

Briefs

- Claimants' First Amended Class Arbitration Complaint – June 26, 2008
- EEOC files second sex discrimination lawsuit – September 24, 2008
- Memorandum in Support of Claimants' Motion for Class Certification – June 21, 2013

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**LARYSSA JOCK, JACQUELYN BOYLE,
CHRISTY MEIERDIERCKS, KELLY
CONTRERAS, LISA FOLLETT, MARIA
HOUSE, DENISE MADDOX, LISA
McCONNELL, GLORIA PAGAN, JUDY
REED, LINDA RHODES, KHRISTINA
RODRIGUES, NINA SHAHMIRZADI,
LEIGHLA MURPHY, DAWN SOUTO-
COONS, and MARIE WOLF,**

Plaintiffs,

-against-

STERLING JEWELERS INC.,

Defendant.
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AAA CASE NO. 11 160 00655 08

**PLAINTIFFS' FIRST AMENDED CLASS
ARBITRATION COMPLAINT**

Plaintiffs Laryssa Jock, Jacquelyn Boyle, Christy Meierdiercks, Kelly Contreras, Lisa Follett, Maria House, Denise Maddox, Lisa McConnell, Gloria Pagan, Judy Reed, Linda Rhodes, Khristina Rodrigues, Nina Shahmirzadi, Leighla Murphy, Dawn Souto-Coons, and Marie Wolf, (collectively referred to as "Plaintiffs") on behalf of themselves and all similarly situated persons, by their attorneys, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Thomas A. Warren Law Offices, P.L., and Burr & Smith, LLP, allege as follows:

INTRODUCTION

1. Plaintiffs bring this action to challenge a pattern or practice of sex discrimination in promotion and compensation committed against current and former female employees by Sterling Jewelers Inc. Sterling Jewelers Inc. operates more than 1300 stores in all 50 states under at least 12 retail brand names, including but not limited to, Jared The Galleria of Jewelry ("Jared"), Kay Jewelers ("Kay"), Belden Jewelers ("Belden"), JB Robinson Jewelers ("JB

Robinson”), Marks & Morgan Jewelers, Weisfield Jewelers, Osterman Jewelers, Shaw’s Jewelers, Rogers Jewelers, LeRoy’s Jewelers, Goodman Jewelers, and Friedlanders Jewelers (collectively referred to as “Sterling”).

2. Sterling’s promotion and compensation policies and practices caused female employees with retail sales responsibilities, which includes store-based employees up to and including district managers, (collectively referred to as “Retail Sales Employees”) to be (a) denied promotional opportunities for which they were qualified, and (b) paid less than men performing the same work. The employment policies and practices of Sterling have had the effect and have been undertaken with the purpose of denying promotional opportunities and equal compensation to qualified female employees because of their gender.

3. This action is brought by current and former female Sterling Retail Sales Employees on behalf of themselves and all other similarly situated women as a class arbitration pursuant to the American Arbitration Association (“AAA”) Supplementary Rules for Class Arbitrations challenging pay and promotion discrimination under Title VII of the Civil Right Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* Plaintiffs also bring this action on behalf of themselves and all similarly situated women as a class arbitration pursuant to the AAA Supplementary Rules for Class Arbitrations challenging the willful denial of equal pay for equal work under the Equal Pay Act, 29 U.S.C. § 206.

JURISDICTION, VENUE AND EXHAUSTION OF REMEDIES

4. Plaintiffs’ class claims arise under Title VII of the Civil Right Act of 1964, 42 U.S.C. §§ 2000(e), *et seq.* and the Civil Rights Act of 1991, 42 U.S.C. § 1981 and the Equal Pay Act, 29 U.S.C. § 206(d). Sterling requires its employees to participate in a mandatory alternative dispute resolution (“ADR”) program that culminates in arbitration before the AAA.

The AAA has jurisdiction over Plaintiffs' class claims and over Plaintiffs Denise Maddox, Lisa McConnell, Judy Reed, and Nina Shahmirzadi's individual claims pursuant to that program.

5. Employees are required to file a written complaint in order to initiate the first stage of the ADR program. The first complaints, each of which alleges a pattern or practice of sex discrimination in promotions and pay on behalf of the complainant and others similarly situated, were filed on February 27, 2006, by Laryssa Jock, Jacquelyn Boyle, Lisa Follett, Judy Reed, Dawn Souto-Coons, and Marie Wolf. The first stage of the ADR process has concluded.

6. The second stage, which allows the employee to appeal and provides an opportunity for the parties to engage in mediation, has also been completed.

7. The third stage of the ADR program provides that unresolved claims be submitted to arbitration pursuant to rules prescribed by the AAA. The Plaintiffs have initiated the instant action with the AAA in order to invoke the third stage of the ADR program.

8. Plaintiffs have exhausted administrative remedies pursuant to 42 U.S.C. § 2000e-5(f)(3). Each of the Plaintiffs, except for Kelly Contreras, has filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of themselves and all other similarly situated current and former female employees of Sterling. On January 3, 2008, the EEOC issued a Determination Letter finding there was reasonable cause to believe Sterling has engaged in a pattern or practice of discrimination as alleged in the charges, in violation of Title VII and the Equal Pay Act. A copy of this Determination is attached hereto as Exhibit 1.

9. Plaintiff Contreras participates as a named Plaintiff pursuant to the single-filing rule.

10. Plaintiffs received notices of their right to sue dated March 18, 2008.

PARTIES

Plaintiffs

11. Plaintiff Laryssa Jock is a female resident of Bombay, New York in Franklin County and has been employed by Sterling from approximately May 15, 1995 to the present as a sales associate in the Kay Jewelers and Belden stores in Massena, New York.

12. Jacquelyn Boyle is a female resident of Tampa, Florida in Hillsborough County and was employed by Sterling from September 2004 to June 1, 2005 as a seasonal and full-time sales associate in the Jared store in Brandon, Florida.

13. Christy Meierdiercks (formerly Christy Davies and Christy Chadwick) is a female resident of Lyons, New York in Wayne County and was employed by Sterling from approximately November 2005 until approximately March 2006 as a part-time sales associate at the Belden store in Massena, New York.

14. Kelly Contreras is a female resident of Ramsey, Minnesota in Anoka County. During her employment with Sterling from approximately March of 1993 until approximately June 2005, Contreras was a manager in waiting in Madison, Wisconsin, a store manager in St. Cloud, Minnesota, Maplewood, Minnesota, and in Cincinnati, Ohio, and a district manager in the Dayton, Ohio area.

15. Lisa Follett is a female resident of Massena, New York in St. Lawrence County and was employed by Sterling from approximately October 2004 until approximately June 2005 as a part-time sales associate at the Belden store in Massena, New York.

16. Maria House is a female resident of Bakersfield, California in Kern County and was employed by Sterling as a sales associate at a Kay Jewelers store in Bakersfield, California from approximately June 2005 through August 2006.

17. Denise Maddox is a female resident of Plano, Texas in Collin County and was employed with Sterling from approximately 1997 through January of 2007. During her employment with Sterling at various Jared stores, Maddox was a sales associate and diamond department manager in Westminster, Colorado, an assistant manager in Roseville, California, a sales associate in Englewood, Colorado, and a store manager in Dallas, Texas.

18. Lisa McConnell is a female resident of Elkhart, Indiana in Elkhart County and was employed by Sterling at a Kay Jewelers store from July 2001 until August 30, 2006 in Elkhart, Indiana. During her employment with Sterling, McConnell was a sales associate, assistant manager, and store manager in Elkhart, Indiana.

19. Gloria Pagan (formerly Gloria Huff) is a female resident of Lake St. Louis, Missouri in St. Charles County and was employed by Sterling as a sales associate at the JB Robinson Jewelers store in Saint Peters, Missouri from approximately August 2005 until December 26, 2005.

20. Judy Reed is a female resident of Palm Harbor, Florida in Pinellas County and has been employed by Sterling from October 2000 until the present. During her employment with Sterling, Reed was an assistant manager in Appleton, Wisconsin, a diamond department manager and assistant manager in Tampa, Florida at Jared.

21. Linda Rhodes is a female resident of Massena, New York in St. Lawrence County and was employed by Sterling from approximately November 2005 until November 14, 2006 as a part-time and full-time sales associate at the Belden store in Massena, New York.

22. Khristina Rodrigues is a female resident of Fall River, Massachusetts in Bristol County and was employed by Sterling from 2001 to 2003. Rodrigues was rehired by Sterling in June 2004 and is currently employed by Sterling as a part-time sales associate. During her

employment with Sterling, Rodrigues was a sales associate and assistant manager at Kay stores in Swansea, Massachusetts and Taunton, Massachusetts.

23. Nina Shahmirzadi is a female resident of Henderson, Nevada in Clark County and was employed by Sterling as a sales associate from approximately October 10, 1997 until November 1, 2006 at a Kay store and Jared store in Henderson, Nevada.

24. Leighla Murphy (formerly Leighla Smith) is a female resident of Mt. Holly, New Jersey in Burlington County and was employed by Sterling as a part-time sales associate at a Kay store in Burlington, New Jersey from approximately August 2004 until April 2005, when she transferred to a Kay store in Cupertino, California where she worked as a full-time associate until September 2005.

25. Dawn Souto-Coons is a female resident of Wimauma, Florida in Hillsborough County and was employed by Sterling from approximately September 1991 until approximately May 27, 2005. During her employment with Sterling, Souto-Coons was a sales associate, assistant manager, and store manager in the JB Robinson store in Waldorf, Maryland, a store manager in Gaithersburg, Maryland, and an assistant manager in Brandon, Florida.

26. Marie Wolf is a female resident of Riverview, Florida in Hillsborough County and has been employed by Sterling as a sales associate at a Jared store in Brandon, Florida from approximately 2002 until the present.

Defendant

27. Defendant Sterling is the largest specialty jeweler in the United States, with at least 1,300 stores, doing business under various brands in all 50 states. Sterling is a nationwide company, with its headquarters located in Akron, Ohio.

COMPANY WIDE PRACTICES CHALLENGED

28. Sterling has subjected female Retail Sales Employees to a pattern or practice of sex discrimination in its promotion and compensation decisions. These practices reflect that discrimination is the standard operating procedure - the regular, rather than the unusual practice at Sterling.

29. Sterling's pattern or practice of sex discrimination in its promotion and compensation decisions have had a disparate impact adverse to women.

30. Pursuant to the EEOC's investigation of Plaintiffs' charges, the EEOC issued a determination that Sterling "subjected charging parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation. Statistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees. Witness testimony further corroborates the allegations." EEOC Determination Letter, Ex. 1.

31. Sterling's promotion and compensation policies, centrally issued, apply to all stores throughout the company, regardless of brand and are substantially similar, if not identical, throughout the Sterling stores.

32. **Discrimination in Promotions:** The Plaintiffs challenge the following practices, and any others with similar purpose or effect, which have encouraged, permitted or had the effect of discriminating against female Retail Sales Employees by denying them equal access to promotions:

- a. Throughout the period covered by this action, Sterling has refused to publicize jobs when they become vacant. Nor does Sterling provide a

system by which employees can apply for particular vacancies or be assured of consideration for selection. Absent a system for announcing vacancies and for permitting applications for particular positions from interested candidates, Sterling has allowed managers to notify and recruit for selection employees whom they personally favor in what has historically been known as a “tap on the shoulder” system. Nor has Sterling provided its managers with merit-based guidance about who should be selected to fill the vacant positions. Accordingly, Sterling has granted its managers virtually unfettered discretion to identify and select candidates using personal preferences and stereotypes, without any assurance the criteria used to make promotion selections are based on merit.

- b. Prior to April 2007, Sterling even lacked a system by which employees could express an interest in promotions generally. Only after Plaintiffs filed charges with the EEOC in 2005 did Sterling announce a process permitting its employees to register their interest in promotion opportunities generally. Still Sterling has refused to publicize job vacancies, nor does it provide employees with the opportunity to apply for particular vacancies.
- c. As a consequence of these policies and practices, women working in store-based jobs and as district managers at Sterling have been denied equal opportunity to obtain promotions into and within management jobs.

