203:3, Ex. 129. Likewise, it is beyond dispute that the Store Manager makes initial pay decisions for *all* employees regardless of department or sub-unit, as Dr. Haworth at times seemed to acknowledge. Haworth Decl. at 92:16-18; Haworth Dep. at 217:8-17, Ex. 129. Neither Dr. Haworth nor Wal-Mart offers any evidence that pay "structures" or policies, in fact, vary according to these invented "sub-units."

This artificial subdivision of store workforce data also fails to account for the frequent movement of employees between departments and other sub-units of the stores. The folly of Dr. Haworth's sub-unit methodology is underscored by her own conclusion that the vast majority of employees bid for positions outside their own departments. *See* Haworth Decl. at 48:5-9, 49-50.

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[11] Dr. Haworth conceded that many of her regressions included as few as 20 to 30 employees, and in some cases fewer. Haworth Dep. at 187:24-191:4, Ex. 129.

Indeed, the same decision-maker, the Store Manager, makes these departmental assignment decisions, rendering her sub-units even less meaningful. Haworth Dep. at 95:15-96:17, Ex. 129. The inescapable conclusion is, that Dr. Haworth's analysis does not reflect how personnel decisions are actually made in Wal-Mart stores.

Disaggregation is only part of the problem with her sub-unit analysis. Dr. Haworth also added unjustified variables to each of her models, further concealing any pay disparities. Thus, for example, Dr. Haworth added variables for: 1) department; 2) work experience in a Wal-Mart grocery division; and 3) whether someone was promoted in the past year. *See* Haworth Decl. at 100: 1-12. None of these factors is listed as relevant in Wal-Mart's pay plans. *See* 1999 Field Associate Compensation Guidelines, Ex.131. Yet, the practical effect of adding these variables is to obscure any pattern of differential treatment. Drogin Rebuttal Decl. at ¶36, 42. Dr. Haworth's regressions would not reflect as a gender difference occasions where male employees received higher pay than female employees holding the same job in different departments,[12] or where men, but not women, had prior Wal-Mart grocery experience or had been promoted within the last year. Since the distribution of men and women is not even with respect to these variables, their use may, in fact, mask gender discrimination. Drogin Rebuttal Decl. at ¶36. Indeed, Dr. Haworth's use of a variable for "promoted within the last year" assumed away a primary issue in the case – whether women are less frequently promoted than men.[13] In sum, Dr. Haworth used what are known as "tainted" variables. *See Coward v. ADT Sec. Sys.*, 140 F.3d 271, 274 (D.C. Cir. 1998); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977); *Greenspan v. Auto. Club of Mich.*, 495 F. Supp. 1021, 1061-64 (E.D. Mich. 1980); Lindemann & Grossman, *Employment Discrimination Law* (3d Ed. 1996) at 1699. *See also* Drogin Rebuttal Decl. Tab 3 at 656, Tab 4 at 8.

(2) *There is No Justification for a Store-by-Store Analysis*

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[12] Wal-Mart's Rule 30(b)(6) witness on compensation testified that the Department in which an employee worked should *not*, under Wal-Mart's policies, affect pay rate. Arnold Dep. at 242:18-243:18, Ex. 132; *see also* 1999 Field Associate Compensation Guidelines, Ex.131.

[13] Dr. Haworth attempts to explain her use of this tainted variable by asserting that "women applying for promotion are promoted at a higher rate than men seeking promotion," presumably referring to her job posting analyses for hourly positions. Haworth Decl. at 100:7 and n. 125. However, the variable she used (PRO) applies only to promotion to Wal-Mart management, not hourly, positions. Drogin Dep. at 76:6-25; 609:23-610:2, Ex. 130.

The store-by-store analysis that Dr. Haworth advocates, but does not conduct, is not appropriate either. The treatment of each store as a separate fiefdom ignores the existence of Wal-Mart's uniform compensation policies, its highly centralized system for monitoring store personnel actions, and the frequent movement of management, particularly Store Managers, between stores, districts and divisions.

In an analysis that Wal-Mart has not contested, Dr. Drogin found that, on average, each Store Manager is transferred to different stores 3.6 times after becoming a Store Manager. In a majority of these transfers, managers moved into different districts and in nearly half of the assignments, managers moved into different regions. *See* Drogin Decl. at Table 17, p. 23; *see also* Drogin Rebuttal Decl. at ¶24. If every store operated differently it would be highly inefficient to transfer and re-train managers. In fact, the uniformity of store and company policies at Wal-Mart permits it to move managers without lost productivity.

