No.

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Petitioner,

v.

GEORGE MCREYNOLDS ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiffs seek to represent a nationwide class of highly compensated African-American financial advisers (FAs) employed by petitioner in hundreds of separately managed offices. They assert that two of petitioner's employment policies—which rely on the exercise of discretion by local managers and FAs themselves—have a racially disparate impact in compensation and promotion of FAs. The district court three times denied class certification, finding that because any statistical disparities necessarily resulted from the individual discretionary acts of managers and FAs, the proposed class lacked commonality, typicality, predominance, and superiority. The Seventh Circuit reversed and ordered certification of a disparate impact injunction "issue" class under Rules 23(b)(2) and (c)(4), even while acknowledging that hundreds of individual trials would be required to resolve multiple issues necessary to establish petitioner's liability to any given FA. The questions presented are:

1. Whether the Seventh Circuit's certification of a disparate impact injunction class conflicts with this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which rejected certification of a nationwide class that, like this one, asserted disparate impact claims based on employment policies requiring the exercise of managerial discretion.

2. Whether the Seventh Circuit erred in holding, in conflict with other circuits, that Rule 23(c)(4) permits class certification of a discrete sub-issue when the claim as a whole does not satisfy Rule 23(b) and hundreds of individual trials would be needed to determine liability.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated is a wholly owned subsidiary of Merrill Lynch Co., Inc., which is a wholly owned subsidiary of Bank of America Corporation. No publicly owned corporation owns 10% or more of Bank of America's stock.

Plaintiffs, respondents here, are George McReynolds, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender-Jackson, and Stephen Smartt.

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PETITION FOR A WRIT OF CERTIORARI

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 672 F.3d 482. The district court's first order denying plaintiffs' motion for class certification (App., *infra*, 21a-41a) is available at 2010 WL 3184179. Its opinion denying plaintiffs' motion for reconsideration (App., *infra*, 42a-49a) is available at 2010 WL 4471028. The Seventh Circuit denied plaintiffs' Fed. R. Civ. P. 23(f) petition to appeal that order (App., *infra*, 50a-51a), and this Court denied plaintiffs' petition for certiorari, 132 S. Ct. 119 (App., *infra*, 57a). The district court's September 19, 2011 opinion denying plaintiffs' "amended post-*Wal-Mart* motion for class certification" (App., *infra*, 52a-56a) is available at 2011 WL 4471028.

JURISDICTION

The court of appeals entered judgment on February 24, 2012. A timely petition for rehearing en banc was denied on March 27, 2012. App., *infra*, 58a-59a. On June 11, Justice Kagan granted an extension of time in which to file this petition through July 25, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Relevant portions of Fed. R. Civ. P. 23 and the Civil Rights Act of 1964 are reproduced at App., *infra*, 60a-65a.

STATEMENT

Plaintiffs seek to represent a national class of African-American financial advisers (FAs) employed by Merrill Lynch in hundreds of separately managed offices. Plaintiffs allege that two Merrill Lynch policies discriminated against them on the basis of race. One policy conferred on FAs themselves the discretion whether and with whom to "team," subject to local manager approval. The other established criteria by which accounts of departing FAs were reallocated, again subject to managerial discretion. The district court on three occasions denied class certification, finding that any discrimination was caused not by either policy, but by the discretionary decisions of thousands of individual FAs and local managers, defeating commonality, typicality, predominance, and superiority. Despite this Court's decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), rejecting a materially identical nationwide Rule 23(b)(2) class asserting disparate impact claims, the Seventh Circuit reversed and ordered the district court to certify a class.

The court of appeals recognized the prevalence of individuated causation and remedies issues, but invoked the "issue class" procedure of Rule 23(c)(4) to circumvent those individual issues and certify an injunction class under Rule 23(b)(2). Instead of looking at plaintiffs' claims as a whole, the court ordered certification of a class limited to the question whether the acts of discretion authorized by the challenged policies have a racially disparate impact on FAs. This Court's review of the Seventh Circuit's erroneous decision is warranted for two reasons.

First, the court of appeals' ruling is irreconcilable with this Court's decision to decertify a disparate

impact injunction class in *Dukes*. As in *Dukes*, plaintiffs challenge policies that delegate discretion to thousands of local decisionmakers. In *Dukes*, this Court held that a national "'policy' of *allowing discretion* by local supervisors" was "just the opposite of a uniform employment practice * * * needed for a class action." 131 S. Ct. at 2554. This Court rejected as "worlds away" from the requisite "proof of a companywide discriminatory" policy the same sort of aggregate statistics—and evidence from the very same sociologist—that plaintiffs rely on here. *Id.* at 2554, 2556. In bypassing those rulings, the Seventh Circuit improperly limited the scope of *Dukes* and provided plaintiffs a roadmap for evading that authoritative decision.

Second, the Seventh Circuit's ruling deepens an acknowledged, three-way circuit conflict over the proper use of Rule 23(c)(4). That Rule provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." The Second, Seventh, and Ninth Circuits allow an "issue class" to be certified even where the claim as a whole cannot proceed under Rule 23(b). As this case shows, that approach allows courts to manufacture compliance with Rule 23 by using (c)(4) to pare away individual issues until the remaining issues supposedly satisfy (b)(2). The Fifth Circuit has correctly rejected that construction of Rule 23(c)(4), holding that courts may certify distinct classes addressed to particular issues only if the claim as a whole also merits classwide treatment. The Third Circuit rejects both positions, instead applying a multi-factor balancing test to certification of Rule 23(c)(4) classes.

Plaintiffs increasingly invoke Rule 23(c)(4) to circumvent rigorous Rule 23(b) standards, an approach the Seventh Circuit has endorsed in contexts far beyond employment litigation, including RICO, environmental torts, and products liability. This expansive interpretation of Rule 23(c)(4) exalts perceived efficiency over the language and intent of the Rule, improperly authorizing class certification whenever some common issue exists, even though determining liability requires a multitude of individual trials. It also invites class-wide injunctive suits designed to rewrite corporate policies and substitute judicial for business judgments, a prospect that is even more threatening to businesses than monetary awards. And the threat of such social engineering enhances plaintiffs' ability to coerce blackmail settlements unrelated to the merits of plaintiffs' claims. Indeed, a one-size-fits-all injunction would affirmatively *injure* class members who benefit from a corporate policy—and there are many in the class certified here—while giving relief to employees who suffered no discrimination.

Certiorari should be granted, and the opinion of the court of appeals reversed.

A. Factual Background

Merrill Lynch employs 15,000 FAs in 600 branch offices. App., *infra*, 23a. FAs are supervised by 135 Complex Directors, each of whom manages multiple offices. Each Complex Director "manages his or her complex as a standalone business." *Id.* And each FA "operates his or her own business within a business." *Id.* An FA must build a "book of business" by convincing investors to entrust the FA with their financial future. *Id.*

Merrill Lynch "pays its FAs based on production," using "a precise mathematical formula" that leaves "no discretion in calculating FA incentive compensation." App., *infra*, 32a. A host of variables affects compensation, resulting in a range of several hundreds of thousands of dollars between the top and bottom of the scale. D312-18 at 33.[1]

Merrill Lynch has a company-wide policy prohibiting race discrimination. D313-51 ¶13. It partners with African-American organizations in recruiting diverse brokers, D313-51 ¶11; provides diversity recruiting training to local managers, *id.* ¶¶10-12; D313-2 pts. 20, 29-30; and ties local manager compensation to the hiring, retention, and success of diverse brokers, *id.* ¶14.

Plaintiffs sought certification of an across-the-board class challenging 26 practices. D257 ¶3. The court below limited the challenge to two: Merrill Lynch's teaming and account distribution policies. As the district court found, those policies "depend in their implementation on discretionary decisions that affect each of the class members" differently. App., *infra*, 55a.

1. *Discretion In Teaming*

Merrill Lynch's only national teaming policies are to encourage teaming and require that FAs obtain local manager approval. D313-51 ¶¶89-91. Managers do not compel FAs to team. FAs themselves decide whether to team with one or more fellow FAs to prospect for clients and share revenue from those clients. *Id.* ¶86. Plaintiff Larue Gibson explained that he exercised his discretion over whether or not to

[1] "D" refers to docket numbers assigned in the district court.

team with potential teammates based on "abilities," "personalities," and whether "you can make it worth my while from a compensation perspective." D314-9 at 206-207.

Local managers have discretion in deciding whether to approve teams, which they exercise in different ways. D313-2 pt.6. Teaming decisions "depend on a myriad other decisions by supervisors and the FAs themselves." App., *infra*, 55a-56a. Plaintiffs themselves had varied teaming experiences. For example, a successful white broker invited plaintiff Jennifer Madrid to team, substantially increasing Madrid's business, D337-4 at 48-53, 70-71, and plaintiff George McReynolds had a positive experience teaming with a white FA, D337-6 at 161-163.

FAs need not team to succeed. D314-3 at 94. Most FAs—including successful ones—are *not* on teams. D313-2 pt.4. Some prefer working alone. App., *infra*, 12a. Some do not want to share business they developed. D313-10 ¶16. Plaintiff Leroy Brown declined a teaming opportunity, and plaintiff Mark Johnson did not ask anyone to team. D314-4 at 226-227; D314-12 at 221.

FAs who team prefer to do so with high producers. McReynolds explained that he wants a teammate who is "knocking the ball out of the park." D337-6 at 195.

Nothing in Merrill Lynch's teaming policy drives any particular result. The district court found that the "policy manifested itself" through "subjective decisions" made "by hundreds of different individuals under different circumstances across the country." App., *infra*, 46a. "Each such decision would have to be examined to determine whether the particular FA

was the victim of discrimination." *Id.* at 56a. Plaintiffs conceded that "a factual inquiry into each [teaming] situation" would be essential. D314-9 at 216; see App., *infra*, 47a ("different witnesses" must testify to resolve each claim).

2. *Discretion In Account Distributions*

Merrill Lynch allocates the right to pursue a departing FA's accounts under a national policy that ranks FAs using published objective criteria that changed during the class period. D313-51 ¶102. Accounts are distributed within individual offices, so FAs compete for distributions only against others in that particular office. App., *infra*, 12a.

The criteria used to rank FAs have included revenue generated; industry certifications achieved; client retention; and, upon departure of a team member, team duration. D313-51 ¶105 & Exh. C. To provide more FAs with a chance to earn distributions, Merrill Lynch also used a "best-ball" criterion that allowed FAs with low production to accumulate points for any recent uptick in business. *Id.* ¶114.

FAs control their own rankings under the policy. Some plaintiffs moved up the rankings by obtaining industry certifications at Merrill Lynch's expense. D337-4 at 148-149. Others rejected managers' advice that they do so. D314-12 at 92. Many class members rank highly under the policy. D313-34 ¶10.

FAs have discretion whether to seek or accept an account. Account distributions typically are not a significant "factor in whether or not an FA is successful." D313-19 ¶11. Some FAs do not participate in distributions because accounts developed by other FAs are difficult to retain. D313-2 pt.11. Others reject particular accounts because they do not fit the

FA's business model or are considered likely to leave with the departing broker. *Id.*

Plaintiffs concede that managers had "discretion" (D380 at 28) to assign accounts in order of FA rank or have FAs select accounts in order of rank until 2006, when Merrill Lynch required the latter method. D313-51 ¶¶120, 127-128. And Dr. Bielby acknowledged that Merrill Lynch "allows managers considerable discretion to depart from the ranking system in distributing accounts." D312-5 ¶38. Local managers may depart from rankings to honor a client request; tap an FA's language skill or specialization; build on an existing relationship; or reflect FA availability. D313-51 ¶116. Sometimes—again outside the rankings—a departing FA would transfer accounts to another FA. *Id.* ¶124.

Plaintiffs benefited from this discretion. Leslie Browne received accounts when the departing FA's clients requested him (D314-5 at 172-174), and Jennifer Madrid received a lucrative account transfer outside the rankings (D337-5 at 399-400). Plaintiffs transferred accounts outside the rankings to white FAs (D337-4 at 57-62), and to other plaintiffs (D314-2 at 113-114).

This discretion means that determining whether an FA was injured by the account distribution policy requires inquiry into "individual circumstances," as plaintiffs conceded. D337-6 at 115-116. Reconstructing a distribution requires determining which FAs participated; whether the local manager used the assignment or draft method; whether discrimination affected plaintiff's rank; which accounts were most desirable to which FAs; and whether the ranking system was followed, and if not whether the manager had a legitimate reason for departing from it. That

inquiry depends on documentation and testimony from local managers, FAs, and clients—and it must be repeated for every distribution to determine both whether there was any flaw and whether the flaw resulted from discrimination.

B. Proceedings Below

1. *District Court Repeatedly Rejects Class Certification*

Before briefing on class certification the parties submitted reports from experts in statistics, sociology, social networks, diversity, and organizational psychology, deposed 25 witnesses, and filed more than 100 affidavits. Based on that extensive record the district court three times denied class certification.

a. In its initial decision the district court pointed to Merrill Lynch's "decentralized procedures, that allow decision-makers across the country to consider subjective factors." App., *infra*, 30a. It found commonality lacking because claimants were supervised "by hundreds of different people" and "had totally different experiences" as "the result of countless decisions made by themselves, other FAs in their branch offices, their branch managers and so on up the chain of command." *Id.* at 30a-31a.

Plaintiffs failed to provide the "'significant proof'" required by *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), that discrimination "manifested itself in the 'same general fashion' as to all putative class members." App., *infra*, 29a. Plaintiffs' "raw statistics" asserting racial disparities could not overcome the individualized nature of plaintiffs' claims. *Id.* at 31a-34a. And plaintiffs' declarations "underscore[d] the lack of commonality," showing plaintiffs

"worked in different offices, had different supervisors, and allegedly experienced vastly different forms of discrimination," necessitating "individual inquiries" to determine whether they "suffered racial discrimination." *Id.* at 34a-37a.

The court held Rule 23(b)(3) certification improper because each FA's claim would "have to be tried to a jury," necessitating "thousands" of proceedings with "different witnesses and proofs." App., *infra*, 39a. The existence of "several separate layers of individual issues" means "common issues do not predominate," and a class trial "would be unmanageable." *Id.* at 40a-41a. The court also held Rule 23(b)(2) certification impermissible. Plaintiffs' compensatory and punitive damages claims are not "incidental" to equitable relief, and (b)(2) certification is "not intended to permit plaintiffs in a case involving significant damage claims to avoid consideration" of manageability and predominance. *Id.* at 38a-40a.

b. Plaintiffs sought reconsideration of the court's decision declining to certify a disparate impact class. The court acknowledged that "in an appropriate case" a disparate impact theory may be based on "discretionary employment practices." App., *infra*, 46a. But class treatment is inappropriate when, as here, "subjective decisions are made by hundreds of different individuals under different circumstances across the country" so that policies did not manifest themselves "in the same general fashion as to all putative class members." *Id.* Neither plaintiffs' statistics nor Merrill Lynch's policies bound together plaintiffs' disparate circumstances or averted the need for "1000 follow-on jury trials" to determine if any class member "suffered discrimination as a result of those policies." *Id.* at 46a-47a.