33. **Discrimination in Compensation:** The Plaintiffs challenge the following practices, and any others with similar purpose or effect, which have encouraged, permitted or had the effect of discriminating against Retail Sales Employees by causing them to be paid less than male employees performing the same work, at the same levels, in the same area, and at the same time period.

- a. Sterling's compensation policy offers little or no guidance on setting wage rates. Pursuant to these policies, Sterling provides its managers with broad discretion to set compensation pursuant to personal biases and stereotypes rather than merit-based criteria.
- b. As a result, women are paid less than men performing the same work, at the same levels, in the same area, and at the same time period.

34. Sterling has a policy or practice barring employees from discussing their wages with other employees. This policy or practice has prevented some Plaintiffs and some members of the proposed class from making a fully-informed comparison of their compensation with the pay of similarly-situated male employees.

35. Sterling has permitted or encouraged other workplace conduct that may exacerbate the discrimination in promotions and compensation alleged above.

- a. Sterling managers have subjected female employees to sexual harassment and other discriminatory comments based upon their sex.
- b. Sterling has failed to take prompt and effective remedial action in response to complaints of discrimination and to comments demeaning to women made in the workplace.

36. Sterling has entrusted its supervisors with broad discretion that is unguided in its exercise, affording them opportunities to apply personal preferences and biases in making promotion and compensation decisions. Sterling knew or should have known that its promotion and compensation practices were being used with the purpose and having the effect of denying qualified women employees equal opportunities to obtain promotions and to be paid at the same levels as similarly-situated male employees. Accordingly, the practices identified above are being challenged under systemic disparate treatment and disparate impact theories of discrimination.

37. Sterling's pay and promotion policies and practices applicable to Retail Sales Employees have adversely affected women employees throughout the company.

38. Similarly, the structure of the workforce comprised of employees with retail responsibilities and the work performed in those positions are similar throughout the more than 1,300 Sterling stores at which members of the proposed class have worked.

39. Sterling's stores have three primary job positions, and each position involves performance of the same or similar duties.

40. The entry level sales job is the sales associate position, above which is the entry level management position known as assistant manager. The highest level position in management within Sterling stores is designated as the store or general manager.

41. Management of sales and personnel actions within Sterling stores are overseen by district managers, who supervise operations at several stores within a district, and by regional vice presidents, who oversee the operations of stores located in multiple districts.

42. The essential duties of each in-store position are the same throughout the Sterling stores, regardless of store brand.

43. As the duties for each position are nearly identical throughout the Sterling stores, employees may and frequently do transfer between Sterling stores with different brand names, and across geographic areas within and between states.

CLASS ARBITRATION ALLEGATIONS

44. The arbitration agreements entered into by the Plaintiffs, the class, and Sterling do not preclude the pursuit of this action on behalf of a class of women similarly situated to the Named Plaintiffs.

45. The Arbitration Agreement does not preclude the pursuit of class claims, as it is silent as to whether class claims may be pursued.

46. The remedies that arbitrators may award pursuant to the RESOLVE Program, moreover, demonstrate that the parties must have intended the Agreement to permit the pursuit of class claims in arbitration. The RESOLVE Program provides that employees may be awarded the same remedies as are available in a court.” As remedies addressing a pattern or practice of discrimination in class actions are available in the courts, they must also be available in arbitration. Accordingly, the Agreement must be construed to permit the pursuit of class claims in arbitration.

47. All Named Plaintiffs have completed Step 1 of the RESOLVE program. As the claims alleged by the Plaintiffs in their Step 1 claims alleged a pattern or practice of sex discrimination on behalf of themselves and others similarly situated, members of the class have vicariously completed Step 1 as well.

48. All of the Named Plaintiffs have completed Step 2 of the RESOLVE program because:

- a. After the majority of the Named Plaintiffs had initiated Step 1 of the RESOLVE program, on January 11, 2007, the parties entered into a tolling agreement, effective October 16, 2006, which tolled the running of applicable statutes of limitations and filing periods for the Named Plaintiffs and the class members. The term of this agreement was extended on multiple occasions and ultimately terminated on March 1, 2008. During the time period the agreement was in effect, multiple mediation sessions were conducted between the parties in which the Named Plaintiffs attempted to negotiate a final settlement of the claims raised in this case on behalf of themselves and all other women similarly situated. As those mediation sessions have concluded without resolution of any claims, further Step 2 mediation on behalf of the Named Plaintiffs and any member of the proposed class are unnecessary and futile.
- b. Alternatively, Plaintiffs Souto-Coons, Wolf, Boyle, and Murphy have completed individual Step 2 mediation in good faith, and, as each alleged a pattern or practice of sex discrimination on behalf of themselves and all women similarly situated, they may proceed to arbitration on behalf of the class.
- c. In addition, the remaining Plaintiffs and the class have vicariously completed Step 2 via the completed mediations of Plaintiffs Souto-Coons, Wolf, Boyle, and Murphy, which raised class-wide claims.

49. As Steps 1 and 2 of RESOLVE have been completed for all Plaintiffs and the class, this matter is ripe for arbitration before the AAA.

50. With respect to their Equal Pay Act claim, Plaintiffs bring this action pursuant to 29 U.S.C. §§ 206(d), *et seq.* and seek certification of a class pursuant to Rule 4 of the AAA Supplementary Rules for Class Arbitrations, on behalf of themselves and all other women similarly situated. The members of the class are all female Retail Sales Employees employed in the United States by Sterling on or any time after February 27, 2003 until the first day of trial of this action.

51. With respect to the claims arising under Title VII of the Civil Rights Act of 1964, as amended, the Plaintiffs bring this action pursuant to 42 U.S.C. § 2000(e), *et seq.* and seek certification of a class pursuant to Rule 4 of the AAA Supplementary Rules for Class Arbitrations, comprised of all female Retail Sales Employees who worked in the United States from the beginning of the illegal practice challenged here through the first day of trial in this action. Plaintiffs are members of the class they seek to represent.

52. Sterling's policy, pattern, or practice of discrimination in pay and promotion operated within one year of the filing of the first RESOLVE Step 1 Claim Forms and within 300 days of the first charge of discrimination and unlawfully denied promotions to one or more named Plaintiffs and caused one or more named Plaintiffs to be paid less than similarly situated men.

53. This action is properly maintainable as a class arbitration because the requirements of Rule 4(a) and Rule 4(b) are met.

54. The class members are sufficiently numerous to make joinder of all members impracticable. Upon information and belief, more than 20,000 current and former employees would qualify as members of the proposed class.

55. The claims alleged on behalf of the named Plaintiffs as class representatives raise questions of law or fact common to the class. These common questions include, but are not limited to:

- a. whether Sterling's common operating practices and procedures discriminate against its female employees;
- b. whether Sterling's common policies have had an adverse impact upon the class, and if so, whether such impact can be justified by business necessity;
- c. whether Sterling has acted intentionally to deny equal opportunities to female employees to obtain promotions into and within management jobs and to compensate female employees less than similarly situated male employees in violation of Title VII;
- d. whether Sterling invests its managers with excessive discretion in making promotion and compensation decisions; and
- e. whether the class may obtain an award of damages and obtain injunctive and other equitable remedies.

56. The claims of the class representatives are typical of the class they seek to represent.

57. The class representatives and counsel will adequately and fairly protect the interest of the class.

58. Each class member is bound by an agreement containing an arbitration clause that is substantially similar to that signed or entered into by the class representatives and each of the other class members.

59. The class arbitration is also properly maintainable pursuant to Rule 4(b) because the questions of law and fact common to members of the class predominate over questions affecting only individual members, and a class arbitration is superior to other available methods for the fair and efficient resolution of this controversy.

ALLEGATIONS OF NAMED PLAINTIFFS

Laryssa Jock

60. Laryssa Jock has been employed by Sterling from approximately May 15, 1995 to the present for a total of more than 13 years.

61. She began her employment with Sterling as a part-time sales associate at the Kay store located in Massena, New York.

62. Within approximately five months, Jock was promoted to full-time sales associate in approximately October 1995.

63. She also held an assistant manager position from the fall of 1996 through February 1997, and as a sales associate was appointed the third key title between the summer of 1997 and fall of 1998 in the Massena, New York Kay store.

64. The third key title is responsible for assisting management employees in opening and closing the store and is placed in charge of the store when the assistant manager and store manager are absent.

65. The third key title is typically a gateway position to higher management positions.

66. On approximately December 18, 1998, Jock transferred to the Massena, New York Belden's store as a sales associate.

67. In approximately 2002, a Sterling manager again asked her to hold the third key title; however, Jock stepped down from this position because Sterling refused to compensate her for performing these additional duties.

68. Jock continues to be employed in the Belden store located in Massena, New York as a full-time sales associate.

69. During her tenure at Sterling, Jock has received numerous merit awards and gifts from Sterling in recognition of her superior sales performance.

70. During Jock's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

71. Upon information and belief, in approximately March 2005, Troy Lawler, a male, was hired as a part-time sales associate in the Belden's store located in Massena, New York and paid \$8.75 per hour.

72. At the time Lawler was hired, Jock was paid only approximately \$8.65 per hour as a full-time sales associate in the same store. Jock was paid less than Lawler in spite of the fact that Lawler had no prior retail jewelry industry experience, and she had approximately ten years of experience at Sterling, including working as an assistant manager and in the third key title. Although Jock received a raise to \$8.85 per hour shortly after Lawler was hired, several other female employees who were employed in the same store in the same position as Lawler continued to be paid less than Lawler. Jock's store manager explained to the female employees including Jock that Lawler needed to be paid more than the females because he had a child to support.

73. But for Sterling's policy prohibiting employees from discussing their wages, Jock would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

74. On May 18, 2005, Jock filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

75. Jock received notice of her right to sue from the EEOC on March 18, 2008.

Jacquelyn Boyle

76. Jacquelyn Boyle worked for Sterling from September, 2004 to June 1, 2005 in the Jared store in Brandon, Florida.

77. Prior to working for Sterling, Boyle obtained a B.A. degree in Legal Studies and obtained jewelry sales experience working for service merchandise.

78. Boyle started at Sterling as a seasonal sales associate, making \$9.50 per hour. She excelled in this job such that she generated a large volume of jewelry sales in December 2004.

79. In February 2005, Boyle became a full-time employee making \$10.25 per hour.

80. In or around February 2005, Boyle's store manager, Eric Wolff told her she was an excellent sales associate and an asset to Jared.

81. During Boyle's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

82. Upon information and belief, Sterling paid similarly-situated male employees including Grant "Billy" Laing, Alan Mong, and Michael Duggan more than Boyle for

performing equal work. Laing, who was hired in August 2004 was paid \$14.50 per hour as a full-time sales associate; Mong, who was hired in July 2004, was paid \$13.50 per hour as a full-time sales associate; and Duggan, who was hired in May 2005, was paid \$11.50 per hour as a full-time sales associate.

83. But for Sterling's policy prohibiting employees from discussing their wages, Boyle would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

84. In addition to the pay discrimination described above, Boyle also experienced sexual harassment while employed at Sterling. Jason May, a male Manager-in-Training, repeatedly called her and sent her text messages expressing his desire to be alone with her.

85. May made unwelcome overtures to Boyle, such as telling her he wanted to kiss her, which caused her discomfort and distress at work.

86. Boyle complained to her managers, Eric Wolff and Aaron Scott, about this harassment but to her knowledge her complaints were not investigated, nor was any corrective action taken against May.

87. Shortly after Boyle's complaint, May was promoted to a general manager position.

88. On September 15, 2005, Boyle filed a timely charge of discrimination with the EEOC.

89. Boyle received notice of her right-to-sue from the EEOC on March 18, 2008.

Christy Meierdiercks

90. Christy Meierdiercks (formerly Christy Davies) was employed by Sterling from approximately November 2005 until approximately March 2006.