Even Wal-Mart's Store Manager declarations, which are flawed and inadmissible,[14] confirm that common compensation policies influence store employee pay throughout the company. Among the many factors that Store Managers identified as influencing the pay rates of store personnel, the factor *most often cited* by far was the company's established pay policy. *See* Haworth Decl. at 93:4-99:4 and Appendix C-16; Haworth Dep. at 276:9-17, Ex. 129; Drogin Rebuttal Decl. at ¶ 31.

(3) *Dr. Haworth's "Chow" Tests Do Not Require a Store-by-Store Analysis*

Wal-Mart and Dr. Haworth assert that the application of the "Chow" statistical test justifies her extensive disaggregation of the workforce data. It does not. The "Chow" test – which defendant never actually explains – was developed to examine whether companies in entirely different industries could be analyzed in the same regression. Drogin Dep. at 493:5-494:15, Ex. 130; Drogin Rebuttal Decl., Tab 4. There is no support in either the professional literature or Title VII jurisprudence for Dr. Haworth's unorthodox application of the Chow test to subdivide a company's workforce into separate regressions , particularly in a case involving substantial evidence of common policies and centralized areas of control.

[14] *See* Motion to Strike Store Manager Declarations, filed June 20, 2003; *see also* Presser Decl., Ex. 133; Drogin Rebuttal Decl. ¶¶ 29-31.

Even if the Chow test was appropriate, however, Dr. Haworth herself only selectively used it. Just as she never did store-by-store analyses, she likewise has not reported a Chow analysis that compares analyses of entire individual stores with analyses of the company overall. She never performed *any* Chow tests to justify her separation of the six specialty sub-units from each other and the grocery and non-grocery regressions.[15] Haworth Dep. at 180:25-181:4, Ex. 129. Moreover, the analyses she did perform merely confirm that store sub-units yield a positive Chow test when compared to the sub-unit's pattern in the company overall.[16] Drogin Dep. at 573:10-574:25, 576:9-21, Ex. 130.

Finally, the Chow test, even as applied to this case, neither precludes a finding of commonality nor requires separate regressions. In fact, as Dr. Drogin explains in his rebuttal, a positive Chow test can be caused if just one of the many variables Dr. Haworth included in the regression equation behaved differently at just one store sub-unit as compared to the overall group. Drogin Rebuttal Decl. at ¶ 38; Haworth Dep. at 182:15-22, 184:1-4, Ex. 129. It is on that flimsy basis that Wal-Mart argues against a unified regression analysis. Dr. Haworth's Chow tests thus do not undermine commonality.

(4) *Dr. Haworth's Pay Analysis, When Appropriately Aggregated, Shows a Statistically Significant Pattern Adverse to Women*

In contrast to her prior practice and writing, Dr. Haworth failed to do the most obvious analysis. She never aggregated her analyses to see whether there was an overall pay disparity, although this could easily have been done. *See* Drogin Rebuttal Decl., ¶¶ 39-40; Haworth Affidavit, *Thomas v. Albright* No. 86-2850 (SS) (D. D.C.) at 5 (Drogin Rebuttal Decl. at Tab. 6); Haworth Report, Statistical and Economic Characteristics of Ingles Markets Inc. Workforce, at 8 (Drogin Rebuttal Decl. at Tab 7); J. Haworth, Economics and Statistics in the Employment Environment, at 8 (Drogin Rebuttal Decl. at Tab 8); *see e.g. Paige*, 291 F.3d at 1148. Although flawed, even Dr.

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[15] Neither her initial or amended reports nor their back-up materials indicate that Dr. Haworth performed any Chow test to justify her separate treatment of grocery versus non-grocery departments. After Dr. Haworth's deposition, she apparently ran such Chow tests. Drogin Rebuttal Decl. at ¶ 22, n.6. Plaintiffs have moved to strike these and other new analyses because they violate Fed. R. Civ. P. 26(a)(2). *See* Motion to Strike Haworth.

[16] A positive Chow test result raises a question as to the appropriateness of analyzing all employees in one regression instead of in smaller groups. Drogin Rebuttal Decl. at ¶ 38.

Haworth's analyses, when properly aggregated, show that women on average are paid $.12 an hour less then men.[17] Drogin Rebuttal at ¶¶40-41. This result is statistically significant (Drogin Rebuttal Decl. at ¶ 40) and supports the conclusion that Wal-Mart's compensation policies have consistently been adverse to female employees.