The Seventh Circuit denied Rule 23(f) review, and this Court denied certiorari. App., *infra*, 50a-51a, 57a.

c. After this Court decided *Dukes*, plaintiffs filed an "amended" motion based on the remarkable argument that *Dukes* "supports" certification of a disparate impact class. App., *infra*, 53a. The district court held otherwise, concluding that *Dukes* only "confirmed" its prior rulings. *Id.* at 56a. Plaintiffs "fail[ed] to account for the requirement that the identified policy must have caused the disparate impact." *Id.* at 55a. The challenged policies "depend in their implementation on discretionary decisions." *Id.* Thus, "the decision on whether to join a team" would "depend on a myriad other decisions by supervisors and the FAs themselves." *Id.* at 55a-56a. While some FAs "might balk" at teaming with an African-American "for discriminatory reasons," "[e]ach such decision would have to be examined to determine whether the particular FA was the victim of discrimination." *Id.* at 56a. These "'dissimilarities'" impede "'the generation of common answers,'" precluding certification. *Id.*

2. *The Seventh Circuit Orders Certification Of A Disparate Impact Injunction "Issue" Class Despite* Dukes

Although the Seventh Circuit had previously denied interlocutory review on the very same issue, after this Court decided *Dukes* it granted plaintiffs' Rule 23(f) petition and reversed. It ordered a class trial under Rule 23(b)(2) and (c)(4) to determine whether Merrill Lynch's teaming and account distribution policies had a disparate impact, and if so whether class-wide injunctive relief is appropriate.

Judge Posner's opinion for the court recognized that "a single proceeding" could "not resolve class members' claims." App., *infra*, 17a. Adjudicating these claims would require "hundreds of separate trials" to determine "which class members were actually adversely affected" and "if so what loss each class member sustained." *Id.* Those "individual suits" are "feasible," because most FAs "earn at least $100,000 a year" and "claims involve multiple years." *Id.* at 19a. Nevertheless, the court held that the question whether the challenged policies had a disparate impact "can most efficiently be determined on a classwide basis," and that Rules 23(b)(2) and (c)(4) permit such an "issue" class action. *Id.* at 17a.

The court acknowledged that "the exercise of discretion at the local level" is "a factor in the differential success of brokers," and that racial disparities among FAs "may have different causes" than discrimination. App., *infra*, 16a-17a. It recognized too that this discretion makes this case "like *Wal-Mart*." *Id.* at 13a. The court held, however, that a classwide proceeding could determine whether national teaming and account distribution policies had an "incremental causal effect" on "the amount of discrimination" experienced by FAs. *Id.* at 16a. The court cited no evidence proffered by plaintiffs establishing such an "increment," or even identifying a methodology capable of measuring this kind of discriminatory effect.

The court of appeals acknowledged that in exercising discretion whether to team, FAs seek teammates who will "result in their getting paid more," "regardless of [their] race." App., *infra*, 13a. But the court speculated that "uncertainty about who will be effective in bringing and keeping shared clients"

might lead "some" white FAs "to base decisions on emotions and preconceptions," including being "more comfortable teaming with other white brokers." *Id.* at 13a-14a.

On remand, the district court held that the class includes former as well as current employees and that the remedy "can include a finding of disparate impact on which individuals may then pursue their own claims." Tr., May 16, at 1.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision contradicts *Dukes*, exacerbates a circuit split over Rule 23(c)(4), and invites similar suits harmful to courts, defendants, and class members alike. Its conclusion that Rule 23(c)(4) may be used to manufacture Rule 23(b) class certification is broadly applicable beyond discrimination suits and encompasses all class litigation, regardless of subject matter. This expansive interpretation of Rule 23 substantially increases the ability of plaintiffs to use the threat of class-wide liability to coerce blackmail settlements of meritless claims. Review should be granted.[2]

[2] This Court granted the petition for certiorari in *Comcast Corp.* v. *Behrend*, No. 11-864, to consider whether a court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence to show that the case is susceptible to awarding damages on a class-wide basis. This case would make an ideal companion case to *Behrend*, allowing the Court to consider and resolve two troubling circuit splits on the scope of Rule 23 at the same time.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH *DUKES* AND SOWS CONFUSION IN AN IMPORTANT AREA OF CLASS ACTION LITIGATION.

A. This Case Is On All Fours With *Dukes.*

Plaintiffs here, as in *Dukes*, invoke a disparate impact theory and seek to enjoin policies that give "discretion [to] local supervisors" scattered nationwide. 131 S. Ct. at 2554. This Court in *Dukes* found that a policy granting discretion to local managers "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices," and "also a very common and presumptively reasonable way of doing business." *Id.* The district court here found that any disparate impact arose from the discretionary implementation of the policies at the local level through individual manager and FA decisions, not from national policies themselves. App., *infra*, 40a, 46a, 54a-56a. And at the local level, it is "unbelievable that all managers" or FAs "would exercise their discretion in a common way." *Dukes*, 131 S. Ct. at 2555. As a result, here as in *Dukes*, plaintiffs cannot "show that all the employees' Title VII claims will in fact depend on the answers to common questions." *Id.* at 2554.

Plaintiffs seek to bind their divergent claims together with the same "three forms of proof" this Court held inadequate in *Dukes*. 131 S. Ct. at 2549. First, plaintiffs in *Dukes* relied on Dr. Bielby, who testified that Wal-Mart's "'corporate culture'" makes it "'vulnerable' to 'gender bias.'" *Id.* at 2553. Bielby could not, however, "'calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.'" *Id.*

Because Bielby "has no answer to that question," this Court held, "we can safely disregard what he has to say." *Id.* at 2554.

Plaintiffs here cite the same theory proffered by the same sociologist with the same defect. Bielby theorized that Merrill Lynch has a "culture" of discrimination. D312-5 ¶87. But Bielby admitted that he did not "study any individual decision," that this "culture" would not cause every manager to use "discretion in a way that favors whites over African-Americans," and that individual factors may "counteract" bias. D314-3 at 101, 104-105, 136. Bielby could not even say whether a successful African-American FA would find it more difficult to team than a successful white FA. *Id.* at 135-136. Thus, as in *Dukes*, the Court "can safely disregard what [Bielby] has to say." 131 S. Ct. at 2554.

Second, just as plaintiffs in *Dukes* offered evidence of "'statistically significant disparities'" in pay and promotions (131 S. Ct. at 2555), plaintiffs here cite aggregate statistical disparities in teaming and account distributions. But *Dukes* held that an "overall sex-based disparity does not suffice." *Id.* at 2556. Aggregate statistics do "not establish the existence of disparities at individual stores." *Id.* at 2555. And in a disparate impact case, it is the operation of the policy, not the "abstract policy" itself, that is the critical inquiry. *Falcon*, 457 U.S. at 159 n.15. Aggregated statistics hiding claimants' divergent circumstances can neither "ti[e] all [plaintiffs'] claims together" (*Dukes*, 131 S. Ct. at 2555-2556) nor avert the need for hundreds of trials to determine if any class member actually "suffered discrimination as a result of [firm] policies." App., *infra*, 47a.

Third, here and in *Dukes* plaintiffs offered anecdotal evidence. But that evidence, the district court found, only "underscore[s]" declarants' "vastly different" experiences. App., *infra*, 36a. As in *Dukes*, some "'thrived while others did poorly. They have little in common but their [race] and this lawsuit.'" 131 S. Ct. at 2557.

Applying *Dukes*, the district court found that under Merrill Lynch's "decentralized procedures" (App., *infra*, 30a), its race-neutral teaming and account distribution policies "depend in their implementation on discretionary decisions that affect each of the class members" differently. *Id.* at 55a. This means no two plaintiffs' stories are alike. Some declined invitations to team; some could not find teammates; some were on teams that helped them. Some benefited from the account distribution policy's consideration of production; some were helped by managerial discretion under the policy. Due to "countless decisions" by managers and FAs, each of the plaintiffs "had totally different experiences," precluding commonality. *Id.* at 31a. The district court correctly held that *Dukes* is not distinguishable in any relevant way and requires denial of a disparate impact injunction class.

B. The Seventh Circuit's Attempted Distinctions Of *Dukes* Are Meritless.

The Seventh Circuit acknowledged that localized discretion makes this case "like *Wal-Mart*." App., *infra*, 13a. In purporting nevertheless to distinguish *Dukes*, the Seventh Circuit stripped this Court's decision of meaning.

1. The Seventh Circuit thought that "there was no company-wide policy to challenge in *Wal-Mart*" because, unlike this case, Wal-Mart's "top manage-

ment" did not establish a "framework" to govern local managers' compensation and promotion decisions. App., *infra*, 11a-12a. One court charitably described that distinction as "razor-thin" because both Wal-Mart in *Dukes* and Merrill Lynch here established a "company-wide policy of delegation of discretionary authority." *Bolden* v. *Walsh Grp.*, 2012 WL 1079893, at *5 (N.D. Ill. Mar. 30, 2012). Just as Merrill Lynch did with respect to teaming and account distributions, Wal-Mart made a business judgment to "allo[w] discretion by local supervisors" over compensation and promotion decisions within the confines of "objective criteria." *Dukes*, 131 S. Ct. at 2547, 2554; see *Dukes* v. *Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 158 (N.D. Cal. 2004) ("managerial discretion" was "exercised in the context" of "overarching policies").

Ignoring the district court's factual findings about the nature of Merrill Lynch's policies, as well as the deferential standard of review, the Seventh Circuit speculated that "the exercise" of discretion by managers might be "influenced" by various factors, some possibly race-related. App., *infra*, 13a. But that analysis only proves the district court's point, which was that Merrill Lynch's *policies* are not responsible for any particular outcome, because the policies "depend in their implementation on discretionary decisions." App., *infra*, 55a. In disparate-impact litigation, the focus is not on "an abstract policy," but on whether that policy, and not some other factor or combination of factors, is responsible for causing some racially disparate effect among employees or applicants. *Falcon*, 457 U.S. at 159 n.15; see *Wards Cove Packing* v. *Atonio*, 490 U.S. 642, 656-657 (1989) (the "proper inquiry" is whether "application of" the "particular employment practice" "created the disparate impact").

Because the effect of teaming and account distribution policies on FA compensation and promotion necessarily depends on discretionary and thus highly individualized factors (as in *Dukes*), plaintiffs cannot show that those policies result in discrimination classwide (as in *Dukes*).

2. The Seventh Circuit analogized Merrill Lynch's policy of giving FAs discretion in teaming to a police department delegating discretion to officers to select their partners. App., *infra*, 14a. While conceding the "undoubted resemblance" to *Dukes*, the Seventh Circuit thought a suit challenging that policy "would not be controlled" by *Dukes* because the policy is made by "top management," not "local managers." *Id.*

But Wal-Mart's local managers did not give themselves discretionary authority. Rather, plaintiffs in *Dukes* "convincingly establishe[d]" that Wal-Mart established a national "corporate policy" "of *allowing discretion* by local supervisors." 131 S. Ct. at 2554. This Court rejected plaintiffs' challenge to that policy because it "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Id.*

The court of appeals' attempted distinction would gut *Dukes*, making it inapplicable to most discretionary employment decisions. Virtually *every* suit challenging local discretionary decisionmaking would involve a company policy delegating discretion to local decisionmakers. What the Seventh Circuit characterized as a critical distinction is no distinction at all.

The Seventh Circuit speculated that FAs might base teaming decisions on "preconceptions." App., *infra*, 14a. But that was also true in *Dukes*. See 131 S.

Ct. at 2563 (a "condition of promotion" at Wal-Mart was "willing[ness] to relocate," which risked managers "act[ing] on the familiar assumption that women" are "less mobile than men") (Ginsburg, J., concurring in part and dissenting in part). This Court made clear that even if *some* decision-makers acted for discriminatory reasons, most—especially in a firm like Merrill Lynch that has strong anti-discrimination policies—would select "neutral, performance-based criteria" that "produce no actionable disparity." *Id.* at 2554-55. Here, as in *Dukes*, each teaming "decision would have to be examined to determine whether the particular FA was the victim of discrimination." App., *infra*, 56a.

3. Turning to account distributions, the Seventh Circuit found commonality in the policy's consideration of the objective factor "past success." App., *infra*, 13a, 15a. But the existence of objective criteria does not distinguish *Dukes*—Wal-Mart's policy, too, included "objective criteria." 131 S. Ct. at 2547. What matters is how those criteria were implemented, which here (as in *Dukes*) was through "discretionary decisions." App., *infra*, 55a.

A host of FA- and manager-specific decisions determined whether, and how, the policy's criteria were applied in the distribution of any particular account, necessitating a plethora of complex, account-by-account inquiries to determine if discrimination occurred. *Supra*, pp. 7-9. The policy's consideration of production benefited successful class members. Other objective criteria boosted the rank of poorer performers who increased their business or obtained certifications. The result is "'[d]issimilarities within the proposed class'" that preclude commonality. App., *infra* 56a (quoting *Dukes*, 131 S. Ct. at 2551).

4. The Seventh Circuit's "assum[ption]" that Merrill Lynch's national policies may have an "incremental causal effect" in producing discrimination substitutes judicial guesswork for evidence. App., *infra*, 16a. Causation is a central element of disparate impact claims. See *Falcon*, 457 U.S. at 156. Proof of causation "is all the more necessary" under Rule 23, which requires "'a class of persons who have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2553, 2555; see *Garcia* v. *Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006) (Rule 23(a)(2) requires that class members "all suffered an adverse effect from the same facially neutral policy").

Plaintiffs, however, never studied the causal effect of the account distribution policy criteria cited by the Seventh Circuit. Nor did they offer any evidence that Merrill Lynch's "policy" of allowing FAs to form teams was the cause of racially disparate outcomes in FA compensation and promotion. To the contrary, the only evidence in the record is that success itself—not race—explains team formation. D312-18 at 44-47. And plaintiffs' expert, Dr. Bielby, could not say whether a successful African-American FA would have any more difficulty joining a team than a successful white FA. D314-3 at 135-136.