91. Throughout Meierdiercks's employment with Sterling she was employed as a seasonal part-time sales associate at the Belden store located in Massena, New York.

92. Meierdiercks excelled in this position and was recognized for her outstanding sales volume.

93. In approximately March 2005, Sterling hired Troy Lawler, a male, to be a part-time sales associate in the Belden store located in Massena, New York.

94. Upon information and belief, Lawler was hired by Sterling in March 2005 and he was paid \$8.75 per hour as a part-time sales associate.

95. When Meierdiercks was hired approximately six months later, she was paid only approximately \$7.00 per hour as a part-time sales associate in the same store. Meierdiercks was paid less than Lawler in spite of the fact that she had three years of retail customer service and commission sales experience when she was hired by Sterling and Lawler only had approximately three months of sales experience at the time he was hired.

96. Sterling failed to correct the inequities in Lawler's and Meierdiercks's pay notwithstanding that Meierdiercks was recognized by Sterling as an outstanding sales producer. But for Sterling's policy prohibiting employees from discussing their wages, Meierdiercks would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

97. Meierdiercks indicated her interest in a full-time sales position to her store manager on several occasions, but was told repeatedly that no full-time positions were available. Meierdiercks ultimately resigned in March 2006 due to the limited promotional opportunities at Sterling.

98. On April 24, 2006, Meierdiercks filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

99. A few weeks after Meierdiercks resigned and after she filed her Charge of Discrimination, male associates Michael Northrop and Shawn Fay were hired or quickly promoted to full-time sales positions in Meierdiercks's Belden store even though Meierdiercks and other female sales employees had been denied such promotional opportunities. Upon information and belief, neither Northrop or Fay had prior jewelry industry experience.

100. During Meierdiercks's employment at Sterling, Sterling did not advertise or post job vacancies or have a consistent or standard application process for job vacancies.

101. Instead, Sterling used a "tap on the shoulder" system for promotion to full-time sales and management positions.

102. Meierdiercks received notice of her right to sue from the EEOC on March 18, 2008.

Kelly Contreras

103. Kelly Contreras was employed by Sterling from approximately March 1993 through approximately June 2005.

104. Contreras was hired as a Manager in Training in Madison, Wisconsin.

105. In 1994, Contreras was a store manager of a Goodman Jewelers store in St. Cloud, Minnesota, and then transferred shortly thereafter to serve as store manager of another Goodman store in Maplewood, Minnesota.

106. In 1997, Contreras transferred to store manager of an Ostermans Jewelers in Cincinnati, Ohio.

107. In 1998, Contreras became the district manager of the Dayton, Ohio area, and was in charge of 12 stores under the Kay and Ostermans brands.

108. Contreras was a district manager from 1998 until she left Sterling in approximately June 2005.

109. At the end of Contrera's employment with Sterling, her district consisted of 13 stores.

110. Throughout her employment with Sterling, Contreras won several awards for her performance at Sterling.

111. Contreras won the Manager of the Year award in 1995, the Pinnacle Manager of the Year award in 1997, the Sales Profitability award in 1997, the Training District Manager of the Year award in 2004, and was twice nominated for District Manager of the Year.

112. During Contreras' employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

113. In 1995, Contreras made approximately \$35,000 a year as a store manager. Her husband, Chris Contreras, who was also a store manager for Sterling, made approximately \$55,000 per year, notwithstanding that they had similar experience within the industry and at Sterling.

114. When Contreras was promoted to district manager in 1998, her husband, who had been promoted to district manager one year prior, made approximately \$10,000 a year more than she.

115. But for Sterling's policy prohibiting employees from discussing their wages, Contreras would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

116. Contreras was interested in a promotion to a Vice President position.

117. In approximately February 2005, a Vice President position came open.

118. Although Contreras was both interested in and well-qualified for this position, it was given to a male, Joe Maisano, who was less qualified or no more qualified than she.

119. During Contreras' tenure, Sterling did not post job vacancies or provide a consistent or standard means for employees to express an interest in promotions.

120. Employees became aware of job vacancies via word of mouth.

121. Accordingly, there are likely other promotional opportunities that Contreras was interested in and qualified for that were awarded to less qualified male employees.

Lisa Follett

122. Lisa Follett was employed by Sterling from approximately November 2004 until approximately May or June 2005.

123. Throughout her employment with Sterling she was employed as a part-time sales associate at the Belden store located in Massena, New York.

124. Follett excelled in this position.

125. In approximately March 2005, Sterling hired Troy Lawler, a male, to be a part-time sales associate in the Belden store located in Massena, New York.

126. On approximately May 5, 2005, Lawler was promoted to a full-time sales associate position.

127. Sterling failed to post the availability of this position and did not conduct interviews of Follett or other female part-time sales associates who were interested in full-time positions.

128. Follett was more qualified than Lawler for the full-time sales associate position because she had seven months of jewelry sales experience with Sterling and had produced substantial sales for Sterling.

129. Upon information and belief, Lawler had no prior jewelry experience and had no record of past performance to support his promotion.

130. During Follett's employment with Sterling, Sterling failed to post additional full-time positions and did not provide a consistent or standard means for employees to express an interest in promotions.

131. Sterling relied on a "tap on the shoulder" promotion system.

132. Follett was interested in being promoted to full-time positions, but was unaware of promotional opportunities for which she was qualified that may have been provided to less qualified male employees at Sterling as a result of these practices.

133. When Lawler was hired by Sterling in March 2005, he was paid \$8.75 per hour as a part-time sales associate.

134. At the time Lawler was hired, Follett was paid approximately \$7.50 per hour as a part-time sales associate in the same store.

135. Follett was paid less than Lawler in spite of the fact that she had approximately seven months of proven sales experience at Sterling and Lawler had no prior retail jewelry industry experience.

136. But for Sterling's policy prohibiting employees from discussing their wages, Follett would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

137. On February 8, 2006, Follett filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

138. Follett received notice of her right to sue from the EEOC on March 18, 2008.

Maria House

139. Maria House worked for Sterling at a Kay store in Bakersfield, California from approximately June 2005 through August 2006.

140. Sterling hired House as a full-time sales associate and was paid \$12.50 per hour.

141. Prior to working for Sterling, House had obtained approximately 20 years of jewelry sales and management experience working for Macy's, Zales, and Michaels Jewelers.

142. Shortly after starting with Sterling, House was selected for the third key title.

143. The third key is responsible for assisting management employees in opening and closing the store and is placed in charge of the store when the assistant manager and store manager are absent.

144. The third key title is typically a gateway position to higher management positions.

145. Despite having performed the third key duties exceptionally well, House was not selected for an assistant manager position in approximately late 2005.

146. Instead, Shaun McCullough, a less qualified male was selected for the assistant manager position.

147. Sterling was aware that House was interested and qualified for this position, and she had discussed the possibility of being promoted into this position with her store manager and district manager.

148. McCullough's lack of qualifications was confirmed in 2006 when Sterling terminated him.

149. House's exceptional job performance continued into 2006 when she became the highest sales producer in her district.

150. As a result, House became a member of Sterling's President Club.

151. The President Club is an organization Sterling created to recognize and reward outstanding performance of its top sales associates throughout the country.

152. In approximately May 2006, the store manager of the Bakersfield, California Kay store was terminated.

153. Because there was no assistant manager as a result of McCullough's termination, House was required to take over acting manager duties.

154. House performed the store manager's duties for several weeks.

155. Although House was interested in the store manager position and had competently performed the store manager duties, Sterling selected Ben Fox, a less qualified male sales associate from a different store as the new store manager.

156. During House's employment with Sterling, Sterling did not post management vacancies or provide a consistent or standard means for employees to express an interest in promotions.

157. Instead, Sterling relied on a "tap on the shoulder" promotion system.

158. House was interested in being promoted, but was unaware of many other promotional opportunities for which she was qualified that may have been provided to less qualified male employees at Sterling as a result of these practices.

159. During the time McCullough was House's assistant manager, McCullough sexually harassed House. He made inappropriate and unwelcome comments about her chest on several occasions. For example, he told her "I would like to suck on your boobs."

160. House immediately reported this harassment to her district manager, who told House to stop overreacting and get back to work.

161. House then made a formal complaint through Sterling's internal complaint process; however, no disciplinary action was taken against McCullough. House later made yet another follow-up complaint to Sterling's Employee Relations Department.

162. To House's knowledge, no action was taken in response to her complaints.

163. On October 10, 2006, House filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

164. House received her Right to Sue notice from the EEOC on March 18, 2008.

Denise Maddox

165. Denise Maddox was employed with Sterling from 1997 through January of 2007.

166. Maddox was hired as a sales associate at a Jared store in Westminster, Colorado.

167. Maddox excelled in this job and was the highest performing salesperson in her store.

168. Maddox also worked as a diamond department manager at the Jared store in Westminster, Colorado.

169. In 2000, Maddox was transferred to a Jared store in Englewood, Colorado.

170. Around 2001 or 2002, Maddox briefly transferred to a Sterling store in Roseville, California, where she was an assistant manager.

171. After a short period of time in California, Maddox transferred back to Colorado, in a sales associate position.

172. Shortly thereafter, in 2002, Maddox was promoted to assistant manager at a Jared store in Lakewood, Colorado.

173. In August of 2005, Maddox was transferred to Dallas, Texas and was promoted to store manager of a Jared store.

174. On October 31, 2006, Sterling informed Maddox that she was being demoted to diamond department manager.

175. Rather than take the demotion and stay in Texas, she transferred back to Colorado where she worked as a sales associate until she resigned from the company in January 2007.

176. In 2003, the store manager position at the Lakewood, Colorado store became vacant.

177. Although Maddox informed her district manager that she was interested in the position, Sterling selected a less-qualified male who had no prior experience with Sterling.

178. In June or July of 2006, a store manager position at a higher volume store in the Dallas, Texas area became vacant.

179. Maddox was interested in a promotion to this store, and informed her district manager of her interest. However, again the position was given to a male, John Costello, who had no previous experience at Sterling.

180. During Maddox's tenure, Sterling did not post job vacancies or provide any consistent or standard means for employees to express an interest in promotions.

181. Employees became aware of openings via word of mouth.

182. Accordingly, there are likely numerous other promotional opportunities that Maddox was interested in and qualified for that she was not given the opportunity to apply for and that were awarded to less qualified male employees.

183. During Maddox's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

184. When Maddox began at Sterling, she earned \$8.00 an hour. Although she was the highest performing salesperson in her store, upon information and belief, male employees were being hired at rates several dollars an hour more than she.

185. Similarly, when her store manager, Melinda Small, requested a raise for Maddox from the district manager, the request was denied.

186. As a store manager, Maddox observed Sterling pay male employees in her store more than their similarly situated female counterparts.

187. Upon information and belief, these pay discrepancies were implemented by the district manager and vice president or more senior company officials.

188. Upon information and belief, Maddox believes she was also paid less than her similarly situated male counterparts employed in assistant manager and store manager positions.

189. But for Sterling's policy prohibiting employees from discussing their wages, Maddox would likely be able to identify male employees who were paid higher wages in these positions than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

190. Sterling has a policy or practice of preventing its employees from discussing their wages with other employees.

191. Sterling's policy preventing the discussion of wages has prevented Maddox from identifying male employees who were paid higher wages than she was for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

192. Maddox was also subjected to comments and other treatment that were demeaning and disparaging of women. For example, in approximately 2000, when Maddox first became a diamond department manager, she was demoted back to a sales position because her district manager told her he wanted to place a male in the position who had "the Jared look."