Wal-Mart contends that $.12 per hour is of no "practical" significance, and thus the disparity, no matter how intentional, should be ignored. That is an argument that Wal-Mart is free to make to the jury at trial, but cannot be the basis for denying class certification because it *assumes* that Wal-Mart's method of analysis and selection of variables is correct. Plaintiffs' evidence demonstrating a much larger disparity could instead be accepted by the jury; Wal-Mart has not challenged that the larger disparities found by Dr. Drogin are lacking practical or statistical significance.

e. Dr. Haworth's Promotion Analyses Are Either Irrelevant or Confirm The Existence of Common Questions of Fact

The bulk of Dr. Haworth's promotion analyses consist of a labored examination of job posting data for lower paid hourly positions that are not at issue in this case. Plaintiffs do not challenge the rates of promotion of women to department head positions.[18]

It is uncontested that Store Managers do *not* have responsibility for the selection or promotion of *any* management personnel in the stores – these decisions are made at the district and regional levels. Motion at 24. For the policies regarding promotion into and within management, which plaintiffs *do* challenge, Dr. Drogin found a common pattern of under-promotion of women across Wal-Mart's many regions. Drogin Decl. at 36:114-37:15. Wal-Mart insists that Dr. Drogin failed to rely on applicant flow data, yet such data largely does not exist.[19]

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[17] Wal-Mart inexplicably refers to a "nine cents" difference. Dr. Drogin's aggregation of Dr. Haworth's regressions revealed a 12 cents difference. Drogin Rebuttal Decl. at ¶ 40.

[18] Dr. Haworth's hourly job posting analysis, however, does demonstrate gender bias in assignments for departments dominated by one gender or the other. Women are assigned to "female" departments and men to predominantly male departments at a far higher rate than their application rates justify. Drogin Rebuttal Decl. at ¶¶ 9-10.

[19] While impassioned, Wal-Mart's assertion that applicant flow data must be used in the promotion analyses here is simply wrong. *See* Opp. at 38. The use of "applicant flow" data is inappropriate where, as here, vacancies are not posted, the selection practices are subjective, and prevailing attitudes about women are based on stereotypes. In such circumstances, applicant flow data would under represent the population of interested and qualified female candidates.

- For Support Manager openings, it is undisputed that only 20% of the vacancies have been posted, affording an insufficient basis for meaningful analysis. Drogin Rebuttal Decl. at ¶ 6. Dr. Haworth never bothered to investigate how frequently these positions were filled by means other than through the posting process. *Id*. at ¶ 7. Haworth Dep. at 101:14-24, Ex. 129.
- For Manager in Training ("MIT") openings, it is undisputed that Wal-Mart lacked any program for regularly posting these vacancies before January 2003. Motion at 22. Even the "new" program appears to have emphasized features of management that Wal-Mart and its expert believed would discourage women from applying.[20] *See* Bielby Dep. at 169:13-172:4, Ex. 143; *Compare* Posting Notice, Ex. 134 (listing negative factors) *with* Wal-Mart's Second Supplemental Objections and Answers to Plaintiffs' First Set of Interrogatories, No. 14 (listing factors), Ex.135, and Haworth Dep. at 55:6-56:6, 56:20-57:20, Ex. 129 (identifying factors that might discourage women from applying).
- Wal-Mart has had the capacity to post Assistant Manager and Co-Manager positions, but rarely has done so, as Dr. Haworth's data readily shows. *See* Haworth Decl. at 66:1-6 (less than 1% of Assistant Manager positions and 2.5% of Co-Manager positions filled through Management Career Selection posting). Confronted in her deposition with the miniscule percentage of Assistant Manager and Co-Manager postings, Dr. Haworth conceded this small sample could not fairly be used to assess the interest of women applicants in general. Haworth Dep. at 310:2-16, Ex. 129.

See Hemmings, 285 F.3d at n. 17. Indeed, one cannot analyze applicant flow if the employer has no application process. This is recognized by the very case on which Wal-Mart relies, *Paige*, 291 F.3d at 1145 (comparison should be to "actual pool of *eligible* employees" unless there is a "'characteristic of the challenged selection device that makes use of the pool of applicants or actual eligible employees inappropriate.'") (emphasis added) (citation omitted). Here, the actual eligible employees were the pool considered available for promotion. However, Wal-Mart's failure to post positions is a "characteristic" which makes use of actual applicants inappropriate. *Id.* Wal-Mart's critiques of Bendick's analyses are similarly baseless, as made clear in the Bendick Rebuttal Decl. and Plaintiffs' Opposition to Motion to Strike Declaration of Marc Bendick, Ph.D.

[20] Wal-Mart made selections for the new MIT program after the close of discovery, shielding them from any scrutiny. Nonetheless, Wal-Mart selected women at a rate 50% higher than its historical average – suggesting an availability of women candidates similar to the "feeder" populations used by Dr. Drogin in his analyses. Drogin Rebuttal Decl. at ¶¶ 13-14. This data raises questions, which should be resolved at trial, about why Wal-Mart was unable to promote qualified women at this rate in the past.

• For promotions to Store Manager, there is a substantial question as to whether the Management Career Selection system is an open process, since candidates must obtain their District Manager's permission to apply. *See* Drogin Rebuttal Decl. at ¶ 18.