The Seventh Circuit's conjecture about the "incremental" causal effect of the firm's national policies is thus unsupported. It also ignores the district court's finding that the policies "depend in their implementation on discretionary decisions" (App., *infra*, 55a), and makes a mockery of this Court's admonition that class certification is permissible only if a "'rigorous analysis'" demonstrates that plaintiffs proved "compliance" with Rule 23. *Dukes*, 131 S. Ct. at 2551.

In short, plaintiffs' case rests on statistical disparities and outright speculation that the challenged policies were the cause of those disparities. If that were enough, *Dukes* would have come out the other way.

C. The Seventh Circuit's Misconstruction Of *Dukes* Has Exceptional Practical Importance.

The Seventh Circuit's decision eviscerates *Dukes*, making it impossible for courts in the circuit to rely on that "milestone" precedent. App., *infra*, 10a. And it creates confusion nationwide as courts struggle with the panel's reasoning.

Plaintiffs acknowledge that circuits already have "reached different conclusions" about "*Wal-Mart*'s effect on disparate impact classes." C.A. No. 11-8027, D1-2 at 11-12 (citing *Bennett* v. *Nucor Corp.*, 656 F.3d 802, 814-816 (8th Cir. 2011) (rejecting certification of disparate impact class because employer's "decentralized management structure" delegated "discretion" to decisionmakers); *Ellis* v. *Costco Wholesale Corp.*, 657 F.3d 970, 983 n.7 (9th Cir. 2011) (vacating certification of disparate impact class involving local discretionary decisionmaking)).

Plaintiffs acknowledge too that this is an "important and recurring issue." C.A. No. 11-8027, D1-2 at 12. If plaintiffs can satisfy Rule 23(a) in the manner approved below then *Dukes*—a decision commentators believe "profoundly changed the litigation landscape"—will become a dead letter in a large segment of employment class actions. Coffee, *The Future (If Any) of Class Litigation After Wal-Mart*, NAT'L L.J. ONLINE (Sept. 12, 2011). So blatant an effort to limit *Dukes*, in such an important and recur-

ring area of litigation, warrants this Court's immediate review. Indeed, the conflict with *Dukes* makes the decision below a good candidate for summary reversal.

II. THE SEVENTH CIRCUIT'S USE OF RULE 23(c)(4) TO MANUFACTURE A RULE 23(b) ISSUE CLASS EXACERBATES A CIRCUIT SPLIT ON A RECURRING QUESTION.

A. An Acknowledged Three-Way Circuit Conflict Exists On The Question Whether Rule 23(c)(4) Authorizes Certification Of Isolated Issues Extracted From Claims That Do Not Satisfy Rule 23(b).

"'The interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issue classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts.'" *Gates* v. *Rohm & Haas, Co.*, 655 F.3d 255, 272 (3d Cir. 2011). There is now a three-way "circuit conflict" concerning the proper interpretation of Rule 23(c)(4). *Gunnells* v. *Healthplan Servs.*, 348 F.3d 417, 444 (4th Cir. 2003); see *In re St. Jude Med. Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (acknowledging "conflict in authority"); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) ("the Circuits have split").

In the Fifth Circuit, "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"; plaintiffs "cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); accord *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 421-422 (5th Cir. 1998) (Title VII suit).

The Second and Ninth Circuits have expressly rejected that approach, holding that "courts may use subsection (c)(4) to single out issues for class treatment" even when the cause of action "as a whole does not satisfy Rule 23(b)(3)." *Nassau Cnty.*, 461 F.3d at 227; see *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

The Third Circuit, "[r]ather than joining either camp in the circuit disagreement," has adopted a multi-factor balancing test proposed by the American Law Institute. *Gates*, 655 F.3d at 273.

The Seventh Circuit's decision exacerbates this circuit split. Because plaintiffs seek backpay, their disparate impact claims as a whole cannot be certified under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2557. Their claims further fail the (b)(2) requirement that Merrill Lynch acted "on grounds that apply generally to the class," for as the district court found, the challenged policies operate through the exercise of manager and FA discretion. Plaintiffs' claims also fail Rule 23(b)(3)'s predominance requirement. The Seventh Circuit acknowledged that "hundreds of separate trials" would be necessary "to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained"—making it clear that, for the claims as a whole, individualized issues predominate. App., *infra*, 17a.

Even though plaintiffs' disparate impact claims as a whole satisfy neither Rule 23(b)(2) nor (3), the Seventh Circuit certified a class under (b)(2) by utilizing Rule 23(c)(4) to strip away individual issues until all that remained was the supposedly common question whether the challenged policies had a racially disparate impact. This use of Rule 23(c)(4) to

evade Rule 23(b) requirements is in direct conflict with the Fifth Circuit's holdings in *Castano* and *Allison*. Plaintiffs acknowledged below that the conflict is squarely presented here: this case, they urged, presents the question whether Rule 23(c)(4) is "limited to cases in which the action as a whole satisfies the requirements of Rule 23(b)," on which there is a "circuit split." Plaintiffs' C.A. Br. 17-18 & n.8.[3]

B. The Seventh Circuit's Interpretation Of Rule 23(c)(4) Is Incorrect.

Rule 23 provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the requirements of (b)(1), (2), or (3) are met. Thus, a class "must satisfy at least one of the three requirements listed in Rule 23(b)." *Dukes*, 131 S. Ct. at 2548. Rule 23(c)(4) does not provide "a fourth avenue" to class certification "on equal footing with Rul[e] 23(b)." *Gunnells*, 348 F.3d at 447 (Niemeyer, J., dissenting).

Rule 23's structure proves this point. While Rule 23(b) defines the types of "Class Actions Maintainable," Rule 23(c) "reflect[s] the laundry list of steps a court may take *after* properly certifying a subdivision (b) class." Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 718-719 (2003) (em-

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[3] The acknowledged conflict over Rule 23(c)(4) has only deepened since *Dukes* was decided. The Third Circuit's decision striking out on a new path with a multifactor test, see *Gates*, 655 F.3d at 272, postdates *Dukes*, even though there is no support in *Dukes* for creating that sort of ad hoc balancing test to expand the reach of 23(b). *Dukes* instead counsels in favor of the Fifth Circuit's position allowing certification only if the claim as a whole could generate common answers, yet the Seventh Circuit has now reaffirmed its position opposite the Fifth Circuit.

phasis added). "None of the other subdivision (c) provisions alter the terms under which a (b) class action may be certified, or provide independent authority to certify another type of class action." *Id.* at 719. Subsection (c)(4) should not be stretched to do so.

"Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates" would "eviscerate the predominance requirement." *Castano*, 84 F.3d at 745 n.21. Even though predominance "is far more demanding" than commonality (*Amchem Prods.* v. *Windsor*, 521 U.S. 591, 624 (1997)), the Seventh Circuit's approach would permit "automatic certification in every case where there is a common issue." *Castano*, 84 F.3d at 745 n.21. Class certification would be "a foregone conclusion." *Gunnells*, 348 F.3d at 451 (Niemeyer, J., dissenting). And contrary to the Seventh Circuit's view that perceived efficiencies justify an issue class despite failure of the claim as a whole to satisfy Rule 23(b), the Advisory Committee understood that "only" when "predominance exists" can "economies" be "achieved by means of the class-action device." Rule 23, 1966 Adv. Comm. Note. The same problems arise if issue certification is used to short-circuit the (b)(2) requirement that challenged conduct "appl[ied] generally to the class," a requirement that ensures necessary class "cohesion." *Amchem*, 521 U.S. at 623; see *Stastny* v. *S. Bell. Tel. & Tel. Co.*, 628 F.2d 267, 280 n.20 (4th Cir. 1980).

This Court has rejected similar attempts to evade Rule 23(b) to certify fragmentary classes. *Amchem* held that a settlement class must satisfy Rule 23(b)(3) because otherwise the "vital prescription [of predominance] would be stripped of any meaning." 521 U.S. at 623. And *Ortiz* v. *Fibreboard Corp.*, 527

U.S. 815, 858 (1999), held that a Rule 23(e) fairness hearing cannot "swallow" the requirements of Rule 23(b)(1). Rule 23(c)(4) "no more empowers courts to circumvent subdivision (a) or (b) requirements than the proposed subdivision (e) end-runs resoundingly rejected by the Court in *Ortiz* and *Amchem*." Hines, *supra*, 52 EMORY L.J. at 752.

Rule 23(c)(4)'s proper role is as "a housekeeping rule that allows courts to sever the common issues for a class trial," but only after Rule 23(b) requirements have been satisfied. *Castano*, 84 F.3d at 745 n.21. Subsection (c)(4) is "the class action equivalent to the bifurcation power authorized by Rule 42(b)," affirming a court's power "to certify a class action even when some issues cannot be resolved commonly." Hines, *supra*, 52 EMORY L.J. at 720-721.

Rule 23(c)(4)'s rulemaking history confirms "the very limited function its framers intended." *Id.* at 713. The Advisory Committee paid (c)(4) "minimal attention." *Id.* at 754. Committee member Professor Wright called it a "'detail.'" *Id.* at 758. Others agreed it made "'obvious points,'" retaining it only "'for the sake of clarity and completeness.'" *Id.* Plainly, the drafters did not intend (c)(4) to be used to eviscerate Rule 23(b) requirements by paring back a claim until it fits into one of the (b) subparts. Rather, the two sentences devoted to issue certification in the Committee Note indicate that the procedure may be used only to bifurcate the "adjudication of liability to the class" from follow-on proceedings needed to "prove the amounts of [class members'] claims." Rule 23, 1966 Adv. Comm. Note. Consistent with that intent, in the only case cited by the Committee reporter as supporting the need for (c)(4), the class trial established defendant's "liability" to all class members

and left only individual damages calculations for follow-on proceedings. *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561, 589 (10th Cir. 1961); see Hines, *supra*, 52 EMORY L.J. at 755-756.

Subsequent rulemaking history confirms this understanding. The 1995 Advisory Committee considered an amendment to permit (c)(4) class actions if 23(a) criteria and superiority were established—*i.e.*, without regard to (b)(2) or (3) requirements. The Committee explained that this change would afford "greater opportunity for use of class actions" for "some issues, if not for the resolution of the individual damage claims themselves." Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 56, 58 (1996). But the Committee *rejected* this "'issues' class" proposal, with its Reporter citing comments "emphasiz[ing] the need to 'return to fundamentals'"—the principles set forth in Rule 23(b)(2) and (3). Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 952 (1998).

The absence of any evidence that the Committee thought (c)(4) could supplant Rule 23(b) requirements makes the Seventh Circuit's interpretation "simply implausible." *Ortiz*, 527 U.S. at 844-845. Its expansive use of (c)(4) collides with this Court's admonition that "the rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.'" *Amchem*, 521 U.S. at 629.

C. Proper Interpretation Of Rule 23(c)(4) Is A Recurring Issue Of Substantial Importance To Class Litigation In Many Contexts.

As courts have engaged in more rigorous Rule 23(b) inquiry, plaintiffs "increasingly seek" issue certification as an "alternative." Mayer, *Recent Developments and Current Trends in United States Class Action Law*, 826 PLI/LIT. 313, 320 (2010); see Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 586 (2004) ("District courts everywhere are inundated with requests for certification of issue class actions"). They have been urged to do so by commentators who advocate use of (c)(4) to circumvent the "challenge" posed by *Dukes* in cases alleging "many other forms of misconduct" beyond discrimination. Coffee, *supra*, NAT'L L.J. ONLINE.

The Seventh Circuit has been at the forefront of efforts to use (c)(4) to certify Rule 23(b) "issue classes" despite individual questions that have led other circuits to reject similar classes. For example, the Seventh Circuit certified a class to determine if "defendants violated RICO," leaving for "separate proceedings" whether class members "were defrauded," and if so "their damages." *Carnegie* v. *Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004). Compare *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (rejecting use of (c)(4) to certify class to determine whether defendant violated RICO). The Seventh Circuit certified a class in a mass tort case to determine whether a manufacturer leaked chemicals, even though a class trial would not resolve "the fact and extent of [class member] injuries." *Mejdrech* v. *Met-Coil Sys.*, 319 F.3d 910, 911-912 (7th Cir. 2003). Compare *Gates*, 655 F.3d at 274 (rejecting use

of (c)(4) to certify class to determine whether defendant leaked chemicals into aquifer). And it certified a class to determine whether a product was "defective," leaving "causation and damages" for follow-on proceedings. *Pella Corp.* v. *Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010). Compare Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1605-1606 (2011) ("courts have largely declined to permit issue class certification" in "product defect" suits).

Similarly, courts have denied certification of price-fixing claims when antitrust injury could not be determined classwide. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2009). Under the Seventh Circuit's view, however, courts could certify the issue whether defendants conspired to fix prices. And while other courts deny certification of securities fraud claims where reliance cannot be established classwide (*In re IPO Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006)), on the Seventh Circuit's reasoning Rule 23(c)(4) could be used to pare back the issues so that a class could be certified solely to determine whether a defendant made misleading statements.

The Seventh Circuit asserted that "issue classes" increase the "efficien[cy]" of litigation. App., *infra*, 17a. But an efficiency test is malleable, resulting in courts "haphazardly" resolving requests for issue certification and "causing uncertainty about when they should be used." Note, *supra*, 64 VAND L. REV. at 1587. Rule 23(b) was designed to protect against just this sort of decision "dependent upon the court's gestalt judgment." *Amchem*, 521 U.S. at 621.

By permitting class certification whenever a common issue exists and a district judge thinks effi-

ciency might be served, the Seventh Circuit's decision exacerbates the problem of blackmail settlements, allowing the threat of a class trial and intrusive injunctive relief to coerce settlement of meritless claims. See *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 476 (1978) (class certification often makes it "economically prudent to settle and to abandon a meritorious defense"). Indeed, the plaintiffs' bar views issue certification as "highly desirable" precisely because it offers "settlement leverage." Note, *supra*, 64 VAND. L. REV. at 1599; accord Taber, *The Reexamination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 DEF. COUNS. J. 63, 63 (2006) ("plaintiffs often seek certification of an issue class to pressure defendants into an overall settlement"). "Settlements should reflect the relative merits of the parties' claims," however—"not a surrender to the vagaries of an utterly unpredictable and burdensome litigation procedure" under Rule 23(c)(4). *Allison*, 151 F.3d at 422 n.17.

"[D]ifferences between jurisdictions" have encouraged "forum-shopping" and "inconsistent" results. Note, *supra*, 64 VAND. L. REV. at 1604, 1623. Accordingly, after a comprehensive review of (c)(4) litigation, one commentator recently urged this Court to "take the opportunity to clarify the proper use of issue class certification." *Id.* at 1591.

D. Proper Interpretation Of Rule 23(c)(4) Is Especially Important In The Context Of Disparate Impact Employment Litigation.