193. Maddox was demoted from the store manager position she held in Dallas, Texas due to her age and sex.

194. Maddox was demoted from her position as store manager in October 2006 because a male district manager needed to be placed in a store manager position in her area. There were several stores that could have been chosen. However, the store managers in each of

these stores were younger than Maddox, who was 51 at the time. Maddox was demoted to diamond department manager instead of one of the younger store managers in spite of the fact that sales for her store were better than the stores managed by the younger store managers.

195. On November 8, 2006, Maddox filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

196. Maddox received her Right to Sue notice from the EEOC on March 18, 2008.

Lisa McConnell

197. Lisa McConnell worked for Sterling at a Kay store from approximately July 2001 until August 30, 2006 in Elkhart, Indiana.

198. McConnell was hired as a part-time sales associate for Sterling and was paid \$8.50 per hour.

199. Within a year, she became a full-time sales associate and was paid \$10.00 per hour.

200. McConnell was an outstanding employee. Her high sales record earned her membership in the President's Club from January 2003 until she became store manager in 2005.

201. In October 2002, she became assistant manager at a salary of \$12.00 per hour. Brad Bartl, her store manager at the time, informed her that she was earning approximately \$2.00 to \$3.00 less per hour than similarly-situated male assistant managers and that her salary was also less than male managers-in-training.

202. McConnell served as assistant manager for approximately two and one-half years during which her personal average annual sales ranged from approximately \$400,000 to

\$600,000, one of the highest in her district. She received the highest bonus in her district in 2005.

203. Despite McConnell's exceptional performance and strong personal sales record, she received only a \$1.00 per hour raise each year that she served as assistant manager. This resulted in her earning approximately \$14.00 per hour immediately before she became store manager.

204. Upon information and belief, in stark contrast, Richard Swiental became assistant manager of the Elkhart, Indiana Kay's store in April 2006 at a starting salary of \$15.33 per hour, \$3.33 per hour more than her starting salary three years prior, despite the fact that Swiental was less qualified for the position than McConnell had been when she became assistant manager.

205. In early 2005, McConnell was promoted to store manager with an annual salary of approximately \$34,000.

206. Brad Bartl, her former store manager who had worked for Sterling for at least a decade, again informed McConnell that she was receiving a significantly lower salary than other male store managers employed by Sterling Jewelers, especially given her training experience and high sales record. Bartl informed her that her situation was not unique because he was aware of many other women that were paid less than similarly situated men in the same job positions. According to Bartl, Bartl's wife, Donna Bartl, had been a store manager with Sterling, and she too had been paid less than similarly-situated male store managers.

207. Although McConnell earned the highest bonus in her district in 2005, she did not receive an annual salary increase in 2006.

208. But for Sterling's policy prohibiting employees from discussing their wages, McConnell would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

209. McConnell's career goal was to obtain at least a district manager position.

210. In 2005, during a meeting for managers in her district, the then district manager Tim Chmiel asked store managers in attendance (approximately 14 managers) about their future goals.

211. When Chmiel asked McConnell about her professional goals, she responded that she wanted to be a district manager.

212. Despite her strong qualifications and interest, Sterling never offered her that position.

213. During McConnell's tenure at Sterling, Sterling did not advertise or post job vacancies or have a consistent or standard application process for job vacancies.

214. Instead, Sterling used a "tap on the shoulder" system for promotion to management positions.

215. Even though McConnell was interested in obtaining a district manager position, due to Sterling's failure to post job openings, McConnell was not made aware of district manager opportunities available to her during her employment. She believes there have been district manager job vacancies filled by males who were less qualified or no more qualified than she. She would have pursued and applied for any such positions, but she was not informed of such vacancies nor was she given the opportunity to apply.

216. McConnell also experienced sexual harassment while employed by Sterling.

217. On April 8, 2006, district manager John Braunsdorf placed manager-in-training Richard Swiental in her store as assistant manager.

218. Swiental was rude and disruptive. He made inappropriate sexual comments about women. He commented on the anatomy of females who walked by the store and even asked McConnell, the store manager, to inquire if a young woman who walked by the store in a short skirt was wearing underwear. He commented on female co-workers "PMSing" and bragged about affairs he had on his wife. When helping sales associate, Stephanie Reinhardt, change a store sign, he said "I can always get it up" when he saw she was having trouble reaching the letters on the sign. He addressed McConnell as "sweetheart" and refused to show her respect or treat her in a professional manner.

219. Shortly after Swiental was transferred to her store, McConnell made verbal and written complaints about his behavior to her district manager Braunsdorf.

220. Upon information and belief, no corrective action was taken against Swiental.

221. In response to McConnell's complaints about Swiental's inappropriate sexual comments against women, inappropriate treatment of women and poor managerial performance, Swiental filed an internal complaint against her accusing her of gender discrimination. Even though Swiental's claim had no merit, Sterling took his side and McConnell was written-up for discriminatory "comments" she never made. She informed the human resource office about Swiental's inappropriate treatment towards women and his disruptive behavior. However, this information was ignored.

222. On or about July 25, 2006, McConnell timely filed a charge of discrimination with the EEOC.

223. On August 31, 2006, McConnell was terminated from Sterling even though she had received the largest bonus in her district that same year and was an effective manager who sought to protect her employees and customers from a male employee's discriminatory behavior.

224. On or about May 12, 2007, McConnell filed an amended charge of discrimination with the EEOC asserting her claims on behalf of herself and female employees of Sterling who are similarly situated. McConnell also asserted an individual claim of retaliation.

225. McConnell received a notice of right to sue from the EEOC dated March 18, 2008.

Gloria Pagan

226. Gloria Pagan was employed with Sterling from approximately August 2005 until December 26, 2005. During this time period, Pagan worked as a full-time sales associate at the JB Robinson Jewelers store located in Saint Peters, Missouri.

227. When Pagan was hired by Sterling, she had prior experience working in the jewelry industry.

228. Pagan excelled in her sales associate position and in October 2005, she was promised the third key title.

229. The third key is the title given to a sales associate who aids the assistant manager and general manager in the performance of their duties, including opening and closing the store and supervising the store in their absence, and which provides training for promotional opportunities. In approximately November 2005, Sterling hired Christopher Sutmoler as a sales associate in the Saint Peters, Missouri JB Robinson Jewelers store. Sutmoler was given the

third key title that had been promised to Pagan in spite of the fact that Pagan had more tenure with Sterling and similar jewelry industry experience.

230. During Pagan's employment with Sterling, Sterling failed to post open management positions and did not provide a consistent or standard means for employees to express an interest in promotions.

231. Instead, Sterling relied on a "tap on the shoulder" promotion system.

232. Pagan was interested in being promoted, but was unaware of promotional opportunities for which she was qualified, which may have been provided to less qualified male employees at Sterling as a result of these practices.

233. During Pagan's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

234. Upon information and belief, Sutmoler, a male with similar jewelry experience as Pagan, was hired at approximately the same time frame in the same sales associate job, and in the same store as Pagan; however, he was paid \$11.50 per hour and Pagan was paid only \$8.50 per hour.

235. But for Sterling's policy prohibiting employees from discussing their wages, Pagan would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

236. On or about July 16, 2006, Pagan timely filed a charge of discrimination with the EEOC.

237. Pagan received a notice of right to sue from the EEOC on March 18, 2008.

Judy Reed

238. Judy Reed began working at Sterling in October 2000 as an assistant manager at a Jared store in Appleton, Wisconsin.

239. In July 2001 Reed transferred to Sterling's Jared Citrus Park store in Tampa, Florida and took a diamond department manager position.

240. In July 2002, she was promoted to assistant manager of the Citrus Park store. Reed is currently a sales associate at the Citrus Park Store in Tampa, Florida.

241. Reed has over 30 years experience in the jewelry industry that includes more than five years as an assistant manager for Sterling.

242. Reed was denied promotions on at least four separate occasions in favor of males who were less qualified or no more qualified than she.

243. In 2003, the general manager position at Sterling's Clearwater, Florida Jared store became vacant.

244. Despite being well-qualified for the position, Reed was not granted an interview.

245. The position was given to David Dion, a less-qualified male with only three years tenure at Sterling and less jewelry industry experience than Reed.

246. In January 2005, the general manager position at Sterling's Brandon, Florida Jared store became vacant.

247. Again, Reed was not interviewed for the general manager position.

248. Instead, the general manager position was given to a less-qualified male, Eric Wolff, who had only two years tenure at Sterling.

249. In March 2005, the general manager position at Sterling's Citrus Park Jared store became vacant.

250. Reed had been assistant manager at this location for approximately four years, and during the course of her tenure, she had on several occasions performed the duties of general manager for the store when the general manager was unavailable.

251. Although Reed was interviewed for the position, Sterling gave the position to a less-qualified male, Avind Mohip, who had only two years of jewelry industry experience.

252. In approximately May 2007, Reed applied for the assistant manager position at Sterling's Citrus Park Jared store but the position was instead given to a less experienced male employee who was the timepiece department manager of a lower volume Jared store.

253. During Reed's employment at Sterling, which is ongoing, Sterling has not posted job vacancies or provided a consistent or standard means for employees to express an interest in promotions.

254. Employees become aware of openings via word of mouth.

255. Accordingly, there are likely numerous other promotional opportunities that Reed was interested in and qualified for, which she was not given the opportunity to apply for, that were awarded to less qualified male employees.

256. During Reed's employment at Sterling male employees have been paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

257. When Reed was promoted to assistant manager of the Citrus Park store, she was paid a salary of \$32,600.

258. In the summer of 2005, a male, Jason May, obtained a position as an assistant manager at Sterling's Jacksonville, Florida store despite having only two years experience at Sterling and no prior jewelry industry experience.

259. Upon information and belief, May was paid a salary of more than \$36,000 per year.

260. But for Sterling's policy prohibiting employees from discussing their wages, Reed would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

261. On November 23, 2005, Reed filed a timely charge of discrimination with the EEOC.

262. After filing her charge of discrimination, Reed learned that she was not considered for several management opportunities in retaliation for filing a charge of discrimination and her participation in this matter, including, but not limited to, the assistant manager position she applied for in approximately May 2007.

263. Reed received notice of her right-to-sue from the EEOC dated March 18, 2008.

Linda Rhodes

264. Linda Rhodes was employed by Sterling from approximately November 2005 until approximately November 14, 2006.

265. Rhodes was hired as a seasonal part-time sales associate at the Belden store located in Massena, New York.

266. Shortly after being hired, Sterling modified Rhodes' employment and classified her as a part-time sales associate, but did not increase her pay.

267. Rhodes excelled in the part-time sales associate position.

268. In approximately March 2005, Sterling hired Troy Lawler, a male, to be a part-time sales associate in the Belden store in Massena, New York.

269. Upon information and belief, when Lawler was hired by Sterling in March 2005, he was paid \$8.75 per hour as a part-time sales associate.

270. When Rhodes was hired approximately six months later, she was paid only approximately \$7.00 per hour as a seasonal and regular part-time sales associate in the same store.

271. Rhodes was paid less than Lawler in spite of the fact that she had approximately 15 years of customer service and sales experience in the restaurant industry when she was hired by Sterling, and Lawler had approximately three months of sales experience.

272. Rhodes also had substantial prior management experience while Lawler had no management experience.

273. Rhodes' store manager explained to the female employees including Rhodes that Lawler needed to be paid more than the females because he had a child to support.

274. Sterling failed to correct the inequities in Lawler's and Rhodes' pay in spite of the fact that Rhodes was recognized by Sterling as an outstanding sales producer.

275. Even after Rhodes was designated third key in the store, she still did not receive a raise.

276. But for Sterling's policy prohibiting employees from discussing their wages, Rhodes would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

277. On April 6, 2006, Rhodes filed a timely charge of discrimination with the Equal Employment Opportunity Commission.

278. Rhodes received notice of her right to sue from the EEOC on March 18, 2008.

Khristina Rodrigues

279. Khristina Rodrigues began working for Sterling in 2001 as a sales associate.

280. She left Sterling as an employee in good standing in 2003, and was rehired by Sterling in June 2004.

281. In July 2005, Rodrigues was promoted to assistant manager.

282. In March 2006, Rodrigues stepped down to a sales associate position.

283. Rodrigues currently works as a part-time sales associate at a Kay Jewelers in Swansea, Massachusetts.

284. When Rodrigues was rehired by Sterling in 2004, her rate of pay was \$10.00 per hour.

285. At the time of her rehire, Rodrigues had three years jewelry industry experience, including approximately one year of experience working as an assistant manager.