Accordingly, Wal-Mart's exclusive reliance on incomplete or non-existent "applicant flow" data does not discredit Dr. Drogin's promotion analysis.[21]

2. The Typicality Requirement Is Met Because A Separate Class Representative for Every Job Title or Store Is Not Needed.

Typicality is satisfied when allegations of the class representatives and class members "arise out of the same remedial and legal theory." *Wofford v. Safeway*, 78 F.R.D. 460, 488 (N.D. Cal. 1978); *Adams v. Pinole Point Steel Co.*, 1994 WL 515347, *7 (N.D. Cal. 1994). Whether they hold hourly or salaried positions or work in a Sam's Club or in Division 1 stores, plaintiffs advance the same claim: Wal-Mart's centrally controlled personnel system systematically disadvantages female employees in compensation and promotion decisions because managers exercise excessive subjectivity and fail to meaningfully post salaried positions. Because all plaintiffs proceed under the same theory of discrimination, the claims of the class representatives are typical of those advanced by the class. *See Wofford*, 78 F.R.D. at 491; *Stender v. Lucky Stores*, 1990 No. C-88-1467 MHP, U.S. Dist. LEXIS 19985, *12-14 (N.D. Cal. June 8, 1990).

Wal-Mart has also alleged that plaintiffs must have a class representative for each managerial position in the class to satisfy typicality. Opp. at 33. The Ninth Circuit has held otherwise. It recently rejected a similar challenge to a decision certifying an employment discrimination class by concluding "[t]hat level of specificity is not necessary for class representatives to satisfy the typicality requirement . . . under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members, they need not be substantially identical." *Staton,* 327 F.3d at 957 (citations omitted).[22] Moreover, the proposed class

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[21] Dr. Haworth's promotion analyses support one of the central claims made in this case: the requirement that employees relocate as a condition of promotion into management has a disparate impact on women and discourages them from seeking such positions. *See* Haworth Decl. at 62-63 (Applicant Preferences for Mobility by Gender).

[22] While the *Staton* class was certified at the time the case was settled, Rule 23(a) requirements are as rigorous in settlement classes as in contested class certification rulings. *Staton*, 327 F.3d at 952, *citing Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

representatives *do* include a plaintiff who held a management position as well as several representatives who were denied promotions into management. *See, eg.,* Supp. Kwapnowski Decl. at ¶ 2; Surgeson Decl. at ¶ 10. Having illegally blocked the advancement of most women into management, Wal-Mart cannot now fault plaintiffs for presenting class representatives whose careers mirror these barriers.[23]

Nor, as Wal-Mart contends, must plaintiffs present representatives from each of the four types of Wal-Mart stores. Opp. at 34. Wal-Mart has never disputed that virtually the same personnel policies operate at all facilities, nor that its stores all have the same job positions and job hierarchy.[24] *Compare* Motion at 9 *with* Opp. at 14. Salaried employees regularly transfer among the different types of stores. Motion at 12. Most important, the challenged compensation and promotion policies are consistent across the stores and have resulted in similar statistical disparities adverse to female employees. As a result, the claim of a class representative employed in management at one store is typical of the claims advanced by class members employed at other stores.

Finally, Wal-Mart contends, wrongly, that typicality is undermined by Wal-Mart's recent promotion of a handful of women to store or District Manager positions. *See* Opp. at 19, n.10. Typicality does not require that every female employee be disadvantaged in every single employment decision ever made at Wal-Mart. *Wagner v. Taylor*, 836 F.2d 578, 591-92 (D.C. Cir. 1987); *see also Shores*, 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1555 (11th Cir. 1986). In fact, Wal-Mart's own female declarants

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[23] Wal-Mart rests its typicality argument on *Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122 (W.D. Wash. 1981). *Seidel* involved vastly different factual issues – current field personnel representing an applicant class and a headquarters employee class – which are not present here. Moreover, to the extent *Seidel* adopted a standard at odds with *Staton,* it is no longer good law.

[24] Sam's Club has the same job positions as Wal-Mart Stores, although the jobs have slightly different titles. Opp. at 14; Burner Dep. at 144:516 - 145:25, Ex.5. The one exception is that Sam's Club has an additional management position, known as Area Manager. This minor variation hardly affects the typicality of the claims but, in any event, one class representative is a current Sam's Club employee, who has been both an Area Manager and an Assistant Manager. *See* Supp. Decl. of Christine Kwapnoski at ¶ 2.

have suffered unjustified pay disparities, about which they were likely unaware when they signed their declarations.[25]

3. Plaintiffs Are Adequate Class Representatives

Wal-Mart contends that plaintiffs are inadequate class representatives because the small number of class members who have held Store Manager positions would have conflicting interests with the remaining class members. Opp. at 7, 31. This claim is belied by the law in this Circuit.