The Seventh Circuit's endorsement of disparate impact issue class actions seeking injunctive relief raises a host of practical problems for employers, employees, and courts.

1. The constitutional rights of defendants and absent class members would be sacrificed by litigating class actions like this one. See *Ortiz*, 527 U.S. at 845 ("the Rules Enabling Act" and "doctrine of constitutional avoidance" "counsel against adventurous application of Rule 23(b)(1)(B)").

a. The type of class certified below and in other cases utilizing (c)(4) as a vehicle to satisfy Rule 23 is "uniquely plagued" by Seventh Amendment obstacles. Note, *supra*, 64 VAND. L. REV. at 1602. The Seventh Circuit severed the "disparate impact" issue for class treatment in an injunction action, and suggested the bench verdict as to whether Merrill Lynch "violated the antidiscrimination statutes" could then be used in "hundreds" of follow-on proceedings to establish individual liability and backpay. App., *infra*, 21a; see *id.* at 17a ("it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful"). But to the extent the remaining issues are legal, Merrill Lynch and absent class members have the right to litigate them before a jury. See *Dukes*, 131 S. Ct. at 2561; *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 473, 476-77 (1962).[4] The procedure established by the court of appeals would thus violate the Seventh Amendment, which generally requires legal questions to be resolved *before* equitable ones. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); 7B WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1801 (3d ed.). The right to a jury trial of

[4] There are also sound arguments that defendants and absent class members should have the right to a jury trial on issues of backpay. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002); *Albemarle Paper* v. *Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring).

all "factual issues related to" legal claims cannot "'be lost through prior determination of equitable claims.'" *Dairy Queen*, 369 U.S. at 473; see also 28 U.S.C. § 2072. For precisely this reason, the Fifth and Eleventh Circuits have forbidden "trial of the disparate impact claim in a class action severed from the remaining non-equitable claims in the case"—the very procedure adopted below. *Allison*, 151 F.3d at 425; accord *Cooper* v. *S. Co.*, 390 F.3d 695, 722 (11th Cir. 2004).[5]

b. The Seventh Circuit's reliance on Rule 23(b)(2) in conjunction with Rule 23(c)(4) also threatens the due process rights of absent class members. *Dukes* cautioned against (b)(2) certification of injunctive claims that "creat[e] the possibility" that class members' damages claims may "be *precluded* by litigation they had no power to hold themselves apart from." 131 S. Ct. at 2559. As one court observed, the Seventh Circuit did just that: "a classwide judgment in favor of" Merrill Lynch would "pose serious barriers to future suits seeking monetary relief." *Cholakyan* v. *Mercedes-Benz USA LLC*, 2012 WL 1066755, at *23 (C.D. Cal. Mar. 28, 2012); see *McClain* v. *Lufkin Indus.*, 519 F.3d 264, 283 (5th Cir. 2008) (rejecting (b)(2) certification of injunctive class where class members "might be barred from bringing individual

[5] When (c)(4) is used to sever issues that must be tried to a jury, there is also a danger that juries in follow-on individual actions will reexamine facts found by the class jury. See, *e.g.*, *Castano*, 84 F.3d at 750-751; Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. REV. 305, 341 (2001) ("the scheme of proof in employment discrimination cases raises the risk that different juries may make different findings based on the same facts—a situation that is prohibited under the Seventh Amendment").

damage claims"). In this way too, the Seventh Circuit's decision risks "sacrificing procedural fairness" and "abridg[ing]" "substantive right[s]." *Amchem*, 521 U.S. at 613, 615.

2. The Seventh Circuit acknowledged that an erroneous injunction against teaming and account distribution policies "could disadvantage" Merrill Lynch in "competition with [other] brokerage firms." App., *infra*, 18a. Yet perceiving the firm to be "in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination," the court saw no "enormous consequences" riding on a class trial. *Id.* The proposed issue class, however, is rife with problems.

"Rule 23(b)(2) applies only when a single injunction" would "provide relief to each member of the class"—not "when each individual class member would be entitled to a *different* injunction." *Dukes*, 131 S. Ct. at 2557-2558; see Rule 23(b)(2) (authorizing class certification only when "final injunctive relief" is "appropriate respecting the class as a whole").

Only "widespread actual injury" can justify a class-wide injunction. *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996); see *id.* at 349-350 ("the role of courts" is "to provide relief to claimants" in "class actions" who suffer "actual harm," not "to shape" an "organization"). But an injunction prohibiting Merrill Lynch's policies, issued for a class whose members cannot opt out (*Dukes*, 131 S. Ct. at 2558), would harm many African-American FAs who successfully team with FAs of their own choosing, rank highly under the account distribution policy, or benefit from the discretion built into the policies. Until the decision below, "no circuit ha[d] approved of class certification where some class members derive a net economic benefit

from the very same conduct alleged to be wrongful by the named representatives." *Valley Drug Co.* v. *Geneva Pharm., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003).

Unsurprisingly, plaintiffs have never articulated "in reasonable detail" the injunction they seek, as Fed. R. Civ. P. 65(d) requires. An injunction that might satisfy that rule—*e.g.*, instituting forced teaming or distributing accounts without regard to production—would harm many class members and chill lawful pro-competitive conduct. See 42 U.S.C. § 2000e-2(h) (immunizing from Title VII challenge differential compensation under a "system which measures earnings" by "production"). And it would penalize "innocent third part[y]" FAs who thrive under the current policies. *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239-240 (1982).

3. Unlike skewed employment tests that screen out African-Americans, the policies challenged here are ordinary organizational tools that make Merrill Lynch's business more effective—from which some class members benefit and others do not. They are the product of Merrill Lynch's business judgment about how best to serve clients and maximize FA production. These sorts of "complex, subtle, and professional" judgments are not a proper object of the "extraordinary remedy" of "injunctive relief." *Winter* v. *NRDC*, 555 U.S. 7, 22, 24 (2008). As this Court recognizes, "[c]ourts are generally less competent than employers to restructure business practices." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978).

Crafting an injunction to address team formation and account assignments would mire the court in decisions at the core of Merrill Lynch's business, in

which Merrill Lynch has concluded that flexibility, discretion, and choice are critically important. Policing such an injunction would intrude on decisions in which plaintiffs say FA "abilities" and "personalities" are key. For a court to engage in this sort of social engineering, devising and supervising complex business policies in the name of equitable relief, is particularly unnecessary because "remedies available at law" to those actually injured, "such as monetary damages," are "[a]dequate to compensate for that injury." *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006).

4. The vast expansion of class litigation resulting from the Seventh Circuit's rewriting of subsection (c)(4) tips the scale decidedly in favor of trial lawyers, who could obtain massive settlement leverage without ever taking a significant step toward proving liability. See *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (class certification puts "hydraulic pressure on defendants to settle"). When the class trial is for an injunction that threatens to overturn the defendant's business methods, the incentive to settle is greater still. Nothing in (c)(4) suggests that it was meant to put so heavy a thumb on plaintiffs' side of the scale. See *Allison*, 151 F.3d at 422 n.17 ("we should not condone a certification-at-all-costs approach" for the "purpose of forcing a settlement").

The "piecemeal certification" approved by the Seventh Circuit "distorts the certification process" beyond recognition, elevating Rule 23(c)(4) to a primary role its drafters never intended, at the expense of the protections set forth in subsections (a), (b)(2), and (b)(3), "result[ing] in unfairness to all." *Allison*, 151 F.3d at 422 n.17. This Court should grant certio-

rari to resolve the circuit conflict about the meaning of Rule 23(c)(4), restore the primary role of Rules 23(a) and (b), and disapprove the end-run around *Dukes* endorsed by the Seventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

George McREYNOLDS, et al., on behalf of themselves and all others similarly situated, Plaintiffs–Appellants,
v.
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., Defendant–Appellee.

No. 11–3639.

Argued January 13, 2012.
Decided February 24, 2012.

Before POSNER, WOOD, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge.

The plaintiffs have filed a class action suit that charges Merrill Lynch with racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The plaintiffs ask that a class be certified for two purposes: deciding a common issue, Fed. R. Civ. P. 23(c)(4)—whether the defendant has engaged and is engaging in practices that have a disparate impact (that is, a discriminatory effect, though it need not be intentional) on the members of the class, in violation of federal antidiscrimination law; and providing injunctive relief. Fed. R. Civ. P. 23(b)(2). They also want damages. But while they asked the district court to certify the class for purposes of seeking compensatory and punitive damages, see Rule 23(b)(3), at argu-

ment the plaintiffs' lawyer said she wasn't asking—not yet anyway—for such certification, though her opening brief had suggested that if we found that the district court had erred in refusing to certify for class treatment the disparate impact issue and injunctive relief, we should order the court to "consider [on remand] the extent to which damages issues also could benefit from class treatment, consistent with *Allen v. International Truck & Engine Corp.,* 358 F.3d 469 (7th Cir. 2004)." We defer that question to the end of our opinion. But we note here that without proof of intentional discrimination, which is not an element of a disparate impact claim, the plaintiffs cannot obtain damages, whether compensatory or punitive, but only equitable relief (which might however include backpay, and thus have a monetary dimension). 42 U.S.C. § 1981a(a)(1); *Kolstad v. American Dental Association,* 527 U.S. 526, 534 (1999). Section 1981a(a)(1) is explicit that damages cannot be awarded in respect of "an employment practice that is unlawful because of its disparate impact."

The district court denied certification, and the plaintiffs asked this court for leave to appeal the denial. A motions panel granted leave, but the defendant argues that the panel erred—that the appeal is untimely. We begin with that question.

Rule 23(f) of the civil rules permits appeals from orders granting or denying class certification despite the general policy (though one with many exceptions) against allowing interlocutory appeals in the federal court system. A denial of class certification often dooms the suit—the class members' claims may be too slight to justify the expense of individual suits. Conversely, because of the astronomical damages potential of many class action suits, a grant of certifica-

tion may place enormous pressure on the defendant to settle even if the suit has little merit. See, e.g., *CE Design Ltd. v. King Architectural Metals, Inc.,* 637 F.3d 721, 723 (7th Cir. 2011). And because class actions are cumbersome and protracted, an early appellate decision on whether a suit can be maintained as a class action can speed the way to termination of the litigation by abandonment, summary judgment, or settlement. E.g., *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832, 834–35 (7th Cir. 1999); *Newton v. Merrill Lynch,* 259 F.3d 154, 162–65 (3d Cir. 2001).

But Rule 23(f) requires that leave to appeal be sought from the court of appeals within 14 days of the entry of the order granting or denying certification. The district court denied the plaintiffs' initial motion for class certification in August 2010. In July 2011 the plaintiffs filed an amended motion for class certification, which the district judge denied in September, and within 14 days of *that* denial the plaintiffs sought our leave to appeal. The defendant asks us to treat the request for leave to appeal as an untimely request to appeal the August 2010 denial of certification. That would amount to treating the plaintiffs' second motion for certification as an untimely motion to reconsider the denial of the first motion.

The question of timeliness may seem to be about jurisdiction, since most deadlines for appeals from a district court have been held to be jurisdictional. But as we noted recently in *In re IFC Credit Corp.,* 663 F.3d 315, 319–20 (7th Cir. 2011), the Supreme Court has been moving toward a definition of the subject-matter jurisdiction of the federal courts that includes all cases that these courts are "competent," in the sense of legally empowered, to decide. This implies

that deadlines for appealing are not jurisdictional, since they regulate the movement upward through the judicial hierarchy of litigation that by definition is within federal jurisdiction. Yet appeal deadlines either found in statutes or adopted by courts by direction of a statute continue to be treated as jurisdictional—though not all of them; the Supreme Court recently rejected such a "bright line" rule in favor of requiring a "clear indication" that the deadline was intended by Congress to be jurisdictional. *Henderson v. Shinseki,* ––– U.S. ––––, 131 S. Ct. 1197, 1203 (2011). (The power of Congress to impose such limits on the jurisdiction of the federal courts is not questioned.) But because no "clear indication" is to be found in the pertinent statutory texts, see, e.g., 28 U.S.C. §§ 2101(c), 2107(a), (c), the Court has found itself saying such things as that Congress is not required to "use magic words in order to speak clearly on this point" and that "context, including [the Supreme Court's] interpretation of similar provisions in many years past, is relevant." *Henderson v. Shinseki, supra,* 131 S. Ct. at 1203, quoting *Reed Elsevier, Inc. v. Muchnick,* ––– U.S. ––––, 130 S. Ct. 1237 (2010).

What we take away from this formula is that if the Court has traditionally treated a particular statutory deadline as jurisdictional it will go on doing so, *id*. at 1203–06; *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 134 (2008); *Bowles v. Russell*, 551 U.S. 205, 209–10 and n. 2 (2007); *In re Caterbone*, 640 F.3d 108, 111–13 (3d Cir. 2011), even though doing so doesn't comport with the new "competence" standard. Deadlines for appealing are just a type of statute of limitations, as acknowledged in *John R. Sand & Gravel v. United States, supra,* 552 U.S. at 133, and statutes of limitations ordinarily are affirmative defenses rather than jurisdictional bars.

A deadline for bringing or appealing a federal case presupposes that the case is within the competence of federal courts to decide.

We declined in *Asher v. Baxter Int'l Inc.,* 505 F.3d 736, 741 (7th Cir. 2007), to rule on whether the deadline in Rule 23(f), though it is promulgated by the Supreme Court under the authority of the Rules Enabling Act, 28 U.S.C. § 2072, rather than found in or directed to be adopted by a statute, is jurisdictional. But by now it is clear that it is not jurisdictional—that the exception to the "competence" standard is limited to statutory deadlines, *United States v. Neff,* 598 F.3d 320, 322–23 (7th Cir. 2010), for how can a court contract or expand its jurisdiction except by force of a constitutional or statutory provision? If the deadline was made by Congress, then whether it is jurisdictional depends on congressional intent, and, the Supreme Court appears to be saying, in the absence of any clues to that intent on whether the courts traditionally have treated the deadline as jurisdictional. The time limit in Rule 23(f), having been created by the Court rather than by Congress (no time limits are specified in the Rules Enabling Act—the Act is an enabler, not a specifier), is governed by the "competence" standard and therefore is not jurisdictional, for obviously the suit from which the appeal is sought to be taken is within the jurisdiction of the federal courts.