286. During Rodrigues' employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

287. Upon information and belief, in approximately April 2005, Luis Cortes, a male with no prior jewelry experience was hired at a rate of \$10.50 per hour. Rodrigues was making \$10.00 per hour at the time.

288. When Rodrigues was promoted to assistant manager in July 2005, her rate of pay was increased to \$11.00 per hour.

289. When she stepped down from the assistant manager position, her rate of pay was reduced to \$10.00 per hour.

290. Upon information and belief, in approximately November 2005, Endhir “Andy” Bonilla, a male with no previous jewelry experience, was hired as a sales associate at a rate of \$14.00 per hour. This was considerably more than Rodrigues was making as an assistant manager, yet Sterling still reduced her pay even further when she stepped down to a sales position in 2006.

291. But for Sterling’s policy prohibiting employees from discussing their wages, Rodrigues would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

292. In addition to the pay discrimination described above, Rodrigues also experienced sexual harassment while employed at Sterling. On or about January 31, 2006, while working at a Kay store in Taunton, Massachusetts, a male store manager from another store made a sexually suggestive comment to her while visiting her store.

293. Rodrigues immediately reported this harassment to her store manager and then to her district manager.

294. The district manager defended the actions of the store manager and blamed Rodrigues for misunderstanding the store manager.

295. When Rodrigues asked the district manager who else she should contact about this, he suggested she call Sterling’s TIPS Line, which she did.

296. Even though she was told she would be notified of the outcome of the investigation, Rodrigues has not received information from Sterling on the status of her complaints and any consequent investigation.

297. On July 18, 2006, Rodrigues filed a timely charge of discrimination with the EEOC.

298. Rodrigues received notice of her right-to-sue from the EEOC dated March 18, 2008.

Nina Shahmirzadi

299. Nina Shahmirzadi was employed with Sterling from approximately October 10, 1997 until November 1998 at a Kay Jewelers' store in Henderson, Nevada.

300. In 1998, she transferred to the Kay store in Las Vegas, Nevada. In approximately 2001, Shahmirzadi transferred to the Jared store in Henderson, Nevada as a part-time sales associate.

301. In approximately the beginning of 2002, Shahmirzadi became a full-time sales associate in that store.

302. Shahmirzadi resigned from her position with Sterling on approximately November 1, 2006.

303. Shahmirzadi was 56 years old when she resigned.

304. When Shahmirzadi joined Sterling, she had significant prior experience managing a jewelry store from approximately 1994 to 1997.

305. During her employment at Sterling, Shahmirzadi was a significant sales producer.

306. Shahmirzadi was recognized by Sterling as a top sales producer by being designated as a member of the President's Club for years 2003, 2004, and 2005.

307. During her tenure at Sterling, Shahmirzadi was interested in being promoted to management positions and informed her district manager that she was willing to transfer to obtain a promotion.

308. In spite of her strong qualifications, Shahmirzadi was passed over for promotional opportunities that were provided to less qualified and younger male employees.

309. In 2005, Darren Desylvia, a male sales associate in his late teens or early twenties was promoted to watch department manager in the Jared store in Henderson, Nevada where Shahmirzadi was employed.

310. In August 2006, Desylvia was promoted to diamond department manager.

311. Upon information and belief, prior to receiving these promotions, Desylvia had little experience in the jewelry industry and had mostly worked on a part-time basis for Sterling.

312. Unlike Desylvia, Shahmirzadi had several years of management experience and approximately nine years of sales experience with Sterling when these promotions occurred. Shahmirzadi was qualified for and interested in both of these promotions.

313. Shahmirzadi was also passed over for promotions in September and November 2006.

314. In September 2006, Andy Goldslam, an approximately 20-year-old male, was given the third key title in the Henderson, Nevada Jared store.

315. Upon information and belief, Goldslam had no prior management experience when Goldslam was promoted to the third key title. Meanwhile, Shahmirzadi had years of management experience and had been a top sales performer for years.

316. During Shahmirzadi's employment with Sterling, Sterling failed to post open management positions and did not provide any consistent or standard means for employees to express an interest in promotions.

317. Instead, Sterling relied on a "tap on the shoulder" promotion system.

318. Because promotions were made pursuant to this tap on the shoulder system, Shahmirzadi is unable to identify all of the promotional opportunities that she was denied access to during her tenure at Sterling in spite of her interest in advancement.

319. On or about January 18, 2007, Shahmirzadi timely filed a charge of discrimination with the EEOC.

320. Shahmirzadi received a notice of right to sue from the EEOC on March 18, 2008.

Leighla Murphy

321. Leighla Murphy (formerly Leighla Smith) began working for Sterling in Burlington, New Jersey at a Kay store as a part-time sales associate and was paid \$8.75 per hour beginning in approximately August 2004.

322. During her employment at the Burlington, New Jersey Kay store, Murphy's manager, Bernard Phillips, limited her opportunities to work on the sales floor and achieve her sales goals.

323. During the course of her employment at this store, Phillips made disparaging and inappropriate remarks to female employees. For example, Phillips remarked that the female assistant manager, "acted like a duck sitting around laying eggs instead of getting on the floor and selling." Phillips also told Murphy and another female sales associate that they, "should find a strong black man to date" and made comments that he did not approve of the men they were dating of other races and national origins.

324. After the female assistant manager left her position at the Burlington, New Jersey store, she was replaced by a male who upon information and belief had no prior retail jewelry experience.

325. This assistant manager position was not posted, and neither Murphy nor other women in the store were given a chance to apply to be considered for the assistant manager position.

326. In approximately December 2004, the new assistant manager, with the first name Duane, followed Murphy into the backroom and tried to kiss her. Murphy physically pushed him away, and told him to stop and back off. His unwelcome sexual advance upset Murphy and made her very uncomfortable.

327. After her Assistant Manager's unwelcome sexual advances were brought to the attention of Phillips, Murphy had a significant drop in her assigned hours on the schedule and then was dropped entirely for the schedule for many weeks. She began to look for other opportunities within Sterling to obtain more hours of work.

328. In approximately April 2005, Murphy transferred to a Kay store in Cupertino, California, as a full-time sales associate, where she worked until approximately September 2005.

329. Sterling agreed to pay her \$10.75 an hour at the California Kay's, which Sterling had confirmed in writing. However, once she arrived there, Sterling initially said she would only be paid \$8.75. Despite her reliance on the promised \$10.75 pay rate in moving to California, and her repeated requests to be paid the full \$10.75 promised, Sterling District Manager Paul Chur, stated Sterling would only agree to pay her \$9.75 per hour.

330. Murphy called a Sterling employee hotlines to complain about her lower pay, but Sterling told her she should be satisfied with her pay rate and took no action on her complaint.

331. Throughout her employment at the Cupertino Kay store, Murphy continued to ask her manager to increase her salary, and her manager repeatedly denied the requests.

332. During Murphy's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions. For example, male sales associates with equal or less experience and responsibility in the Cupertino, California Kay store, including Cesar Navarro and J.P. (last name unknown) were paid more than Murphy. In addition, a female assistant manager at that store told Murphy that Navarro was paid even higher than that assistant manager was paid.

333. But for Sterling's policy prohibiting employees from discussing their wages, Murphy would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

334. Murphy was also interested in obtaining higher paying jobs at Sterling, however her opportunity was limited because Sterling did not post promotional opportunities nor did it provide formal means for employees, similar to Murphy, to apply for promotional opportunities.

335. Murphy believes there were promotional opportunities at Sterling that she was qualified for and interested in that were given to males who were less qualified or no more qualified than she, and because of Sterling's practices, she was not considered for them.

336. On June 7, 2006, Murphy filed a timely charge of discrimination with the EEOC.

337. Murphy received her right-to-sue notice on March 18, 2008.

Dawn Souto-Coons

338. Dawn Souto-Coons was employed with Sterling from approximately September 1991 until approximately May 27, 2005.

339. Souto-Coons began her employment as a sales associate in a JB Robinson store in Waldorf, Maryland.

340. In approximately June 1992, Souto-Coons was promoted to assistant manager in that store.

341. In approximately December 1992, Souto-Coons was promoted to store manager at the JB Robinson store in Gaithersburg, Maryland.

342. In approximately January 1994, Souto-Coons was transferred as a store manager to the Waldorf, Maryland JB Robinson, which was a higher volume store than the Gaithersburg, Maryland store.

343. In the summer of 1998 until approximately June 1999, Souto-Coons worked part-time.

344. Souto-Coons was a full-time store manager at the Waldorf JB Robinson from approximately June 1999 until July 2001.

345. In approximately July 2001, Souto-Coons transferred to Florida as an assistant manager at the Jared store located in Brandon, Florida.

346. On May 27, 2005, Souto-Coons felt compelled to resign her employment with Sterling after more than thirteen years of service because of Sterling's continued policy, pattern and practice of discriminating against her and other female employees in promotion and pay practices.

347. Souto-Coons was a successful store manager in Maryland.

348. She was recognized as one of Sterling's top ten managers and received seven incentive trips and numerous merit bonuses.

349. When Souto-Coons transferred to Florida, she was qualified for and interested in promotions to general manager or district manager positions.

350. In January 2005, two general manager positions became available, one at the Brandon, Florida Jared, and one at the Citrus Park, Florida Jared.

351. Although Souto-Coons expressed interest in these positions and had frequently served in an acting manager role in the Brandon, Florida Jared, Souto-Coons was not granted an interview for either general manager position.

352. Instead, in approximately February 2005, Eric Wolff, a less-qualified male employee with approximately two years experience with Sterling was given the Brandon, Florida Jared general manager position, and Avind Mohip, a less-qualified male employee with only two years of jewelry experience, was given the Citrus Park, Florida Jared general manager position.

353. At the time of these promotions, Souto-Coons had over 13 years of experience with Sterling, including approximately nine years of prior experience working as a store manager.

354. During Souto-Coons' employment with Sterling, Sterling failed to post vacancies for management positions and did not provide a consistent or standard means for employees to express an interest in promotions.

355. Instead, Sterling relied on a "tap on the shoulder" promotion system.

356. Because promotions were made pursuant to this tap on the shoulder system, Souto-Coons is unable to identify all of the promotional opportunities that she was denied access to during her tenure at Sterling in spite of her interest in advancement.

357. On October 3, 2005, Souto-Coons timely filed a charge of discrimination with the EEOC.

358. Souto-Coons received a notice of right to sue from the EEOC on March 18, 2008, 2008.

Marie Wolf

359. Marie Wolf has been employed by Sterling as a sales representative at a Jared store in Brandon, Florida from 2002 to the present.

360. Prior to starting at Sterling, Wolf had several years of jewelry sales experience during which she sold over a million dollars in jewelry for her former employer.

361. Wolf continued this success at Sterling, selling over a million dollars worth of jewelry every year since 2003. This entitled her to membership in the President's Club for each of those years. In 2003, Wolf was among the top twenty in sales throughout the company and earned an incentive trip to Europe. In 2004, Wolf was among the top two in sales throughout company and earned an incentive trip to Hawaii.

362. After the trip to Hawaii, Wolf told her general manager Aaron Scott that she wanted a raise and that she wanted to be the highest paid sales associate in the store. Scott informed Wolf that she was the highest paid sales associate.