In *Staton*, 327 F.3d at 958, the Ninth Circuit rejected a "*per se* rule concerning adequacy of representation where the class includes employees at different levels of an employment hierarchy." *Id.* Instead, the Court identified three factors that led to its finding that no conflict existed: (1) the named plaintiffs included representatives from each major employee sub-group; (2) the relief sought applied equally throughout the class; and (3) the plaintiffs offered evidence of a general discriminatory policy. *Id.* These factors dictate a finding of adequacy here, where plaintiffs include a representative from the salaried as well as hourly group of employees, the relief sought would apply equally throughout Wal-Mart, and plaintiffs have presented substantial evidence of general discriminatory policies. *See* Motion at 25-29.

Certifying a single class of female retail employees, which includes both hourly and salaried positions, is not only permitted but warranted by the evidence in the record and the manner in which pattern and practice cases are tried. The record reflects that hourly and salaried employees have been subject to largely the same subjective compensation policies and to the same type of subjective policies governing promotions into and within management. *See supra* at II. A.1. Equally

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[25] Since Wal-Mart failed to identify these women during discovery, plaintiffs have had no opportunity to test their stories in deposition. *See* Plaintiffs' Motion to Strike Declarations of Ten Undisclosed Witnesses. Nonetheless, Wal-Mart's own workforce data demonstrate that: in both 2001 and 2002, Victoria Howard was the only female out of the six Store Managers in her District. In 2002, Julie Jeneane Murphy earned less than all but three of the 71 male District Managers, many of whom had the same or less experience at Wal-Mart than she did. For example, Ralph Armino was hired in 1990, over five years after Ms. Murphy, but he became District Manager in 1996 (four years sooner than Ms. Murphy) and in 2002, made over $75,000 more than she did. In 2002, there were 63 male and 10 female District Managers in Margaret Daniel's area and she made less than 47 of those men. As one example, Mr. Terry Reed became District Manager seven years sooner than Ms. Daniel and, in 2002, he earned almost $200,000 more than she did. In 2002, there were 56 male and 6 female District Managers in Sandy Ellison's area and she made less than all but four of the men. *See* Declaration of Jennifer Cynn in Support of Plaintiffs' Reply on Class Certification.

significant, the pay disparities are comparable for hourly and salaried employees and for employees seeking entry into management and those seeking to advance within management. Drogin Decl. at ¶¶ 20, 24-27, 68, 70.

The *Staton* Court distinguished *Wagner*, 836 F.2d at 595, the case upon which Wal-Mart relies. In *Wagner,* a single named plaintiff sought to represent African American employees at all levels of a federal agency as well as unsuccessful applicants. In this case, as in *Staton*, plaintiffs include both managerial and hourly employees, they seek relief equally applicable to all employees and present evidence of a general discriminatory policy at Wal-Mart. Most recently, in *Dean v. Boeing Co.,* 2003 U.S. Dist. LEXIS 8787, 85 (D. Kan. 2003) the district court certified a class including supervisory and non-supervisory employees, noting that a "showing of coextensive interest among the female supervisors and other female employees [was] one factor in support of the Plaintiffs' adequacy." *Id.* at 54-55.

Moreover, the litigation of liability does not turn on an examination of each promotion and compensation decision nor must discrimination be the universal practice to constitute a "pattern and practice." *United States v. Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir. 1971). Plaintiffs need not prove that individual managers, male or female, personally committed discrimination since liability ultimately depends upon an assessment of Wal-Mart policies and senior management's failure to act in the face of repeated warnings and substantial evidence of pervasive discrimination. Unlike the concerns expressed in *Donaldson v. Microsoft*, 205 F.R.D. 558 (W.D. Wash. 2001) therefore, female managers here who made fair and job-related decisions on pay and promotions have no interest in defeating the class claims since the evidence shows that they were adversely affected by the same practices that the class challenges. In short, Wal-Mart's asserted conflict is not borne out by the record and governing law. *See Staton*, 327 F.3d at 958; *Butler v. Home Depot*, 1996 U.S. Dist. LEXIS 3370 at * 11-12 (N.D. Cal. 1996) (certifying class of supervisors and non-supervisors). *Beck v. The Boeing Co*., 203 F.R.D. 459 (W.D. Wa. 2001), *modified by slip op*. Dec. 27, 2001, *affirmed in part, vacated in part by unpublished decision*, 60 Fed. Appx. 38, 83 Empl.