But suppose our understanding of the evolving Supreme Court doctrine is wrong, and the deadline in Rule 23(f) *is* jurisdictional. The only difference between a deadline that is jurisdictional and one that is not is that a litigant cannot lose the benefit of the former type (until judgment becomes final after exhaustion of appellate remedies) by failing to assert it,

or because the other party's failure to comply would in nonjurisdictional settings be excused by such doctrines as equitable estoppel or equitable tolling. The defendant has from the outset vigorously contested the timeliness of the appeal, and the plaintiffs are not arguing that they should be excused for having missed the deadline. Even if not jurisdictional, a deadline is mandatory in the sense that if invoked by a party in timely fashion the court is bound by it. *Eberhart v. United States,* 546 U.S. 12, 19 (2005) (per curiam); *Asher v. Baxter Int'l Inc., supra,* 505 F.3d at 741; *Maxwell v. Dodd,* 662 F.3d 418, 421 (6th Cir. 2011); *Wilburn v. Robinson,* 480 F.3d 1140, 1146–47 (D.C. Cir. 2007).

Rather, the plaintiffs' argument is that their 14 days to seek leave to appeal ran anew from the denial of their amended motion for class certification. The defendant points out that a deadline for appealing cannot be extended by a motion for reconsideration of a previous appealable order, *Asher v. Baxter Int'l Inc., supra,* 505 F.3d at 739–40; *Gary v. Sheahan,* 188 F.3d 891 (7th Cir. 1999); *Jenkins v. BellSouth Corp.,* 491 F.3d 1288, 1290–92 (11th Cir. 2007); *McNamara v. Felderhof,* 410 F.3d 277, 280–81 and n. 8 (5th Cir. 2005), unless the motion is made within the time allowed for taking the appeal, *Blair v. Equifax Check Services, Inc., supra,* 181 F.3d at 837, and this rule applies to appeals under Rule 23(f). *Id.* Otherwise the deadline for taking the appeal would be eviscerated. And this is so even if the motion for reconsideration doesn't just say "and for the reasons stated in our original motion we ask the court to reverse its ruling" but adds "and by the way we have thought of some clever new arguments for why our motion should have been granted." *Carpen-*

ter v. Boeing Co., 456 F.3d 1183, 1190–91 (10th Cir. 2006). For it is easy to think up new arguments.

But it doesn't follow that the failure to take a timely appeal from one interlocutory order operates as a forfeiture, jurisdictional or otherwise, of the right to appeal a subsequent order. For the later motion may not be, either in form or, more important, in substance, a motion to reconsider the previous denial. A rule limiting parties to one interlocutory appeal from a grant or denial of class certification would disserve Rule 23(f). It is important that the question whether the case is to proceed as a class action be resolved sooner rather than later. So if it becomes clear in the course of the lawsuit, as a result of new law or newly learned facts, that the denial of certification was erroneous, and if years of litigation lie ahead before a final judgment can be expected, and if therefore an appeal from the denial of certification may either end the litigation or at least place it on a path to swift resolution, the court of appeals should have discretion to allow the appeal.

The fact that the appellate court has a discretionary jurisdiction over Rule 23(f) appeals is important. Appellate jurisdiction in the federal system ordinarily is mandatory. With few exceptions, we have to decide all appeals that we have jurisdiction to hear; we do not have a discretionary appellate jurisdiction like the Supreme Court. But because our jurisdiction to hear interlocutory appeals under Rule 23(f) *is* discretionary, there is little danger that the filing in the district court of a second motion for certification based on altered circumstances, followed if it is denied by a motion in this court for leave to appeal, will either delay the district court proceedings (Rule 23(f) provides that "an appeal does not stay proceedings in

the district court unless the district judge or the court of appeals so orders") or burden us or the opposing party. If the movant is playing a delay game, prompt denial by the motions panel of leave to appeal probably will end it; if he persists he will be courting sanctions in both the district court and this court for filing frivolous pleadings. And by the way, we do not permit a party to circumvent the 14–day deadline in Rule 23(f) by appealing a denial of class certification under 28 U.S.C. § 1292(b) (authorizing interlocutory appeals that present a controlling issue of law on which there is substantial room for disagreement and prompt resolution would expedite the litigation), *Richardson Electronics, Ltd. v. Panache Broadcasting,* 202 F.3d 957, 959 (7th Cir. 2000), which has no deadline.

Dicta in the Tenth Circuit's opinion in *Carpenter v. Boeing Co., supra,* go beyond the unexceptionable proposition that merely presenting "new arguments" does not change a motion for reconsideration of a grant or denial of class certification into a motion that if denied is appealable under Rule 23(f). The opinion states (456 F.3d at 1191) that

> given the multifactor analysis that courts must apply in deciding the propriety of class certification, [even appellate review limited to whatever changed circumstances had given rise to the fresh motion for certification] would often require contorted thinking that exceeds the capacities of even appellate courts. How can an appellate court say that one particular new factor would require a different result regardless of how the district court weighed the factors presented originally? In stating that the new factor required a

> different result, the appellate court must engage in weighing the factors weighed by the district court in its original ruling but cannot know precisely how much weight the district court granted to each. In particular, what if the district court clearly erred in giving dispositive weight to one factor? How is the appellate court to ignore such error (in keeping with the presumption that the original decision was correct) even when it addresses a motion for reconsideration that raises only a rather inconsequential new factor? ... We are not inclined to adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple. We note that the very absence of a prompt appeal by the party aggrieved by the decision on certification suggests that the concerns justifying Rule 23(f) are, at the least, less significant in the particular case. If the decision whether or not to certify the class was truly outcome determinative, one would not expect the losing party to continue the litigation for months before launching a new challenge to the ruling. Any value in permitting a belated interlocutory appeal is overridden by the desirability of the district court's proceeding expeditiously.

A court of appeals is never obliged to engage in "contorted thinking" about a Rule 23(f) appeal, for it can always deny leave to appeal, and should do so if it would have to do mental contortions in order to make up its collective mind whether appeal should be allowed. And if the new motion for certification "raises only a rather inconsequential new factor,"

then the failure of the plaintiffs to have sought interlocutory review of the denial of the original motion for certification becomes a reason to deny leave to appeal out of hand, without any "mental gymnastics." As for "not expect[ing] the losing party to continue the litigation for months before launching a new challenge to the ruling," the new challenge is timely if filed as soon as the development warranting a new motion for certification occurs, but untimely if the plaintiff dawdles. And if the appeal is not "belated," but based on developments that may warrant certification, allowing the appeal may very well speed up rather than slow down the litigation. In effect the court held in *Carpenter* that the new motion for certification was in substance an untimely motion for reconsideration. The holding is unexceptionable, but the dicta are not persuasive.

The basis of the plaintiffs' renewed motion for class certification in the present case was the Supreme Court's decision in *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S. Ct. 2541 (2011), handed down a month earlier. That was an important development in the law governing class certification in employment discrimination cases—possibly a milestone. It may seem a perverse basis for a renewed motion for class certification, since the Supreme Court reversed a grant of certification in what the defendant in our case insists is a case just like this one. But the district judge, though he again denied certification, didn't think the plaintiffs were perverse in basing their new motion on *Wal–Mart.* On the contrary, he said that "*Wal–Mart* does add a lot to the landscape under Rule 23.... I think this really cries out for a 23(f) appeal, and I would support it. And I'm going to put that in my order [denying the renewed motion for certification—and he did].... [T]his

is one [case] that really cries out for [a Rule 23(f) appeal] with the change in the landscape by the *Wal–Mart* opinion. Of course, you know, most defendants think that the change is in their interest, not in the plaintiffs'. But you've [the judge was addressing the plaintiffs' lawyer] made a good argument, and I think it deserves to be put to rest one way or the other." The judge was right.

Wal–Mart holds that if employment discrimination is practiced by the employing company's local managers, exercising discretion granted them by top management (granted them as a matter of necessity, in Wal–Mart's case, because the company has 1.4 million U.S. employees), rather than implementing a uniform policy established by top management to govern the local managers, a class action by more than a million current and former employees is unmanageable; the incidents of discrimination complained of do not present a common issue that could be resolved efficiently in a single proceeding. Fed. R. Civ. P. 23(a)(2). Not that the employer would be immune from liability even in such a case; if the local managers are acting within the scope of their employment in discriminating against their underlings on a forbidden ground (sex, alleged in *Wal–Mart,* race in our case), the employer is liable for their unlawful conduct under the doctrine of respondeat superior. But because there was no company-wide policy to challenge in *Wal–Mart*—the only relevant corporate policies were a policy *forbidding* sex discrimination and a policy of delegating employment decisions to local managers—there was no common issue to justify class treatment.

The district judge thought this case like *Wal–Mart* because Merrill Lynch, accused of discriminat-

ing against 700 black brokers currently or formerly employed by it, delegates discretion over decisions that influence the compensation of all the company's 15,000 brokers ("Financial Advisors" is their official title) to 135 "Complex Directors." Each of the Complex Directors supervises several of the company's 600 branch offices, and within each branch office the brokers exercise a good deal of autonomy, though only within a framework established by the company.

Two elements of that framework are challenged: the company's "teaming" policy and its "account distribution" policy. The teaming policy permits brokers in the same office to form teams. They are not required to form or join teams, and many prefer to work by themselves. But many others prefer to work as part of a team. Team members share clients, and the aim in forming or joining a team is to gain access to additional clients, or if one is already rich in clients to share some of them with brokers who have complementary skills that will secure the clients' loyalty and maybe persuade them to invest more with Merrill Lynch. As we said, there are lone wolves, but there is no doubt that for many brokers team membership is a plus; certainly the plaintiffs think so.

The teams are formed by brokers, and once formed a team decides whom to admit as a new member. Complex Directors and branch-office managers do not select the team's members.

Account distributions are transfers of customers' accounts when a broker leaves Merrill Lynch and his clients' accounts must therefore be transferred to other brokers. Accounts are transferred within a branch office, and the brokers in that office compete for the accounts. The company establishes criteria

for deciding who will win the competition. The criteria include the competing brokers' records of revenue generated for the company and of the number and investments of clients retained.

The Complex Directors, as well as the branch-office managers, have a measure of discretion with regard to teaming and account distribution; they can veto teams and can supplement the company criteria for distributions. And to the extent that these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is indeed like *Wal–Mart*. But the exercise of that discretion is influenced by the two company-wide policies at issue: authorization to brokers, rather than managers, to form and staff teams; and basing account distributions on the past success of the brokers who are competing for the transfers. Furthermore, team participation and account distribution can affect a broker's performance evaluation, which under company policy influences the broker's pay and promotion. The plaintiffs argue that these company-wide policies exacerbate racial discrimination by brokers.

The teams, they say, are little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers. Obviously they have their eyes on the bottom line; they will join a team only if they think it will result in their getting paid more, and they would doubtless ask a superstar broker to join their team regardless of his or her race. But there is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncer-

tainty people tend to base decisions on emotions and preconceptions, for want of objective criteria.

Suppose a police department authorizes each police officer to select an officer junior to him to be his partner. And suppose it turns out that male police officers never select female officers as their partners and white officers never select black officers as their partners. There would be no intentional discrimination at the departmental level, but the practice of allowing police officers to choose their partners could be challenged as enabling sexual and racial discrimination—as having in the jargon of discrimination law a "disparate impact" on a protected group—and if a discriminatory effect was proved, then to avoid an adverse judgment the department would have to prove that the policy was essential to the department's mission. 42 U.S.C. § 2000e–2(k)(1)(A)(i); *Ricci v. DeStefano,* 557 U.S. 557, 129 S. Ct. 2658, 2672–73 (2009); *Bryant v. City of Chicago,* 200 F.3d 1092, 1098–99 (7th Cir. 2000). That case would not be controlled by *Wal–Mart* (although there is an undoubted resemblance), in which employment decisions were delegated to local managers; it would be an employment decision by top management.

Merrill Lynch's broker teams are formed by brokers, not managers, just as in our hypothetical example police officers' partners are chosen by police officers, not supervisors. If the teaming policy causes racial discrimination and is not justified by business necessity, then it violates Title VII as "disparate impact" employment discrimination—and whether it causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination.

And likewise with regard to account distributions: if as a result of racial preference at the team level black brokers employed by Merrill Lynch find it hard to join teams, or at least good teams, and as a result don't generate as much revenue or attract and retain as many clients as white brokers do, then they will not do well in the competition for account distributions either; and a kind of vicious cycle will set in. A portion of a team's pre-existing revenues are transferred within a team to a new recruit, who thus starts out with that much "new" revenue credited to him or her—an advantage, over anyone who is not on a team and thus must generate all of his own "new" revenue, that translates into a larger share of account distributions, which in turn helps the broker do well in the next round of such distributions. This spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers presents another question common to the class, along with the question whether, if the team-inflected account distribution system does have this disparate impact, it nevertheless is justified by business necessity.

There is no indication that the corporate level of Merrill Lynch (or its parent, Bank of America) *wants* to discriminate against black brokers. Probably it just wants to maximize profits. But in a disparate impact case the presence or absence of discriminatory intent is irrelevant; and permitting brokers to form their own teams and prescribing criteria for account distributions that favor the already successful—those who may owe their success to having been invited to join a successful or promising team—are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore challenging those policies in a class action is not forbidden by the *Wal–Mart* decision; rather

that decision helps (as the district judge sensed) to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.

Echoing the district judge, the defendant's brief states that "any discrimination here would result from local, highly-individualized implementation of policies rather than the policies themselves." That is too stark a dichotomy. Assume that with no company-wide policy on teaming or account distribution, but instead delegation to local management of the decision whether to allow teaming and the criteria for account distribution, there would be racial discrimination by brokers or local managers, like the discrimination alleged in *Wal–Mart*. But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect (overlooked by the district judge) of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis.

We are not suggesting that there is in fact racial discrimination at any level within Merrill Lynch, or that management's teaming and account distribution policies have a racial effect. The fact that black brokers have on average lower earnings than white brokers may have different causes altogether. The only issue at this stage is whether the plaintiffs' claim of disparate impact is most efficiently determined on a class-wide basis rather than in 700 individual lawsuits.

The district judge exaggerated the impact on the feasibility and desirability of class action treatment of the fact that the exercise of discretion at the local

level is undoubtedly a factor in the differential success of brokers, even if not a factor that overwhelms the effect of the corporate policies on teaming and on account distributions. Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful. Rule 23(c)(4) provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." The practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis, consistent with the rule just quoted.

As said in *Mejdrech v. Met–Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003),

> class action treatment is appropriate and is permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury. Often, and as it seems to us here, these competing considerations can be reconciled in a "mass tort" case by carving at the joints of the parties' dispute. If there are

> genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.