363. During Wolf's employment at Sterling, male employees were paid higher wages than female employees for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

364. Wolf's starting wage at Sterling was \$12.00 per hour.

365. Three years later her wage was \$13.47.

366. Upon information and belief, similarly situated male employees, including Grant Laing, Steven Harrington, and Alan Mong were paid higher base hourly rates even though Wolf had greater sales and longer seniority at Sterling. This unequal pay between her and her male co-workers occurred even though the males were performing substantially equal work that required equal skill, effort, and responsibility under similar working conditions.

367. But for Sterling's policy prohibiting employees from discussing their wages, Wolf would likely be able to identify additional male employees who were paid higher wages than her for equal work in jobs requiring equal skill, effort, and responsibility that were performed under similar working conditions.

368. Wolf was also interested in promotional opportunities and inquired about obtaining the timepiece manager position and an assistant manager position in her store, but she was discouraged from pursuing management opportunities.

369. Sterling does not advertise or post job vacancies or have a consistent or standard application process for job vacancies. Therefore, Wolf is only aware of promotional opportunities by word of mouth.

358. On September 13, 2005, Wolf filed a timely charge of discrimination with the EEOC.

359. Wolf received her right-to-sue from the EEOC on March 18, 2008.

CLASSWIDE COUNT I
Violation of Title VII - Disparate Impact

360. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 359.

361. This claim is brought on behalf of all Plaintiffs and the class they represent.

362. The foregoing conduct described above violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e), *et. seq.* and constitutes a continuing violation of that Act.

363. Sterling has maintained a system for making promotion and compensation decisions that is excessively subjective the operation of which has a disparate impact adverse to female employees, and which is not consistent with business necessity, or if it could be so justified, less discriminatory alternatives exist that could equally serve said necessity.

364. Sterling's discriminatory practices described above have denied female employees promotional opportunities and compensation to which they are entitled, which has resulted in the loss of past and future wages and other job benefits to Plaintiffs and members of the class.

365. Plaintiffs request relief as provided in the Prayer for Relief below.

CLASSWIDE COUNT II
Violation of Title VII - Disparate Treatment

366. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 359.

367. Sterling has intentionally discriminated against the Plaintiffs and the members of the proposed class by maintaining a system for making promotion and compensation decisions that is excessively subjective and through which Sterling has permitted or encouraged managers to deny female employees equal access to promotion opportunities and the same compensation paid to similarly situated male employees.

368. Sterling's discriminatory practices described above have denied female employees promotional opportunities and compensation to which they are entitled, which has resulted in the loss of past and future wages and other job benefits to Plaintiffs and members of the class.

369. The foregoing conduct described above violates Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et. seq.* and constitutes a continuing violation of that Act.

370. The foregoing conduct described above caused the Plaintiffs and members of the proposed class emotional harm and other forms of harm proximately caused by Sterling's discriminatory conduct.

371. The foregoing conduct described above was undertaken with malice or reckless disregard of the rights protected by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et. seq.*

372. Plaintiffs request relief as provided in the Prayer for Relief below.

CLASSWIDE COUNT III
Violation of Equal Pay Act, 29 U.S.C. § 206(d)

373. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 359.

374. Sterling required Plaintiffs and the other members of the class to perform the same or substantially similar work as other male employees, requiring equal skill, effort, and responsibility under similar working conditions at the same establishment and paid Plaintiffs and the other female retail employees lower wages than similarly situated male employees. The difference in pay was not part of or occasioned by a seniority system, merit system, a system based on the quantity or quality of production or upon a factor other than gender.

375. By the conduct described above Sterling has willfully violated the Equal Pay Act, 29 U.S.C. §206(d). As a direct result of Sterling's unlawful and discriminatory conduct in willful violation of the Equal Pay Act, Plaintiffs and other female retail employees have been and continue to be paid less than similarly-situated men.

376. Plaintiffs request relief as provided in the Prayer for Relief below.

COUNT IV ON BEHALF OF PLAINTIFF DENISE MADDOX
Violation of Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.

377. Plaintiff Maddox repeats and realleges the allegations contained in paragraphs 1 through 10, and paragraphs 17, 27, and 165 through 196.

378. The foregoing conduct, among others, violates the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (“ADEA”) and constitutes a willful violation of the ADEA.

379. Plaintiff Maddox requests relief as provided in the Prayer for Relief below.

COUNT V ON BEHALF OF PLAINTIFF LISA MCCONNELL
For Retaliation in Violation of Title VII, 42 U.S.C. § 2000e-3.

380. Plaintiff McConnell repeats and realleges the allegations contained in paragraphs 1 through 10, and paragraphs 18, 27, and 197 through 225.

381. The foregoing conduct, among others, violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).

382. Plaintiff McConnell requests relief as provided in the Prayer for Relief below.

COUNT VI ON BEHALF OF PLAINTIFF JUDY REED
For Retaliation in Violation of Title VII, 42 U.S.C. § 2000e-3.

383. Plaintiff Reed repeats and realleges the allegations contained in paragraphs 1 through 10, and paragraphs 20, 27, and 238 through 263.

384. The foregoing conduct, among others, violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a).

385. Plaintiff Reed requests relief as provided in the Prayer for Relief below.

COUNT VII ON BEHALF OF PLAINTIFF NINA SHAHMIRZADI
Violation of Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.

386. Plaintiff Shahmirzadi repeats and realleges the allegations contained in paragraphs 1 through 10, and paragraphs 23, 27, and 299 through 320.

387. The foregoing conduct, among others, violates the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* and constitutes a willful violation of the ADEA.

388. Plaintiff Shahmirzadi requests relief as provided in the Prayer for Relief below.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request the Arbitrator

As to the Class Claims:

A. Declare that the arbitration agreements entered into by the Plaintiffs and the class with Sterling permit class arbitration;

B. Declare that the practices described in this complaint exist at Sterling and that they are unlawful;

C. Grant certification of this action as a class arbitration on behalf of the proposed Plaintiff class and designation of Plaintiffs as representatives of the class and their counsel of record as Class Counsel;

D. Issue a permanent injunction prohibiting Sterling, its officers, agents, employees and successors, from engaging in the discriminatory employment practices complained of herein in violation of Title VII of the Civil Rights Act of 1964, as amended;

E. Issue a permanent mandatory injunction requiring Sterling adopt employment practices in conformity with the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*;

F. Award liquidated damages pursuant to 29 U.S.C. § 201, *et seq.*;

G. Award back pay and other job benefits sufficient to make the Plaintiffs and the class whole;

H. Award compensatory damages and pre-judgment interest, and punitive damages appropriate to the proof at trial;

I. Award reasonable attorneys' fees and costs, including expert fees, pursuant to 42 U.S.C. § 2000e and 42 U.S.C. § 1988; 29 U.S.C. § 216(b); 29 U.S.C. § 201, *et seq.*; and

J. Order such other and further relief as the Arbitrator deems just and proper.

As to Plaintiffs Maddox, McConnell, Reed, and Shahmirzadi's Individual Claims:

K. Award back pay and other job benefits sufficient to make Plaintiffs Maddox, McConnell, Reed, and Shahmirzadi whole;

L. Award Plaintiffs Maddox and Shahmirzadi liquidated damages and pre-judgment interest pursuant to 29 U.S.C. § 626(b);

M. Award Plaintiffs Maddox and Shahmirzadi reasonable attorneys' fees and costs, including expert fees, pursuant to 29 U.S.C. § 621, *et seq.*; 29 U.S.C. § 216(b);

N. Award Plaintiffs McConnell and Reed compensatory damages and pre-judgment interest, injunctive relief, and punitive damages appropriate to the proof at trial;

O. Award Plaintiffs McConnell and Reed reasonable attorneys' fees and costs, including expert fees, pursuant to 42 U.S.C. § 2000e and 42 U.S.C. § 1988; and,

P. Order such other and further relief for Plaintiffs Maddox, McConnell, Reed, and Shahmirzadi as the Arbitrator deems just and proper.

Dated: New York, New York
June 26, 2008

Respectfully submitted,

**COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.**



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Exhibit 1



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Sterling Jewelers, Inc. 375 Ghent Road Akron, OH 44333	Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination on the merits of this charge filed under the Equal Pay Act of 1963 (Equal Pay Act) and/or Title VII of the Civil Rights Act of 1964 as amended (Title VII) and the Civil Rights Act of 1991. Timeliness, deferral and all other requirements for coverage have been met.

Charging Parties collectively allege that Respondent has discriminated against a class of female employees with retail sales responsibilities in regard to promotion and compensation.

Respondent denies the allegations of discrimination in their entirety and asserts that legitimate, non-discriminatory reasons support its decisions. Respondent also disputes the Buffalo Area's jurisdiction over several of the individual charges, and asserts timeliness claims in regard to several individual charges.

The investigation determined that Respondent subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation. Statistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees. Witness testimony further corroborates the allegations. As such, I find reasonable cause to believe that Respondent has engaged in a pattern or practice of discrimination as alleged, in violation of Title VII and the Equal Pay Act.

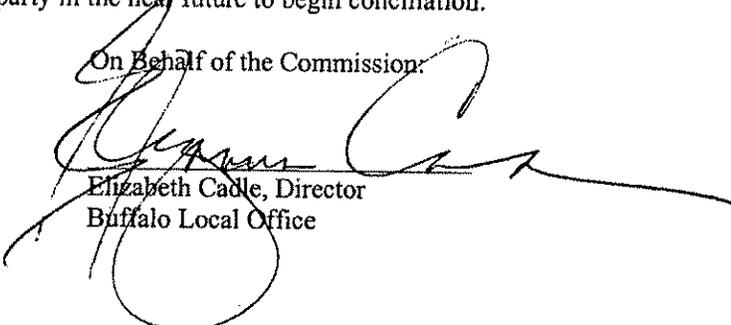
Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in a collective effort toward a just resolution to this matter. The confidentiality provisions of Title VII, the Equal Pay Act, and the Commission Regulations apply to information obtained during conciliation.

When the Respondent declines to discuss settlement or when, for any reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

JAN 03 2008

Date


Elizabeth Cadle, Director
Buffalo Local Office

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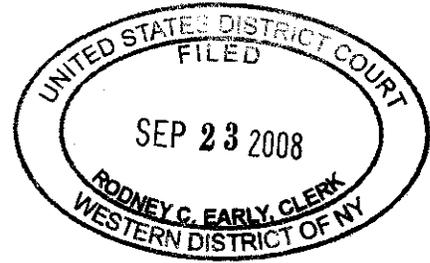
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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

-----X
**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,**

Plaintiff,

-against-

STERLING JEWELERS INC.,

Defendant.
-----X

Civil Action No.

COMPLAINT

JURY TRIAL DEMANDED

08 CV 0706 *A*
08 CV 0700

NATURE OF THE ACTION

This is an action under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of sex and to provide appropriate relief to a class of employees who were adversely affected by such unlawful practices. Plaintiff Equal Employment Opportunity Commission (the "Commission") alleges that Defendant Sterling Jewelers Inc. ("Sterling") pays its female retail sales employees less than male employees performing substantially equal work and denies female employees promotional opportunities for which they are qualified. As alleged with greater particularity in paragraphs 6-11 below, Sterling's promotion and compensation policies have had the effect and have been undertaken with the purpose of denying promotional opportunities and equal compensation to qualified female employees because of their sex.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5(f)(1)

and (3) and -6. ("Title VII"). This action is also authorized and instituted pursuant to Section 102 of Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

2. The employment practices alleged to be unlawful were and are now being committed within the jurisdiction of the United States District Court for Western District of New York.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission, is the agency of the United States of America charged with the administration, interpretation and enforcement of Title VII, and is expressly authorized to bring this action by Sections 706(f)(1) and (3) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and (3) and -6.

4. At all relevant times, Sterling has continuously been a Delaware corporation, doing business in the State of New York and the City of Buffalo, and has continuously had at least 15 employees.