Prac. Dec. ¶¶ 41, 313 (9th Cir. Feb. 25, 2003) (certifying class of salaried, non-executive women which included supervisors and non-supervisors).[26]

B. Plaintiffs Have Satisfied the Requirements Of Rule 23(b)(2)

1. Certification Under Rule 23(b)(2) is Appropriate Because Equitable Relief Predominates

Wal-Mart argues that Rule 23(b)(2) certification is inappropriate because "monetary claims so plainly predominate." Opp. at 44. The Ninth Circuit has rejected such simplistic reasoning by recognizing that damages may be sought in addition to injunctive relief in a class certified under Rule 23 (b)(2). In *Molski v. Gleich,* 318 F.3d 937 (9th Cir. 2003), the Ninth Circuit adopted an *ad hoc* approach to determining whether monetary relief predominated over injunctive relief and rejected the bright-line rule, advanced by Wal-Mart, that pursuit of damages not "incidental" to the injunctive relief preclude certification under Rule 23(b)(2). *Id.* at 949-50. Relying instead upon an inquiry into the intention of the plaintiffs who brought the action, *Molski* found that injunctive relief predominated where plaintiffs had alleged facts showing that defendant "acted in a manner generally applicable to the class," and any damage claims arising from physical injury were left for class members to pursue individually outside of the class structure. *Id.*

The same conclusion is warranted here. Plaintiffs allege that Wal-Mart acted in a manner generally applicable to the class and seek declaratory and broad injunctive relief for the entire class. Third Amended Complaint ¶ 19, Prayer for Relief ¶¶ 5-9. In addition, plaintiffs have excluded compensatory damages from the case, leaving class members to pursue claims for damages individually and outside the class context. *See* Third Amended Complaint, Prayer for Relief.

Indeed, the *only* form of damages sought in this case is punitive damages. Back pay, of course, is a make whole remedy that is a form of equitable, not legal, relief. *See Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1152-55 (9th Cir. 1999) (back pay is equitable relief); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (backpay does not interfere with

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[26] Although it is unnecessary, the Court, of course, has the option to create two subclasses, one comprised of hourly and the other of salaried employees. The record reflects that each subclass would be sufficiently numerous and would satisfy the other requirements of Rule 23 (a). *See* Fed. R. Civ. P. 23(c)(4)(b); Annotated Manual for Complex Litig. (Third) § 33.52 (2003).

certification under Rule 23(b)(2)).[27] Punitive damages are sufficiently speculative that they could hardly be the primary reason that plaintiffs brought this action. Nor is the formulation of a class-wide punitive damage award an elaborate undertaking since its focus is entirely upon Wal-Mart's conduct. Motion at 45-46.

Plaintiffs have also proposed that notice and the opportunity to opt-out be afforded members of the class in the event that any wish to pursue compensatory or punitive damages individually. This approach has been endorsed by the Ninth Circuit and other circuits. *See Molski* at 947; *Jefferson v. Ingersoll*, 195 F.3d 894, 898-99 (7th Cir. 1999); *Eubanks v. Billington,* 110 F.3d 87 (D.C. Cir. 1997). Since the *dicta* in *Ticor Title Ins. v. Brown*, 511 U.S. 117, 121 (1994), to which Wal-Mart refers, linked the due process concerns to the absence of notice and a right to opt-out, it is of little moment here.

2. This Case is Manageable

Wal-Mart argues that plaintiffs must meet the manageability requirement set forth in Rule 23 (b)(3). Opp. at 44-45. The class that plaintiffs propose, however, would be certified under Rule 23 (b)(2). *Compare* Fed. R. Civ. P. 23(b)(2) *with* Fed. R. Civ. P. 23(b)(3) (D). While *Staton* alluded to possible manageability issues, that class had been certified, with respect to the damage claims, under Rule 23(b)(3). *See Staton*, 357 F.3d at 948.

In any event, this class would be manageable. The only liability question for the jury is whether there is a pattern or practice of discrimination in compensation and salaried promotion practices at Wal-Mart.[28] *Teamsters*, 431 U.S. at 360 and n.46. Without sacrificing manageability, Wal-Mart may elect to defend against the pattern and practice claim by arguing that a store-by-store analysis shows no significant disparities in most individual stores. It just made the same argument in its opposition to class certification. Little more would be required at trial. Wal-Mart may not, however, conjure an unmanageable trial by demanding the right to defend against the pattern and

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[27] While the very size of Wal-Mart and the extent of its misconduct may lead to a large punitive damage award, the *amount* of likely damages is not the test for predominance. *See Molski,* 318 F.3d. at 949-950. Were it otherwise, certification of class cases against the largest companies – or those engaging in the most egregious conduct – would be more difficult than for companies that are smaller or whose infractions are less severe. This result would turn Rule 23 on its head.