The kicker is whether "the accuracy of the resolution" would be "unlikely to be enhanced by repeated proceedings." If resisting a class action requires betting one's company on a single jury verdict, a defendant may be forced to settle; and this is an argument against definitively resolving an issue in a single case if enormous consequences ride on that resolution. *In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012, 1020 (7th Cir. 2002); *In re Rhone–Poulenc Rorer, Inc.,* 51 F.3d 1293, 1299–1300 (7th Cir. 1995); contra, *Klay v. Humana, Inc.,* 382 F.3d 1241, 1274 (11th Cir. 2004). But Merrill Lynch is in no danger of being destroyed by a binding class-wide determination that it has committed disparate impact discrimination against 700 brokers, although an erroneous injunction against its teaming and account distribution policies could disadvantage it in competition with brokerage firms that employ similar policies—though we have no information on whether others do.

The *Mejdrech* decision, and *Bridgestone/Firestone* and *Rhone–Poulenc* more fully, discuss the danger that resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury. The alternative is multiple proceed-

ings before different triers of fact, from which a consensus might emerge; a larger sample provides a more robust basis for an inference. But that is an argument for separate trials on pecuniary relief, and the only issue of relief at present is whether to allow the plaintiffs to seek class-wide injunctive relief. There isn't any feasible method—certainly none has been proposed in this case—for withholding injunctive relief until a series of separate injunctive actions has yielded a consensus for or against the plaintiffs.

As far as pecuniary relief is concerned, there may be no common issues (though then again there may be, see *Allen v. International Truck & Engine Corp., supra,* 358 F.3d at 472), and in that event the next stage of the litigation, should the class-wide issue be resolved in favor of the plaintiffs, will be hundreds of separate suits for backpay (or conceivably for compensatory damages and even punitive damages as well, if the plaintiffs augment their disparate-impact claim with proof of intentional discrimination). The stakes in each of the plaintiffs' claims are great enough to make individual suits feasible. Most of Merrill Lynch's brokers earn at least $100,000 a year, and many earn much more, and the individual claims involve multiple years. But the lawsuits will be more complex if, until issue or claim preclusion sets in, the question whether Merrill Lynch has violated the antidiscrimination statutes must be determined anew in each case.

We have trouble seeing the downside of the limited class action treatment that we think would be appropriate in this case, and we conclude that the district judge erred in deciding to the contrary (with

evident misgivings, however). The denial of class certification under Rules 23(b)(2) and (c)(4) is therefore REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

George McREYNOLDS, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender–Jackson, and Stephen Smartt, individually on behalf of themselves and all others similarly situated, Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Defendant.

No. 05 C 6583.

August 9, 2010.

AMENDED MEMORANDUM OPINION AND ORDER

ROBERT W. GETTLEMAN, District Judge.

Plaintiffs George McReynolds, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender-Jackson, and Stephen Smartt, individually and on behalf of all others similarly situat-

ed, have brought a two count second amended putative class action complaint against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(e) *et seq*. (Count I), and 42 U.S.C. § 1981 (Count II). Plaintiffs have moved pursuant to Fed. R. Civ. P. 23 to certify a class, defined as:

> African-American financial advisors ("FAs") and FA Trainees ("Trainees") who are or were employed in the retail brokerage unit, referred to as Global Private Client ("GPC") of defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., from January 2001 to the present.

The parties have engaged in lengthy and often contentious discovery proceedings including both factual and expert discovery. Not surprisingly, this has resulted in overly lengthy briefs with countless unnecessary citations and footnotes.[1] For the reasons discussed below, the motion is denied.

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[1] Although the court allowed the parties to exceed the 15 page limit provided by LR 7.1, the court did not expect the parties to abuse this allowance. For example, plaintiffs' opening brief is 55 pages (the "Argument" section does not begin until page 43) with 86 footnotes, many of which contain as much or more text than the page on which they appear. Worse yet, many of the footnotes in both parties' briefs contain argument or substantive factual points that belong in the text. Added to the hundreds of pages of exhibits submitted with the instant motions, the burden placed on the court was as taxing as it was unnecessary.

FACTS

Defendant is the largest provider of brokerage and brokerage related services in the United States. It employs over approximately 15,000 FAs to aid clients in identifying and reaching their financial goals. The company employs 135 Complex Directors ("Directors") each of whom manages the operation of a number of branch offices within his or her complex. There are over 600 branch offices within the 135 complexes, employing the approximate 15,000 FAs. The Directors report to 30 Regional Managing Directors, most of whom are also Directors themselves, and who in turn report to 5 Divisional Managing Directors ("DMDs"). The five DMDs report to a Senior Vice-President ("SVP") for the Advisory Division, who reports to the President of defendant's Global Wealth Management ("GWM") business.

Each Director manages his or her complex as a stand alone business. The Directors monitor profits and losses of their complexes and make individualized employment decisions regarding FAs, constrained only by national policies. Each FA basically operates his or her own business within a business. Each FA is responsible for building a book of business by soliciting clients in the community, although some accounts are distributed by management. Each FA is paid based on an objective grid. Compensation is increased based on increased production. In addition, defendant's compensation plan pays different rates based on the size of the customer's "household," which is not a single client but includes all related individuals. For example, the adult children of a client are grouped in a "household" even if they do not live under one roof or have joint investment ac-

counts. Since 2001 FAs received compensation for accounts under $100,000 only if those accounts belong to a "household" with wealth in excess of $100,000.

As each FA reaches increased length of service levels ("LOS"), the FA must meet certain production hurdles or else earn a lower rate of payout. This requirement is referred to as the "penalty box." Once in the penalty box the FA remains in until he or she meets certain minimum production or revenue requirements. Thus, the longer an FA is employed at defendant, the more business that FA is expected to generate.

DISCUSSION

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 155 (1982) (*quoting Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979)). Class relief is particularly appropriate when the issues involved are common to the class as a whole and when the issues turn on questions of law applicable in the same manner to each member of the class. *Id.* The court has broad discretion in determining whether to certify a class, and the proponent bears the burden of showing that certification is warranted. *Sandoval v. City of Chicago,* 2007 WL 3087136 (N.D. Ill. 2007).

Fed. R. Civ. P. 23, which governs class actions, requires a two step analysis to determine whether class certification is appropriate. First, plaintiffs must satisfy all four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Martinez v. Haleas,* 2009

WL 2916852, at *2 (N.D. Ill. 2009); *Harriston v. Chicago Tribune Co.,* 992 F.2d 697, 703 (7th Cir. 1993). These requirements are prerequisites to certification, and failure to meet any one of them precludes certification of the class. *Parker v. Risk Management Alternatives, Inc.,* 206 F.R.D. 211, 212 (N.D. Ill. 2002). Additionally, plaintiffs must satisfy one of the conditions of Fed. R. Civ. P. 23(b).

When evaluating whether a party has met its burden of proving that a class should be certified, the court should not consider the merits of the underlying claim, *Eisen v. Carlisle and Jacqueline,* 417 U.S. 156, 166 (1974), but may "probe behind the pleadings" to determine whether the named plaintiffs' claims fairly encompass those of the class they seek to represent. *Falcon,* 457 U.S. at 160; *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 673 (7th Cir. 2001). Where factual and legal questions that "would strongly influence the wisdom of class treatment" are disputed, the court will not merely accept plaintiffs' assertions as true, but will require some evidence before making a decision. *Szabo,* 249 F.3d at 675-76. That decision, may, at times, require inquiry into any preliminary resolution of disputed issues of fact, even if those same factual issues are also relevant to the merits of the case. *Id.*

Rule 23(a) Requirements

1. *Numerosity*

Under Rule 23(a)(1), plaintiffs must show that the class is so numerous that joinder of all members is impracticable. The exact number of class members need not be pleaded or proved, but impracticability of joinder must be positively shown and cannot be speculative. *Parker,* 206 F.R.D. at 212. Plaintiffs define

the proposed class as African-American FAs and FA Trainees who are or were employed in a retail brokerage unit referred to as Global Private Client, from January 1, 2001 to the present. In a footnote, plaintiffs indicate that the class includes brokers, broker trainees and persons hired with intent to enter defendant's broker training program, even if they never received a broker production number, persons who had production numbers but also performed managerial duties, including sales or producing managers and persons who attended the firm's Management Assessment Center ("MAC"). According to plaintiffs, there are approximately 700 class members, which is sufficiently large to satisfy the numerosity requirement.

2. *Commonality*

Rule 23(a)(2) requires the presence of questions of law or fact common to the class. The Rule does not mandate absolute commonality; a common nucleus of operative facts is usually enough to satisfy the requirement. *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998). A common nucleus of operative fact is usually found where "defendants have engaged in standardized conduct towards members of the proposed class...." *Id.* Thus, racial discrimination in an employment context, arising out of the employer's standard operating procedure, is generally well-suited to class adjudication. *Falcon,* 457 U.S. at 157. In a Title VII action, however, commonality is the "most critical element and one in which the class action and merit inquiries essentially collide." *Stastny v. S. Bell Tel. & Co.,* 628 F.2d 267, 274 (4th Cir. 1980). As *Falcon* makes clear, a party attempting to maintain a pattern or practice discrimination class action must demonstrate more than shared member-

ship in a protected class, but must offer sufficient evidence to bridge the gap between his or her own individual claim and those of class members who suffered the same injury.

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [plaintiffs] to bridge that gap [they] must prove much more than the validity of their own claims. [*Falcon,* 457 U.S. at 157-58.]

Thus, the inquiry into whether plaintiffs meet the commonality requirement necessarily overlaps with the merits of their claim that defendant discriminates against blacks. Count One of plaintiffs' second amended complaint, which is brought under Title VII, is actually very broad, encompassing both a pattern or practice discriminatory treatment claim and a discriminatory impact claim. Although the parties do not differentiate between the claims, those claims require different proofs. Under a disparate impact theory, plaintiff need not prove intentional discrimination, only that defendants' facially neutral actions adversely affected a protected group. *Teamsters v. United States,* 431 U.S. 324, 355 n.15 (1977). To establish a pattern or practice disparate treatment claim, however, plaintiffs must show that intentionally discriminatory practices were defendant's

standard operating procedure, not merely sporadic or isolated occurrences. *Id.* at 336. To do so plaintiffs may offer direct evidence of intentional discrimination or they may offer evidence of a combination of circumstances from which a court or jury may infer discriminatory intent. *Ellis v. Elgin River Boat Resort,* 217 F.R.D. 415, 420 (N.D. Ill. 2003).

Obviously, establishing commonality under a disparate treatment theory is more difficult than doing so under the disparate impact theory. *Clayborne v. Omaha Public Power Dist.,* 211 F.R.D. 573, 592 (D. Neb. 2002). After *Falcon,* a plaintiff seeking certification of a class alleging pattern or practice discrimination must make "a specific showing of underlying facts which might raise an inference of a common question of pattern and practice through allegations of specific incidents of discrimination, supporting affidavits or statistical evidence." *Ellis,* 217 F.R.D. at 423. Subjective employment processes may provide a common basis for a class-wide claim of discrimination if these subjective employment criteria were uniformly "used as a mask for discrimination." *Puffer v. Allstate Ins. Co.,* 255 F.R.D. 450, 460 (N.D. Ill. 2009).

Plaintiffs allege that defendant has engaged in a pattern or practice of race discrimination and that it has policies and practices that result in a disparate impact on African-Americans. They contend that defendant knows of this "systemic discrimination" which results from a hostile corporate culture, as well as policies and practices that steer business opportunities away from African-American FAs. This "culture" and policy allegedly include maintaining stereotypical views about African-Americans that underlie personnel decisions, impeaches the work environment, and denies African-American FAs the

same opportunities and support that other FAs are given. To support their motion for certification plaintiffs identify what they consider to be several issues of common fact that they claim will prove a pattern or practice, including:

1. Defendant has a uniform branch office management and job structure;

2. Defendant has a "strong, uniform, racially-biased corporate culture that ensures uniformity and consistency in practices and attitudes across the country;

3. Defendant has implemented and developed firm-wide employment policies regarding hiring and training, teaming, account distribution and transfer, management assessment and selection and multi-cultural markets;

4. Expert evidence that common employment practices result in statistically significant disparities to the disadvantage of African-Americans;

5. Anecdotal evidence for 16 named plaintiffs and other class members; and

6. Evidence that defendant was aware of race discrimination but refused to take action.

After identifying these so-called common issues, however, plaintiffs offer little to establish the "significant proof" required by *Falcon,* to establish that the asserted discriminatory culture manifested itself in the "same general fashion" as to all putative class members. *Falcon,* 457 U.S. at 159 n.15. In fact, however, plaintiffs' attempt to make this showing is undermined by the different experiences of the proposed class members, in terms of length of service

with the defendant, income, position levels, the people who made the relevant employment decisions, and the conflicting and unconvincing anecdotal evidence found in their declarations.

Commonality is generally easily satisfied when an individual or even a small centralized group makes decisions. *Ellis,* 217 F.R.D. at 424. It is also more easily satisfied in a disparate impact case where all of the proposed class members have been impacted by a facially neutral policy. Neither situation is present in the instant case.[2]

Instead, plaintiffs allege that defendant has a corporate culture of racial discrimination that it implements through the discretionary decisions of over 15,000 FAs, over 600 branch office managers, 135 complex directors, 30 Regional Managing Directors and 5 Divisional Managers situated across the entire United States. Such decentralized procedures, that allow decision-makers across the country to consider subjective factors makes it far more difficult to establish that the employer engages in a pattern or practice of discrimination as a standard operating procedure, and thus more difficult to establish commonality. *Id.* (*citing Stastny*, 628 F.2d at 276).

In the instant case, the putative class members were supervised and reviewed by hundreds of different people, held a wide variety of salary levels and positions and had totally different experiences. For

[2] Plaintiffs do allege in conclusory fashion a disparate impact, but the gravamen of their complaint, as well as the evidence presented, is not that neutral policies neutrally applied have a discriminatory impact, but that defendant is subverting its neutral policies by applying them in an intentionally discriminatory fashion.

example, some putative plaintiffs claim they were denied access to the management program (MAC) while others were recommended for management and reached at least vice-president levels. Some putative plaintiffs were hugely successful financially, while others never got through the FA training program. Each individual plaintiff's experience was the result of countless decisions made by themselves, other FAs in their branch offices, their branch managers and so on up the chain of command. Plaintiffs' position essentially is that all of these decisions were made by racist employees of a racist company. As numerous decisions from this district demonstrate, however, class certification should be denied when the plaintiffs' class definition implicates numerous, independent decision-makers resulting in the need for numerous individual inquiries. *See Puffer,* 255 F.R.D. at 460-61 (and cases cited therein).

Plaintiffs place great reliance on statistical evidence to establish commonality. They have provided statistics to demonstrate that for the years in question there was low African-American representation in the FA workforce; African-American FAs were compensated at lower rates; African-American FAs were less likely than whites to participate in teams; African-American trainees were less likely to participate in pools; and white trainees received accounts that had significantly higher average total asset values than those distributed to African-American trainees.