5. At all relevant times, Sterling has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g) and (h).

STATEMENT OF TITLE VII CLAIMS

6. More than thirty days prior to the institution of this lawsuit, Laryssa Jock filed a charge with the Commission alleging violations of Title VII by Sterling. Charges alleging similar violations by Sterling were subsequently filed by Jacquelyn Boyle, Christy Davies, Lisa Follett, Marie House, Carol King, Denise Maddox, Lisa McConnell, Carolyn Morse, Gloria Pagan, Judy Reed, Linda Rhodes, Khristina Rodrigues, Sharon Scroggins, Nina Shahmirzadi, Tana Shiver, Leighla Smith, Dawn Souto-Coons, and Marie Wolf (collectively "Charging Parties"). All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since at least January 1, 2003, Sterling has engaged in unlawful employment practices throughout its stores nationwide in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a), as detailed below:

(a) Sterling has intentionally discriminated against female retail sales employees by maintaining a system for making promotion and compensation decisions that is excessively subjective and through which Sterling has permitted or encouraged managers to deny female employees equal access to promotion opportunities and the same compensation paid to similarly situated male employees.

8. Since at least January 1, 2003, Sterling has engaged in unlawful employment practices throughout its stores nationwide in violation of Section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k), as detailed below:

(a) Sterling has maintained a system for making promotion and compensation decisions that is excessively subjective and that has a disparate impact on female retail sales employees, and that is not consistent with business necessity, or if it could be so justified, less discriminatory alternatives exist that could equally serve that necessity.

9. The effect of the practices complained of in paragraphs 7-8 above has been to deprive Charging Parties and other similarly situated female retail sales employees of equal employment opportunities and otherwise adversely affect their status as employees, because of their sex.

10. The unlawful employment practices complained of in paragraphs 7-8 above were and are intentional.

11. The unlawful employment practices complained of in paragraphs 7-8 above were and are done with malice or with reckless indifference to the federally protected rights of Charging Parties and Sterling's other female retail sales employees.

PRAYER FOR RELIEF

Wherefore, the Commission requests that this Court:

A. Grant a permanent injunction enjoining Sterling, its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, from engaging in sex discrimination as described herein.

B. Order Sterling to institute and carry out policies, practices and programs that provide equal employment opportunities for women and that eradicate the effects of its past and present unlawful employment practices.

C. Order Sterling to make whole Charging Parties and other female retail sales employees, by providing appropriate backpay with prejudgment interest, in amounts to be proved at trial, and other affirmative relief necessary to eradicate the effects of its unlawful employment practices, including but not limited to pay increases and/or promotions of Charging Parties and other female retail sales employees.

D. Order Sterling to make whole Charging Parties and other female retail sales employees by providing compensation for past and future pecuniary losses resulting from the unlawful practices described in paragraphs 7-8 above, including relocation expenses, job search expenses, and medical expenses not covered by the Employer's employee benefit plan, in amounts to be determined at trial.

E. Order Sterling to make whole Charging Parties and other female retail sales employees by providing compensation for past and future nonpecuniary losses resulting from the unlawful practices complained of in paragraphs 7-8 above, including emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation, in amounts to be determined at trial.

F. Order Sterling to pay Charging Parties and other female retail sales employees punitive damages for its malicious and/or reckless conduct described in paragraphs 7-8 above, in an amount to be determined at trial.

G. Grant such further relief as this Court deems necessary and proper in the public interest.

H. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by its complaint.

Ronald S. Cooper
General Counsel

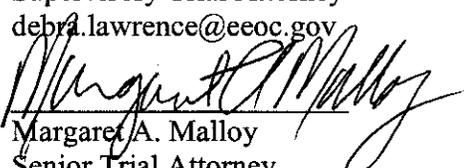
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BEFORE THE AMERICAN ARBITRATION ASSOCIATION

**LARYSSA JOCK, CHRISTY
MEIERDIERCKS, MARIA HOUSE,
DENISE MADDOX, LISA
McCONNELL, GLORIA PAGAN,
JUDY REED, LINDA RHODES, NINA
SHAHMIRZADI, LEIGHLA MURPHY,
DAWN SOUTO-COONS, and MARIE
WOLF**

Claimants,

-against-

STERLING JEWELERS INC.,

Respondent.

AAA CASE NO. 11 160 00655 08

Arbitrator: Hon. Kathleen Roberts
Case Manager: Jonathan Weed

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	5
A.	Corporate Structure of Sterling Jewelers Inc.	5
1.	Field Operations.....	5
2.	Human Resources	8
B.	Sterling’s Compensation Policies	9
1.	Pay Disparities Originate with Starting Pay Rates of Sales Associates	11
2.	Sterling Perpetuated Pay Disparities through Merit Increase Practices	14
3.	Sterling’s Policy Prohibiting Employees From Discussing Pay Largely Concealed Pay Disparities From Detection.....	17
C.	Sterling’s Promotion Policies	19
1.	Management Selections are Made Largely from Promotions of Candidates Within Sterling.....	21
2.	Succession Management Directs Managers to Select and Groom Candidates for Promotion	22
3.	Managers Pre-Select Candidates for Promotion.....	24
a.	Career Advancement Register (“CAR”).....	24
b.	CAR Has Been Manipulated.....	25
D.	Patterns of Discrimination: Analyses Conducted by Dr. Louis Lanier	26
1.	Analysis of Compensation Disparities.....	27
2.	Analysis of Promotion Disparities.....	30
3.	Pay and Promotion Decisions are Widespread.....	32
E.	Intentional Mistreatment of Women by Sterling Executives.....	32
1.	Conduct of Executives	33
2.	Direct Evidence of Gender Discrimination and Other Stereotyped Remarks About Women Employees.....	40
F.	Human Resources and Employee Relations Permit, Rather than Protect Against, Sex Discrimination	43
1.	Sterling’s HR Department Has Been Understaffed and Unprepared to Address Discrimination in the Workplace.....	44
2.	Sterling’s Handling of Complaints Discourages Employees From Challenging Discrimination and Fails to Detect or Address Much of the Discrimination That Exists	46
3.	Sterling Uses its Human Resources Program to Manage Litigation Risk Rather Than to Expose and Address Workplace Problems.....	49
G.	Expert Reports of Dr. Kathleen Lundquist & Dr. James Outtz	54
1.	Dr. Kathleen Lundquist.....	54
2.	Dr. James Outtz.....	57
III.	ARGUMENT	60
A.	Legal Standard	60
1.	Federal Rule of Civil Procedure 23(a) and AAA Supplementary Rule 4(a).....	60

2.	Federal Rule of Civil Procedure 23(b) and AAA Supplementary Rule 4(b)	61
3.	The Arbitrator’s Inquiry.....	62
4.	The Proposed Class.....	62
B.	Claimants Satisfy the Requirements of Rule 23(a) and Equivalent AAA Supplementary Rule 4(a)	62
1.	Numerosity: Claimants Satisfy the Requirements of Rule 23(a)(1) and AAA Supplementary Rule 4(a)(1)	62
2.	Commonality: Claimants Satisfy the Requirements of Rule 23(a)(2) and AAA Supplementary Rule 4(a)(2)	63
a.	The Standard for Commonality Following Wal-Mart v. Dukes	63
b.	Claimants Have Satisfied the Standard for Commonality	66
i.	Claimants’ Equal Pay Act Claims Present Issues of Fact and Law Common to the Class	68
(a)	Claimants’ Prima Facie Case Can Be Established Using Evidence Common to the Class.....	69
(b)	Defenses can be Adjudicated on a Basis Common to the Class.....	72
ii.	Claimants’ Disparate Impact and Disparate Treatment Claims under Title VII Present Issues Common to the Class.....	74
(a)	Claims of Disparate Impact in Compensation and Promotion.....	74
(1)	Compensation	74
(2)	Promotion.....	77
(b)	Pattern or Practice Claims of Disparate Treatment in Compensation and Promotion	80
3.	Typicality: Claimants Satisfy the Requirements of Rule 23(a)(3) and AAA Supplementary Rule 4(a)(3)	85
a.	The Pay Claims of the Claimants Are Typical of the Class Claims	86
b.	The Promotion Claims of the Claimants Are Typical of the Class Claims.....	88
c.	Sterling’s Defenses Do Not Draw the Focus of the Litigation from Common Legal or Factual Issues	89
4.	Adequacy of Representation: Claimants Satisfy the Requirements of AAA Supplementary Rule 23(a)(4).....	91
C.	Claimants Satisfy the Requirements of Rule 23(b)(3) AAA Supplementary Rule 4(b)	93
1.	Common Questions Predominate	93
2.	A Class Proceeding Is Superior	97
3.	This Dispute is Manageable.....	99
4.	Class-Wide Calculations of Damages.....	103
5.	Efficient Notice and Claims Process.....	105

6.	Use of Special Masters and Claims Administrator	106
IV.	CONCLUSION.....	107

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aldrich v. Randolph Cent. School Dist.</i> , 963 F.2d 520 (2d Cir. 1992).....	73
<i>Am-Gen Inc. v. Conn. Ret. Plans & Trust Funds</i> , 133 S. Ct. 1184 (2013).....	62, 94, 99
<i>Amchem Prods, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	93, 97
<i>Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.</i> , 222 F.3d 52 (2d Cir. 2000).....	89, 91
<i>Belfi v. Prendergast</i> , 191 F.3d 129 (2d Cir. 1999).....	69, 72, 73, 105
<i>Bence v. Detroit Health Corp.</i> , 712 F.2d 1024 (6th Cir. 1983)	73
<i>Berkman v. City of New York</i> , 705 F.2d 584 (2d Cir. 1983).....	103
<i>Bolden v. Walsh Constr. Co.</i> , 688 F.3d 893 (7th Cir. 2012)	65
<i>Brown v. Trs. of Bos. Univ.</i> , 891 F.2d 337 (1st Cir. 1989).....	98
<i>Brownlee v. Gay & Taylor, Inc.</i> , 642 F. Supp. 347 (D. Kan. 1985), <i>aff'd</i> , 861 F.2d 1222 (10th Cir. 1988).....	71
<i>Bryant v. Joel Antunes, LLC</i> , AAA No. 1116001178305 (AAA 2007, Pratt, George C., Arb.)	4
<i>Burlington Indus., Inc. v. Ellerth</i> , 524 U.S. 742 (1998).....	69
<i>Calibuso v. Bank of Am. Corp.</i> , 893 F. Supp. 2d 374 (E.D.N.Y. 2012)	64, 66
<i>Caridad v. Metro-North Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 1999).....	86

<i>Carmell v. Texas</i> , 529 U.S. 513 (2000).....	48
<i>Chapman v. Fred's Stores of Tenn., Inc.</i> , No. 2:08-cv-01247-HGD, 2013 WL 1767791 (N.D. Ala. Mar. 15, 2013).....	71
<i>Chin v. Port Authority of N.Y. & N.J.</i> , 685 F.3d 135 (2d Cir. 2011).....	98
<i>Collins v. Dollar Tree Stores</i> , 788 F. Supp. 2d 1328 (N.D. Ala. 20011).....	71
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).....	105
<i>In re Countrywide Fin. Mortgage Lending Litig.</i> , 708 F.3d 704 (6th Cir. 2013)	65
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006).....	91
<i>Diamond v. T. Rowe Price Assoc.</i> , 852 F. Supp. 372(D. Md. 1994)	73
<i>Duling v. Gristede's Operating Corp.</i> , 267 F.R.D. 86 (S.D.N.Y. 2010)	89
<i>EEOC v. Outback Steak House of Fl.</i> , 576 F. Supp. 2d 1202 (D. Colo. 2008).....	102
<i>EEOC v. Pitre, Inc.</i> , No. 1:11-cv-00875-RB/KM, 2012 WL 6161945 (D.N.M. Nov. 30, 2012).....	102
<i>EEOC v. Sterling Jewelers Inc.</i> , 788 F. Supp. 2d 83 (W.D.N.Y. 2011).....	102
<i>Ellis v. Costco Wholesale Corp.</i> , 285 F.R.D. 492 (N.D. Cal. 2012), <i>appeal dismissed</i> , 657 F.3d 970 (9th Cir. 2013)	passim
<i>Floyd v. City of New York</i> , 283 F.R.D. 153 (S.D.N.Y. 2012)	79, 86
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976).....	105
<i>Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 903 F.2d 176 (2d Cir. 1990).....	91