[28] The Court would rule on the adverse impact claim. 42 U.S.C. § 1981(b)(1) & (c).

practice claim through litigating the merits of each class member's claim. *Id.*; *see also Thiessen v. General Elec. Cap. Corp.*, 267 F.3d 1095, 1106-07 (10th Cir. 2001) *cert. denied,* 536 U.S. 934 (2002); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 158-60 (2d Cir. 2001).

Nor would an adjudication of the back pay and punitive damage claims be unmanageable. Although Wal-Mart contends that these claims require individual hearings, rendering them unmanageable, courts have readily dispensed with that requirement in the circumstances presented here.[29] Wal-Mart seeks unsuccessfully to distinguish the authorities supporting a formulaic award of back pay on grounds that its use is rare and, in any event, was somehow silently superceded by enactment of the Civil Rights Act of 1991. Opp. at 46-47. Rare or not, the circumstances in which a formulaic award is warranted are present here. Formulaic approaches are best suited to occasions where an employer's lack of objective standards or adequate records would make any attempt at reconstructing the career paths of affected employees to quantify lost earnings individually a "quagmire of hypothetical judgments." *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974). In *McKenzie v. Sawyer*, for example, the D.C. Circuit held that individual proceedings were unnecessary where employees similarly situated to plaintiffs received a benefit through a subjective system without having to apply for it. *McKenzie v. Sawyer*, 684 F.2d 62, 76 (D.C. Cir. 1982). Here, pay increases have been awarded differentially without any application system and promotions have been made to employees who, in the absence of posting, never applied and simply received a "tap on the shoulder." No records of applications could exist where no system for posting vacancies was in place. *See supra* at 15. Nor are the subjective compensation judgments routinely documented. Shatz Dep. at 58:5-10, Ex. 136. In its support for a formulaic approach, the *McKenzie* Court has been joined by the Ninth Circuit and other circuits.[30] *See Domingo v. New England Fish*

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[29] The *Teamsters* decision, on which Wal-Mart heavily relies, only held that "a district court must *usually* conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Teamsters,* 431 U.S. at 361 (emphasis added). Thus, additional proceedings, and even individual proceedings, are *not* always required.

[30] *Beck* did not, as Wal-Mart argues, reject the use of a formulaic approach to back-pay. Opp. at 2-3. *Beck*, 203 F.R.D. 459 (W.D. Wa. 2001), *modified by slip op*. Dec. 27, 2001. While the district court initially rejected the use of a formula to allocate back pay, 203 F.R.D. at 467, it issued a clarification of its rulings and specifically reserved the question of whether back-pay claims would be certified and a formula used. Ex. 137. The Ninth Circuit *never addressed* the issue of back-pay in *Beck* because it was not before it. Nor did the Ninth Circuit hold that

Co., 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *EEOC v. O & G Spring & Wire Forms Spec. Co.,* 38 F.3d 872, 876 (7th Cir. 1994); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984). *Mitchell* may represent the view of the Sixth Circuit, as of 1978, but it is at odds with most authority on this subject.[31]

Nor would the award of back pay by formula result, as Wal-Mart warns, in payments to women who were never victims of discrimination. *See* Opp. at 45- 48. The determination of which class members would be entitled to back pay, and in what amounts, could be drawn from the economic models that each side's experts create, which compare the pay each woman received to the pay of similarly-situated male employees. Motion at 48-49. The model would, and the plaintiffs' model presently does, account for performance evaluation scores, tenure, and other legitimate factors. Thus, *a formulaic approach does not reward undeserving class members.* As the *McKenzie* Court observed, *Teamsters* "does not mandate individualized hearing in every case;" it requires only "some demonstration that the individual class members receiving compensation were likely victims of illegal discrimination." *McKenzie*, 684 F.2d at 76.

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certification of a class seeking punitive damages is inappropriate, as Wal-Mart contends. Opp. at 23. The Court held only that, with the process defined by the district court, certification of a classwide punitive damage claim was premature. *Beck,* 60 Fed. App. 38 at 39-40.

[31] The few lower court decisions to which Wal-Mart refers to support the need for individual hearings neither control here nor are germane. *See* Opp. at 49. Whatever these other courts may have held, the Ninth Circuit's decisions in *Domingo* and *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) control. Moreover, *Seidel*, 93 F.R.D. at 127, is wrong in the view that no cases after *Teamsters* have used formulae. *See supra* at 24. *Sandoval v. Saticoy Lemon Ass'n*, 747 F. Supp. 1373, n.12 (C.D. Cal. 1990) is even more inapposite. In discussing the statute of limitations in a hiring case, the court said in passing that class members would have to show that they applied during the relevant time period to show that they had timely claims. No individual hearings are required here to determine which women were employed by Wal-Mart during the liability period. *Smith v. Union Oil Co. of Calif.*, No. C-73-1636 WHO, 1978 WL 13884 (N.D. Cal. June 15, 1978) is also inapposite because it merely outlines the remedial process the judge chose to follow and never addressed the issue of whether a formula may be used.