Plaintiffs argue that these raw statistics alone are sufficient to establish commonality, and the court might be inclined to agree with plaintiffs if this were a true disparate impact case. As explained above, however, it is not. Take, for example, plaintiffs' claim

that African-American FAs are compensated at lower rates than white FAs. According to plaintiffs, between 2001 and 2004 African-American FAs earned 33 to 42% less in annual compensation than white FAs. If this were a disparate impact case, that statistic would present a compelling argument for finding commonality and certifying a class. But plaintiffs do not argue that defendant's facially neutral compensation program applied neutrally leads to the resulting discrepancy in compensation. Instead, plaintiffs argue that all of the factors that lead to the application of the facially neutral compensation program had been applied in an intentionally discriminatory manner, resulting in the discrepancy.

Defendant pays its FAs based on production. It pays FAs based on a percentage of the production credit ("PCs") and other revenue generated when one of the FA's clients uses or purchases a Merrill Lynch financial product or security. There is no discretion in calculating FA incentive compensation, which is based on a precise mathematical formula and grids contained in the program. Plaintiffs do not claim that the compensation program itself is discriminatory, but rather that it works to African-American's disadvantage because the discriminatory culture at defendant stunts the African-Americans' ability to produce. For example, because African-Americans are given fewer opportunities to team with high-producing FAs, and thus do not get to inherit shared accounts when those originating FAs retire, the African-Americans FAs tend to have lower production. Lower production means not only lower compensation, but also receipt of fewer of the accounts that are distributed through the firm account distribution program. Receipt of fewer accounts again means less production and less compensation, creating a vicious

circle that acts to prevent African-American FAs from succeeding. Thus, it is the individual allegedly discriminatory decisions along the way, such as a white FA's decision not to team with an African-American FA that leads to the asserted disparity in compensation, not a neutral application of the mathematical formula.

Defendant, of course, has supplied its own statistical experts who, not surprisingly, attack plaintiffs' evidence.[3] In particular, defendant's experts criticized plaintiffs' statisticians for failing to take into account that African-American FAs on average have fewer personal social connections with potential clients with wealth. Defendant's expert performed a study of published available census data and concluded that access to networks of potential clients with substantial wealth varies by race among defendant's FAs. As a result, customers independently generated by African-American FAs' participation in the training program early in their careers come from neighborhoods with significantly higher African-American populations and significantly lower average wealth.

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[3] Defendant has also moved to strike the testimony and conclusions of plaintiff's expert as inadmissible under Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm. Inc.,* 509 U.S. 579 (1993). The court is mindful of the Seventh Circuit's instruction that "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." *American Honda Motor Company Inc. v. Allen,* 600 F.3d 813, 816 (7th Cir. 2010). In the instant case, however, plaintiffs are unable to establish the requirements for the class certification, even with their experts' reports and testimony. Therefore, there is no reason to reach defendant's motion to strike, and it is denied as moot.

The contrasting statistical evidence and expert testimony demonstrates the danger of relying too heavily on statistical evidence supported by raw data. "It is said that you can find a statistic to prove anything." *Barricks v. Eli Lilly and Co.,* 481 F.3d 556, 559 (7th Cir. 2007). As Mark Twain put it, "there are three kinds of lies—lies, damned lies and statistics." *Puffer,* 255 F.R.D. at 461. That is why although statistical evidence may be a useful tool to prove discrimination, it is rarely sufficient in itself. *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 423 (7th Cir. 2001). Statistical evidence that fails properly to take into account nondiscriminatory explanations does not permit an inference of discrimination. *Puffer,* 255 F.R.D. at 461.

To bolster their statistical evidence, plaintiffs present "anecdotal" evidence in the form of declarations from 19 named plaintiffs and 47 putative class members which purport to show that discrimination occurred uniformly company-wide across the country. Defendant has moved to strike the class members' declarations on the grounds that they lack foundation, are not tied to the class period and are otherwise conclusory and so lacking in specifics as to be worthless.

The court agrees that most of the declarations provide little support on the commonality issue because they are so vague. All 19 named plaintiffs' declarations and 27 of the 47 putative class members' declarations are lawyer crafted statements that simply allege the declarants' general belief that defendant has a history of discriminatory practices toward African-Americans. Each of these declarants indicates that since 1994 they have seen themselves as part of a group acting to advance the interest of

African-American FAs at defendant. Such general allegations unaccompanied by specific discriminatory acts are too vague to be of any use. *Puffer,* 255 F.R.D. at 467 (*citing Mattenson v. Baxter Healthcare Corp.,* 438 F.3d 763, 770 (7th Cir. 2000)). Of the 20 declarations that actually identify a particular instance of alleged discrimination, six contain simple conclusory statements, such as the declarant was denied a management position because of race. Absent first-hand factual support, such declarations are not probative of commonality. *Puffer,* 255 F.R.D. at 467.

The remaining 14 declarations do provide some anecdotal evidence of discriminatory treatment, but rather than support commonality among the class, they demonstrate the differences and uniqueness of each individual claim. Some of the individual claims are petty in nature while others are more serious. On the more serious side, one declarant states that his manager pressured him into relinquishing his production number and moving to an investment advisor salaried position, and that after returning to a production position he was discouraged from applying for a management position until the instant action was filed. Another stated that when accounts were distributed he always got the African-American accounts while still another alleged that when the largest producing FA in the defendant's branch office retired, the declarant did not receive an equitable share of that FA's assets. One other declarant indicated that although he already had Series 7, 31 and 3 licenses from his previous employment at another brokerage firm, he was terminated from the training program at Wayne, Pennsylvania, but given an option to go to a salaried position at the New Jersey Financial Advisory Center ("FAC"). He worked at the FAC from 2005 to early 2007, and while he had been

one of the very few African-Americans at Wayne, over 25% of the salaried employees at the FAC were African-American.

On the other end of the spectrum, one declarant stated that he saw and heard a senior FA make an insensitive joke about President Obama. Another indicated that although he had achieved a production level to qualify for a private office he was denied one. Still another indicated that when he went to company sponsored events his office mates did not sit with him. Finally, another declarant stated that he was invited to go to a party at his manager's home but refused to go because he had heard that the manager had a confederate flag in his house.

As demonstrated by these declarations, the individuals worked in different offices, had different supervisors, and allegedly experienced vastly different forms of discrimination. The declarations serve not to support commonality, but to underscore the lack of commonality in the proposed class. Because commonality is lacking, class certification is inappropriate.

3. *Typicality*

Plaintiffs have also failed to meet their burden of establishing typicality. Rule 23(a)(3) requires plaintiffs to establish that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality inquiry is closely related to the commonality inquiry. *Keele*, 149 F.3d at 595. " 'A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives a rise to the claims of other class members and is based on the same legal theory. *Id.*' " (*quoting De*

La Fuente v. Stokley-Van Camp, Inc., 713 F.2d 255, 262 (7th Cir. 1985).

As with commonality, a comparison of the claims of the named plaintiffs and the declarations of the putative class members show a lack of typicality. The variations among the experiences of the class members would necessitate individual inquiries to determine whether the individual suffered racial discrimination.

Additionally, even if individual class members could establish a prima facie case of discrimination, defendant's defenses would vary between the putative class members. For example, defendant could present arguments of a legitimate non-discriminatory reason for a putative class member's failure to make it through the training program. Such evidence would necessarily differ for each individual claimant. Consequently, the court would have to examine numerous individual factors to determine the parameters of each individual claim, negating typicality. *See Payton v. County of Carroll,* 473 F.3d 845, 854 (7th Cir. 2007).

Rule 23(b) Requirements

Plaintiffs' proposed class also fails under Rule 23(b). Plaintiffs seek certification under a hybrid of Rule 23(b)(2) and 23(b)(3). Under Rule 23(b)(2) plaintiff seeks certification for liability, injunctive and equitable relief and common damages issues. Under Rule 23(b)(3), plaintiffs seek compensatory and punitive damages. A Rule 23(b)(2) class is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class

as a whole." Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(2) is generally limited to cases "when the main relief sought is injunctive or declaratory, and the damages are only incidental." *In re Allstate Insurance Co.,* 400 F.3d 505, 507 (7th Cir. 2005). Rule 23(b)(2) certification is inappropriate where final relief relates exclusively or predominately to money damages. *Puffer,* 255 F.R.D. at 470. This is because under Rule 23(b)(2) class members are not given a chance to opt out, and employees with significant damage claims may prefer to litigate on their own and have a constitutional right to a jury trial. *See Jefferson v. Ingersoll International Inc.,* 195 F.3d 894 (7th Cir. 1999) (holding that Rule 23(b)(2) may not be used, even in a pattern or practice suit, unless persons with significant damage claims are allowed to opt out of the class to the extent that the litigation concerns financial relief). In the instant case, the individual putative class members' financial interests are too high to be considered incidental to the requested equitable relief. Consequently, opt out rights must be extended to the members, and certification under Rule 23(b)(2) is inappropriate.

Certification under Rule 23(b)(3) requires plaintiffs to demonstrate "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance requirement is similar to the typicality of claims and defenses requirement of Rule 23(a)(3), but is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchen Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997).

In the instant case, the court has already determined that plaintiffs' proposed class fails to meet the commonality and typicality requirements. Because plaintiffs' statistical evidence alone is insufficient to establish company-wide discrimination in a manner that affects each class member in the same way, each individual putative class members' claim for liability and damages will have to be tried to a jury. These inquiries would involve different witnesses and proofs for each member to determine, among other things, the motivation of each supervisor who made the individual allegedly discriminatory decision. "If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate...." *Puffer,* 255 F.R.D. at 471 (*quoting Andrews v. Chevy Chase Bank,* 545 F.3d 570, 577 (7th Cir. 2008)). For these same reasons, a divided certification, with certification of a 23(b)(2) class for the equitable issues and certification of a 23(b)(3) class for the damages issues is also inappropriate. There is no predominance of common issues to certify a 23(b)(3) class for any issue, and even if there were, because of the right to a jury trial the damages cases would all have to be tried first, eliminating any advantage to certifying the instant case as a class action.

Finally, certification under Rule 23(b)(2) for all issues, combined with notice and an opportunity to opt out as though certified under Rule 23(b)(3), is also inappropriate. *See Lemon v. International Union of Operating Engineers, Local 139,* 216 F.3d 577, 580-81 (7th Cir. 2000); *Jefferson,* 195 F.3d at 898. Obviously, certification under this approach is advantageous to plaintiffs, because it avoids Rule 23(b)(3)'s requirement that common issues predomi-

nate and that a class action be the superior method of resolving the dispute. This court agrees with Judge Kennelly, however, that the Seventh Circuit's suggestion of this approach in *Lemon* and *Jefferson* was not intended to permit plaintiffs in a case involving significant damage claims to avoid consideration of whether a class action would be a manageable way to resolve the case. *See Adams v. R.R. Donnelley & Sons,* 2001 WL 336830, at *16 (N.D. Ill. 2001). Consequently, the court concludes that even if plaintiffs could establish all the requirements of Rule 23(a), which they cannot, they cannot establish the requirements of Rule 23(b).

As Judge Kennelly noted in *Adams,* although it maybe possible in an appropriate case to certify a company-wide class involving multiple branch offices across the country, this is not the appropriate case. The large number of individual issues involved in trying the individual claims as class claims would completely overwhelm any common issue. As Judge Kennelly noted, if such individual issues were limited to damages, a different conclusion would be reached because individuality in damages issues does not necessarily undermine the predominance of common issues, and there likely would be a proper way to structure a trial or trials with a minimum of inefficiency without doing violence to the parties' Seventh Amendment rights. *Id.* In the instant case, however, as in *Adams,* there are several separate layers of individual issues, including the variation in personnel practices among the various branch offices, and how various office managers and complex managers handle individualized personnel decisions. These extra layers of individualized issues lead the court to conclude that common issues do not predominate over individual issues, and that trial of the

claims as a class action would be unmanageable. Accordingly, plaintiffs' motion for class certification is denied.[4]

CONCLUSION

For the reasons discussed above, plaintiffs' motion for class certification is denied.

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[4] The court rejects plaintiffs' argument that defendant's stipulation to certification of a settlement class in *Cremin v. Merrill Lynch,* No. 96 C 3773 (N.D. Ill. 1998), mandates certification in the instant case. *Cremin* involved different plaintiffs, different time periods during which different personnel applied different practices, and a different type of alleged discrimination. Defendant never agreed in *Cremin* or any other case to certification of a litigation class. "Support for *settlement* class is not inconsistent with Defendant's current position that class *litigation* would be a nightmare." *McDaniel v. Qwest Communications Corp.,* 2006 WL 1476110, at *6 (N.D. Ill. 2006) (emphasis in original).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

George McREYNOLDS, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender–Jackson, and Stephen Smartt, individually on behalf of themselves and all others similarly situated, Plaintiffs,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Defendant.

No. 05 C 6583.

February 14, 2011.

MEMORANDUM OPINION AND ORDER

ROBERT W. GETTLEMAN, District Judge.

Plaintiffs George McReynolds, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender-Jackson, and Stephen Smartt, individually and on behalf of all others similarly situated, have brought a two count second amended puta-

tive class action complaint on behalf of themselves and all others similarly situated against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (Count I), and 42 U.S.C. § 1981 (Count II). The parties engaged in lengthy and often contentious discovery, after which plaintiffs moved to certify a class defined as:

> African-American financial advisors ("FAs") and FA Trainees ("Trainees") who are or were employed in the retail brokerage unit, referred to as Global Private Client ("GPC") of defendant Merrill Lynch, Pierce, Fenner & Smith, Inc., from January 2001 to the present.

In a comprehensive opinion issued on August 9, 2010, the court denied plaintiffs' motion for class certification, concluding that plaintiffs had failed to established the requirements of Fed. R. Civ. P. 23(a)(2), (3) and Fed. R. Civ. P. 23(b). *McReynolds v. Merrill Lynch,* 2010 WL 3184179 (N.D. Ill. 2010). Plaintiffs seek reconsideration of that decision, and also seek to clarify and/or narrow their class definition. After another round of briefing the court heard oral argument, after which the parties submitted yet another round of briefing outlining a "trial plan" should the court agree with plaintiffs and certify a class. After reviewing everything the parties have submitted the court remains convinced that this case is not appropriate for class treatment and denies plaintiffs' motion to reconsider.