Punitive damages are equally suited for a class-wide award.[32] *See* Motion at 46. The class-wide award may be allocated among class members in proportion to the amount of lost wages they are awarded.[33] Motion at 49. As long as the total punitive damage award it may pay is fair, Wal-Mart would have no legitimate interest in its allocation among class members. *Hilao*, 103 F.3d at 786; *Hameed*, 637 F.2d at 520.

The Civil Rights Act of 1991 likewise does not foreclose a formulaic approach to the award of back pay. It recognizes two avenues for proving intentional discrimination. Plaintiffs may prove discrimination by demonstrating that an employment action was taken "because of" plaintiffs' sex, not merely that sex was "a motivating factor." 42 U.S.C. § 2000e-2(a). Alternatively, plaintiffs may seek to establish liability for a "mixed motive" violation. 42 U.S.C. §2000e-2(m). While the latter method provides a *lower* burden of proof, the statute also limits the remedies available to a plaintiff. *Id*. Wal-Mart contends that it is entitled to defend each class member back pay claim as a "mixed motive" case and, on that basis, create the need for thousands of back pay proceedings, rendering this stage unmanageable.

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[32] Seeking to engage in revisionist history and muddy the case for punitive damages, Wal-Mart offers the declaration of Charlyn Jarrells Porter to support its hollow claim that it has always "abhor[ed] discrimination" and "promote[d] diversity." Opp. at 20. The diversity initiatives to which Ms. Jarrells Porter refers almost entirely began, or were resurrected, *after this suit was filed,* and can hardly eclipse Wal-Mart's lack of attention to diversity before the litigation commenced. *See, e.g.,* Jarrells Porter Dep. at 83:18-24, 86:18-25, Ex. 138 and Wesbecher Dep. at 189:25-190:13, Ex. 139 (Mentoring Challenge raised only recently at the January 2002 annual meeting); Bilgischer Dep. at 43:20-24, Ex. 140 (Women in Leadership Group was dormant until April 2002); Peterson Dep. at 218:13, 220:15-226:22, Ex. 141 (Diversity Committee was dissolved in 1998 or 1999, and not reinstated until April, 2002); Memorandum dated May 21, 2002, from Ramona Benson to Cole Peterson, Ex.142, states that the "Women's Breakfast" would begin in July 2002, and that the first meeting of the Women of Wal-Mart ("WOW") had not yet occurred. Ms. Jarrells Porter also admits in her declaration that other diversity initiatives, including the Diversity Champion Award, Compliance Award and Get It Done Award, were created subsequent to the filing of this lawsuit in June 2001. Jarrells Porter Decl. at ¶ 18.

[33] Wal-Mart does not dispute, nor could it, that a punitive damages award focuses on the defendant's conduct. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536 (1991). Instead, Wal-Mart dwells on the requirement that the award of punitive damages be linked to the make whole relief awarded to individual class members. Opp. at 48. Plaintiffs' proposal provides for precisely such a link between the wages lost to each individual and the pro-rata share of the punitive damages awarded to each class member. Motion at 49.

Even if section 2000e-2(m) required individualized determinations, a premise plaintiffs do not concede, plaintiffs have chosen to pursue their claims *solely* under §2000e-2(a). Having done so, the "mixed motive" affirmative defense is not available to Wal-Mart. *See Bogle v. McClure*, No. 02 13213, 2003 US App. LEXIS 11332, *23-24 (11th Cir. June 6, 2003) (defense cannot invoke mixed motive defense where plaintiff established claim under higher standard). Nothing in the Supreme Court's decision in *Desert Palace v. Costa*, 123 S. Ct. 2148 (2003), suggests otherwise.[34] Accordingly, Wal-Mart's defense at trial is fully compatible with class action status.

III. CONCLUSION

Having satisfied all requirements for class certification, plaintiffs respectfully request that the Court accord the case class treatment under Rule 23(b)(2) and open this Court's doors to the thousands of women aggrieved by Wal-Mart's discriminatory policies and practices.

Dated: July 2, 2003

Respectfully submitted,

By: _____
Jocelyn Larkin
THE IMPACT FUND

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[34] *Desert Palace*, 123 S. Ct. 2148, makes clear that the mixed motive analysis is an alternative available to a plaintiff seeking to prove her case, not a universal first step in a two-step proof process, as Wal-Mart erroneously claims. *Id* at 2151. ("The first [provision] establishes an *alternative* for proving that an 'unlawful employment practice' has occurred.") (emphasis added).