Plaintiffs' motion seeks reconsideration on two primary issues. First, plaintiffs argue that the court misunderstood aspects of their disparate impact

claim and improperly held that to state a claim for disparate impact plaintiffs must establish a facially neutral policy that was also neutrally applied. Next, plaintiffs argue that the court rejected their expert evidence without ruling on defendant's motion under *Daubert v. Merrell Dow Pharm, Inc.,* 509 U.S. 579 (1993).

With respect to the first issue, plaintiffs have misread the court's opinion. In that opinion the court recognized that Count I, which simply realleges the previous 47 paragraphs detailing numerous acts of intentional discrimination, was potentially broad enough to encompass both a pattern or practice discriminatory treatment claim and a discriminatory impact claim. The court then discussed the differences between the two types of claims, particularly with respect to the issue of commonality under Fed. R. Civ. P. 23(a)(2). When determining whether plaintiffs could establish commonality, the court first looked to the allegations of the complaint. The operative paragraphs of Count I allege that defendant engaged in "racially biased decision-making and treatment" and that defendant "is strictly responsible for the acts and conduct of its managers and knew [or] should have known of a culture created by its managers and employees that discriminated against and was hostile to African-Americans." Indeed, the complaint revolves around allegations of intentional discrimination:

- Approximately 75% of African-American trainee brokers were forced to leave Merrill Lynch as a result of discriminatory treatment prior to completing the training program. (¶ 11).

- Merrill Lynch intentionally perpetuates its own discrimination and any bias that may exist in society. (¶ 15).
- African-Americans are also treated with disrespect and experience a hostile work environment in Merrill Lynch's branch offices despite proclamations in the firm's internal materials and advertisements that it is built on the principal of "Respect for the Individual." (¶ 18).
- McReynolds and the other named plaintiffs have performed their jobs in an impressive manner but were subjected to and harmed by Merrill Lynch's ongoing, nationwide pattern or practice of systemic and pervasive racial discrimination. (¶ 23).
- The Nashville Complex recruits almost exclusively at predominately white colleges and universities. Well-qualified African-American graduates are not welcome at Merrill Lynch. (¶ 26).
- Plaintiffs, like other African-Americans at Merrill Lynch, also have been subjected to a hostile work environment where African-Americans are treated as inferior and are subjected to abusive and harassing treatment, comments and behavior. (¶ 39).

It was against this background that the court indicated that plaintiffs' statistics would be more compelling if plaintiffs were attacking the neutral application of a neutral policy. The court did not hold that a plaintiff cannot bring a disparate impact claim unless a neutral policy is neutrally applied. Obviously, *Watson v. Forth Worth Bank and Trust,* 487 U.S. 977

(1988), holds that in an appropriate case a disparate impact claim can be based on subjective or discretionary employment practices. But the mere fact that a plaintiff can state a disparate impact claim based on subjective employment practices does not mean that class treatment is always appropriate, particularly when those subjective decisions are made by hundreds of different individuals under different circumstances across the country.

Thus, contrary to plaintiffs' assertion, the court did not hold that plaintiffs cannot state a disparate impact claim. Instead, the court indicated that plaintiffs' statistical evidence would make a more compelling case for commonality and class certification if they were arguing that a neutral policy neutrally applied resulted in an adverse impact. That would indicate that the African-American FAs across the country all suffered from that same application or that the alleged policy manifested itself in the same general fashion as to all putative class members. *See Puffer v. Allstate Insurance Co.,* 255 F.R.D. 450, 460-61 (N.D. Ill. 2009).

Accordingly, for the reasons indicated above and those discussed in the court's original opinion, the court remains convinced that plaintiffs' have failed to establish commonality.

In addition, the court remains convinced that plaintiffs are unable to satisfy Fed. R. Civ. P. 23(b). Certification under Rule 23(b)(2) is inappropriate because the individual putative class members' financial interests are too high to be considered incidental to any requested equitable relief. Consequently, the members must be extended opt-out rights, leaving Rule 23(b)(2) certification inappropriate. *See Jeffer-*

son v. Ingersoll International Inc., 195 F.3d 894 (7th Cir. 1999).

Nor is certification under Rule 23(b)(3) appropriate. Plaintiffs cannot establish that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for thoroughly and efficiently adjudicating the controversy. Even under plaintiffs' proposed trial plan, the court would conduct an initial trial to resolve one issue-whether defendant's employment policies and practices are discriminatory. If they are, according to plaintiff's own trial plan the court would then have to conduct close to 1000 follow-on jury trials to determine whether each individual class member suffered discrimination as a result of those policies and, if so, the amount of damages. This prospect would be entirely inefficient. *See Puffer,* 255 F.R.D. at 472. Because each of the proposed plaintiffs worked in separate branch offices spread out across the country, each trial would involve different witnesses, leaving it impossible even to combine the cases in to smaller groups. Consequently, litigation of the follow-on trials would be unmanageable.

Next, plaintiffs complain that the court implicitly rejected their expert evidence without ruling on defendant's motions under *Daubert.* Once again plaintiffs misread the court's opinion. In fact, the court accepted all of plaintiff's statistical evidence but concluded that it was insufficient to support class certification for the reasons stated above.

Plaintiffs provided expert statistical opinions from Dr. Janice Madden and Dr. William Bielby. Contrary to plaintiff's assertion in their brief in sup-

port of their motion to reconsider (p. 8), this court did not hold that:

> Defendant's expert performed a study of published available census data and concluded that access to networks or potential clients with substantial wealth varies by race among defendant's FAs. As a result, customers independently generated by African-American FAs' participation in the training program early in their careers come from neighborhoods with significantly higher African-American populations and significantly lower average wealth.

Actually, the opinion first described plaintiffs' statistical evidence (2010 WL 3184179, at *5-6), and then noted that defendant "of course, has supplied its own statistical expert who, not surprisingly, attacked plaintiffs' evidence." In the paragraph quoted above the court simply described generally defendant's statistical evidence and the conclusion that defendant's experts drew from the data. The court then noted that the contrasting statistical evidence and expert testimony demonstrated the dangers of relying too heavily on statistics supported by raw data.

The opinion also noted that the Seventh Circuit had recently cautioned that district courts must perform a full *Daubert* analysis before certifying a class if the situation warranted. *Id.* at *6, n.3 (*citing American Honda Motor Co. Inc. v. Allen,* 600 F.3d 813, 816 (7th Cir. 2010)). Only defendant had brought motions to bar under *Daubert;* plaintiffs did not challenge defendant's experts' qualifications or submissions. Had the court relied on plaintiffs' statistical evidence to certify a class, under *American Honda* it would have had to perform a full *Daubert* hearing on defendant's

motions. Instead, the court accepted plaintiffs' statistics and denied certification for failure to establish the requirements of Rule 23(a) and (b). Only defendant could complain about the court's decision not to rule on its motion, and defendant is not complaining.

Plaintiffs are also incorrect that the court relied on defendant's expert Dr. Saad's criticism of plaintiffs' expert Madden. Again, the court's opinion simply described Dr. Saad's criticism of plaintiffs' expert and then noted the danger in relying solely on statistics.[1] The court did not endorse Dr. Saad's nor any other expert's opinion, and has not held that racial differences in access to wealth caused disparate outcomes. The court simply concluded that plaintiffs' statistics in conjunction with their anecdotal evidence were insufficient to support class certification.

Accordingly, for the reasons described above, plaintiffs' motion for reconsideration is denied.

[1] Plaintiffs did not move to bar Dr. Saad's testimony (but did move to strike his affidavit) and expressly told the court that the "debate between Saad and Madden is a battle of the experts that needs not be resolved in conjunction with the motion for class certification."

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re: George McREYNOLDS, et al.,
Petitioners

No. 11-8008

Originating Case Information:
District Court No: 1:05-cv-06583
Northern District of Illinois, Eastern Division
District Judge Robert W. Gettleman

April 20, 2011

ORDER

Before
RICHARD A. POSNER, Circuit Judge
DIANE P. WOOD, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

The following are before the court:

1. **Petition for Leave to Appeal pursuant to Rule 23(F) of the Federal Rules of Civil Procedure from Order Denying Class Certification**; filed on February 28, 2011, by counsel for the Petitioners.

2. **Defendant-Respondent Merrill Lynch's Answer in Opposition to Plaintiffs' Petition for**

Leave to Appeal pursuant to Rule 23(F), filed on March 14, 2011, by counsel for the Respondent.

3. **Reply to Defendant-Respondent Merrill Lynch's Answer in Opposition to Plaintiffs' Petition for Leave to Appeal pursuant to Rule 23(F)**, filed on April 1, 2011, by counsel for the Petitioners.

IT IS ORDERED that #1 is **DENIED**.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

George McREYNOLDS, Maroc Howard, Larue Gibson, Jennifer Madrid, Frankie Ross, Marva York, Leslie Browne, Henry Wilson, Leroy Brown, Glenn Capel, Christina Coleman, J. Yves Laborde, Marshell Miller, Carnell Moore, Mark Johnson, Cathy Bender–Jackson, and Stephen Smartt, individually on behalf of themselves and all others similarly situated, Plaintiffs,
v.
MERRILL LYNCH, PIERCE, FENNER & SMITH INC., Defendant.

No. 05 C 6583.

September 19, 2011.

ORDER

ROBERT W. GETTLEMAN, District Judge.

After this court's August 9, 2010, amended memorandum opinion and order denying plaintiff's motion to certify the class,[1] and its February 14, 2011, memorandum opinion and order denying plaintiff's

[1] *McReynolds v. Merrill Lynch,* 2010 WL 3184179 (N.D. Ill. 2010).

motion to reconsider,[2] the Supreme Court issued its opinion in *Wal–Mart Stores, Inc. v. Dukes,* ––– U.S. ––––, 131 S. Ct. 2541 (June 20, 2011). Although the *Wal–Mart* decision has been described as the death knell of employment class actions,[3] plaintiffs' counsel, being the fine lawyers they are, persuaded this court to allow them to file an "amended post-*Wal-Mart* motion for class certification," in which they argue that the *Wal–Mart* decision actually supports the certification of a class alleging strictly a disparate impact claim in this litigation. Thus, the court allowed the parties to brief the issue of whether *Wal–Mart* actually changes the conclusion that this court had reached on two prior occasions that the class could not be certified in this litigation under either plaintiff's original disparate treatment/impact claim or a new strictly disparate impact claim.

Having considered this court's prior opinions and the rationale supporting those opinions, the parties' excellent briefs on plaintiff's amended post-*Wal-Mart* motion, and the *Wal–Mart* decision itself, the court concludes that plaintiff's amended motion for class certification must be denied.

Without belaboring the point or repeating the analyses that this court has previously articulated, the parties appear to agree that in a strictly disparate impact case plaintiffs must identify a specific, uniform employment policy and offer sufficient evidence of disparate impact in order to certify a class

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[2] *McReynolds v. Merrill Lynch,* 2011 WL 658155 (N.D. Ill. 2011).

[3] Defendant's paraphrase, citing John C. Coffee, Jr., "You Just Can't Get There From Here": A Primer on *Wal–Mart v. Dukes,* 80 U.S. Law Week 93 (July 19, 2011).

under Fed. R. Civ. P. 23. In the instant motion, plaintiffs argue that the court should certify a hybrid class employing both Rule 23(b)(2) (injunctive and declaratory relief only) and 23(b)(3) (to allow subsequent recovery of back wages) in a bench trial on the issue of liability, followed (if successful) by the appointment of a special master to conduct individual damages proceedings.

Plaintiffs appear to have identified two specific employment policies: the so-called National Teaming Policy; and the National Account Distribution Policy. In addition, they have offered statistical evidence to show that African–American Financial Advisors ("FAs") earned far less on a company-wide basis than their white counterparts, thus demonstrating a disparate impact. This, plaintiffs argue, is enough to compel the certification of a disparate impact class.

The court disagrees. In the context of this case, even assuming that plaintiffs have identified a specific employment policy and a disparate impact, the nature of the employment relationship at issue does not permit the certification of a class because plaintiffs cannot establish that "there are questions of law or fact common to the class," as a threshold requirement of Rule 23(a)(2).

As Judge Scalia held in *Wal–Mart* (131 S. Ct. at 2551):

> Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate—impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the

> assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.
>
> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." [Quoting Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 132 (2009).]

The *Wal–Mart* Court denied class certification because Wal–Mart's "policy" of allowing discretion by local supervisors over employment matters "[o]n its face ... is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." *Id.* at 2554 (emphasis in original).

The problem with plaintiffs' analysis of the *Wal–Mart* decision is their failure to account for the requirement that the identified policy must have caused the disparate impact. The two policies in question in the instant case depend in their implementation on discretionary decisions that affect each of the class members. Thus, with respect to the National Teaming Policy, the decision on whether to join a team or to be invited to join a team would de-

pend on a myriad other decisions by supervisors and the FAs themselves. For example, a manager might choose to suggest a particular FA to a team and the FA may decline for personal or professional reasons. Similarly, an FA and an FA's teammates might balk at his or her joining a team for discriminatory reasons. Each such decision would have to be examined to determine whether the particular FA was the victim of discrimination. Consequently, even though plaintiffs might be able to raise a common question or questions, there is no "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." Thus, "the [d]issimilarities within the proposed class ... impede the generation of common answers," *id.* at 2551, and preclude class certification.

The problems and impediments to certifying a class in this case that were identified in the court's previous opinions were therefore confirmed by the Supreme Court's holding in *Wal–Mart,* which was a disparate treatment and disparate impact case. Despite plaintiffs' counsels' heroic efforts, the court denies their amended motion for class certification. Because of the importance of this decision, and the potential influence of the Supreme Court's recent decision in *Wal–Mart,* this court would support a motion for an interlocutory appeal to the United States Court of Appeals for the Seventh Circuit under Fed. R. Civ. P. 23(f) or 28 U.S.C. § 1292(b).

APPENDIX F

SUPREME COURT OF THE UNITED STATES

George McREYNOLDS, et al., Petitioners,
v.
MERRILL LYNCH, PIERCE, FENNER & SMITH INC.

No. 10-1534.

October 3, 2011.

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**George McREYNOLDS, et al.,
on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,
v.
MERRILL LYNCH, PIERCE, FENNER & SMITH INC., Defendant-Appellee.**

No. 11-3639

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 05 C 6583.
Robert W. Gettleman, Judge

March 27, 2012.

ORDER

Before
RICHARD A. POSNER, Circuit Judge
DIANE P. WOOD, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

On March 9, 2012, defendant-appellee filed a petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has re-

quested a vote on the petition for rehearing *en banc*.[*] The petition is therefore **DENIED**.

[*] Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

APPENDIX H

42 U.S.C. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards

of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

* * * * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is

job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

* * * * *

APPENDIX I

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions.

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

* * * * *