<i>Grumbine v. United States</i> , 586 F.Supp. 1144 (D.D.C. 1984)	71
<i>Guan Ming Lin v. Benihana N.Y. Corp.</i> , No. 10 Civ. 1335 (RA)(JCF), 2012 U.S. Dist. LEXIS 186526 (S.D.N.Y. Oct. 23, 2012)	86
<i>Gutierrez v. Johnson & Johnson</i> , No. 01-5302 (WHW), 2006 WL 3246605 (D.N.J. Nov. 6, 2006)	72
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977)	27, 80
<i>Hnot v. Willis Grp. Holdings Ltd</i> , 228 F.R.D. 476 (S.D.N.Y. 2005)	92
<i>Houston v. Manheim-New York</i> , No. 09. Civ. 4544 (SCR)(GAY), 2010 WL 6121688 (S.D.N.Y. July 7, 2010)	98
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977)	passim
<i>Jacob v. Duane Reade, Inc.</i> , No. 11 Civ. 0160 (JPO) 2013 U.S. Dist. LEXIS 38675 (S.D.N.Y. Mar. 20, 2013)	86
<i>Johnson v. Morton's Rest. Group, Inc.</i> , AAA No. 111600153105 (AAA 2007, Golick, Roberta, Arb.)	4
<i>Kassman v. KPMG, LLP</i> , No. 1:11-cv-03743-LGS, 2013 WL 452913 (S.D.N.Y. Feb. 7, 2013)	64
<i>Kirkland v. N.Y. State Dept. of Corr. Servs.</i> , 520 F.2d 420 (2d Cir. 1975)	72
<i>Kolstad v. Am. Dental Ass'n</i> , 527 U.S. 526 (1999)	102
<i>Koppel v. 4987 Corp.</i> , 191 F.R.D. 360 (S.D.N.Y. 2000)	89
<i>Latino Officers Ass'n City of N.Y. v. City of New York</i> , 209 F.R.D. 79 (S.D.N.Y. 2002)	92
<i>Ledbetter v. Goodyear Tire & Rubber Co., Inc.</i> , 550 U.S. 618 (2007)	69
<i>Long John Silver's Rests., Inc. v. Cole</i> , 514 F.3d 345 (4th Cir.), cert. denied, 555 U.S. 815 (2008)	4

<i>M.O.C.H.A. Soc'y, Inc. v. City of Buffalo</i> , No. 98-CV-99C, 2008 WL 343011 (W.D.N.Y. Feb. 6, 2008)	92
<i>Marisol A. v. Giuliani</i> , 126 F.3d 372 (2d Cir. 1997).....	86
<i>McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 672 F.3d 482 (7th Cir. 2011), <i>cert denied</i> , 133 S. Ct. 338 (U.S. 2012).....	64, 65, 66, 76, 77, 79
<i>Moore v. Napolitano</i> , No. 00-953(RWR/DAR), 2013 WL 659111 (D.D.C. Feb. 25, 2013).....	66, 95, 100
<i>Moore v. Publicis Grp. SA</i> , No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 2574742 (S.D.N.Y. June 29, 2012).....	70
<i>Nat'l Labor Relations Bd. v. Main St. Terrace Care Ctr.</i> , 218 F.3d 531 (6th Cir. 2000)	19
<i>In re Nassau Cnty. Strip Search Cases</i> , 461 F.3d 219 (2d Cir. 2006).....	98
<i>Novella v. Westchester Cnty.</i> , 661 F.3d 128 (2d Cir. 2011).....	63
<i>Osborn v. Home Depot U.S.A., Inc.</i> , 518 F. Supp. 2d 377 (D. Conn. 2007).....	72
<i>O'Sullivan v. City of Chicago</i> , 474 F. Supp. 2d 971 (N.D. Ill. 2007)	48
<i>Pagan v. Abbott Labs., Inc.</i> , NO. 10-CV-4676(ADS)(WDW), 2012 U.S. Dist. LEXIS 159273 (E.D.N.Y. Oct. 20, 2012).....	86
<i>Paige v. California</i> , 291 F.3d 1141 (9th Cir. 2002)	72
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	85
<i>Rehwaldt v. Elec. Data Sys. Corp.</i> , No. 95-876, 1996 WL 947568 (W.D.N.Y. Mar. 28, 1996)	70
<i>Robidoux v. Celani</i> , 987 F.2d 931 (2d Cir. 1993).....	63, 86

<i>Ryduchowski v. Port Auth. of N.Y. & New Jersey</i> , 203 F.3d 135 (2d Cir. 2000).....	72
<i>Sadki v. SUNY Coll. at Brockport</i> , 310 F. Supp. 2d 506 (W.D.N.Y. 2004).....	82
<i>Sandor v. Safe Horizon, Inc.</i> , No. 08-CV-4636 ILG, 2011 WL 115295 (E.D.N.Y. Jan. 13, 2011)	73
<i>Shultz v. Wheaton Glass Co.</i> , 421 F.2d 259 (3d Cir. 1970).....	69
<i>Slattery v. Swiss Reinsurance Am. Corp.</i> , 248 F.3d 87 (2d Cir. 2001).....	82
<i>Sobel v. Yeshiva Univ.</i> , 839 F.2d 18 (2d Cir. 1975).....	76, 85
<i>Sobol v. Kidder, Peabody & Co.</i> , 49 F. Supp. 2d 208 (S.D.N.Y. 2003).....	73
<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003)	92
<i>Stinson v. City of New York</i> , No. 10 Civ. 4228 (RWS), 2012 U.S. Dist. LEXIS 56748 (S.D.N.Y. Apr. 23, 2012).....	86
<i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U.S. 555 (1931).....	105
<i>Tomassi v. Insignia Fin. Group</i> , 478 F.3d 111 (2d Cir. 2007).....	82
<i>Tomka v. Seiler Corp.</i> , 66 F.3d 1295 (2d Cir. 1995).....	69, 70
<i>United States v. City of N.Y.</i> , Nos. 11-5113-CV-L, 12-491-CV XPA, 2013 WL 1955782 (2d Cir. May 14, 2013)..	81, 84, 99
<i>United States v. City of New York</i> , 276 F.R.D. 22 (E.D.N.Y. 2011).....	passim
<i>United States v. City of New York</i> , 681 F. Supp. 2d 274 (E.D.N.Y. 2010)	105, 106
<i>United States v. City of New York</i> , 847 F. Supp. 2d 395 (E.D.N.Y. 2012)	97, 104, 106

<i>United States v. City of New York</i> , 877 F. Supp. 2d 57 (E.D.N.Y. 2012)	97, 104
<i>United States v. City of New York</i> , No. 07-CV-2067 (NGG)(RLM), 2011 WL 2259640 (E.D.N.Y. June 6, 2011)	105
<i>Velez v. Novartis</i> , Civ No. 04 Civ. 09194(CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010).....	100, 102, 103
<i>Velez v. Novartis Pharm. Corp.</i> , 244 F.R.D. 243 (S.D.N.Y. 2007)	89, 92, 100
<i>In re Visa Check/MasterMoney Antitrust Litig.</i> , 280 F.3d 124 (2d Cir. 2001), <i>overruled on other grounds by In re IPO</i> , 471 F.3d 24 (2d Cir. 2006), <i>superseded by statute on other grounds as stated in Attenborough v.</i> <i>Const. and Gen. Bldg. Laborers' Local 79</i> , 238 F.R.D. 82 (S.D.N.Y. 2006)	92
<i>In re Vivendi Universal, S.A. Sec. Litig.</i> , 248 F.R.D. 144 (E.D.N.Y. 2012)	100, 103, 105, 106, 107
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011)	passim

STATUTES

29 U.S.C. § 206(d)(1)	72, 73
29 U.S.C. § 255(a)	4
42 U.S.C. § 1981(a)(b)(1)	102
42 U.S.C. § 2000e-5	4
Equal Pay Act of 1963, 29 U.S.C. § 206(d)	1, 3, 69, 70, 72, 104

OTHER AUTHORITIES

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29 C.F.R. § 1620.9(b)	70
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Federal Rule of Civil Procedure 23	passim
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Michael O. Finkelstein & Bruce Levin, <u>Statistics for Lawyers</u> 242-43 (Springer, 1st ed.1990)	71, 77
Joseph L. Gastwirth, et al., <i>Some Important Issues Courts Should Consider in Their Assessment of Statistical Analyses Submitted in Class Certification Motions: Implications for Dukes v. Wal-Mart</i> , 10 <u>Law, Probability & Risk</u> 225 (2011)	71, 77

EXHIBITS LIST

Exhibit	Document	Bates Number
1	EEOC Letter of Determination (Jan. 3, 2008)	CL-STR 6466-68
2	Mall Store Manager Job Description	SJI 2079-82
3	Jared General Manager Job Description	SJI 2099-101
4	Laryssa Jock EEOC Charge	SJI EEOC 50442-43
5	Johnson v. Morton's Restaurant Group, Inc., AAA No. 111600153105 (AAA 2007, Golick, Roberta Arb.)	
6	Bryant v. Joel Antunes, LLC, AAA, No. 1116001178305 (AAA 2007, Pratt, George C, Arb.)	
7	Declaration Appendix Chart	
8	Excerpts from 30(b)(6) Deposition of Tryna Kochanek (Oct. 25, 2012)	
9	Excerpts from Deposition of Joseph Beck (Jan. 24, 2013)	
10	Excerpts from Deposition of Barry Fernholz (Feb. 6, 2013)	
11	Organizational Chart	SJI 1929-36
12	Organizational Chart	SJI 1948-49
13	Glossary of Sterling Executives	
14	Excerpts from 30(b)(6) Deposition of William Luth (Nov. 12, 2012) ("Luth I")	
15	Email, To: Steve Martz, From: Bill Williams (June 10, 2009)	SJI 291718-19
16	Email, To: Michael Kestin, From: Bill Mooney (Mar. 24, 2008)	SJI 160099
17	Email, To: John Braunsdorf, From: Joseph Gifford (Jan. 19, 2009)	SJI 183093-94
18	Email, To: John Liebler, From: Marcia Hayes (Aug. 6, 2009)	SJI 280041-42
19	Email, To: Dan Gregorio, From: Joe Maisano (Dec. 23, 2011)	SJI 586813
20	Email, To: Michelle McFarland, From: Barry Fernholz (June 10, 2009)	SJI 81130-31
21	Email, To: Perry Bignotti, From: Barry Fernholz (May 12, 2009)	SJI 112836-37
22	Email, To: Laurie Farris, From: Barry Fernholz (Mar. 12, 2009)	SJI 977506-507
23	Email, To: Steve Martz, From Joe Beck (July 8, 2008)	SJI 63892
24	Jared Assistant Manager Job Description	SJI 1597-98

25	Mall Assistant Store Manager Job Description	SJI 1614-16
26	Jared Sales Associate Job Description	SJI 1606-07
27	Mall Sales Associate Job Description	SJI 1617-18
28	Sterling's Career Advancement Register	SJI 8744-62
29	Excerpts from 30(b)(6) Deposition of William Luth (Nov. 13, 2012) ("Luth II")	
30	Statement of Standards of Conduct and Business Ethics	SJI 2380-85
31	Team Member Handbook	SJI 289808-23
32	Memorandum, To: Store Managers, Repair Shop Managers, District Managers, District Repair Managers, From: Steve Becker (May 25, 2005)	SJI 2528-29
33	Excerpts from 30(b)(6) Deposition of Steven Becker (Dec. 4, 2012)	
34	T.I.P. Line/Internal Investigation Summary Report	SJI 238039
35	Investigation Closure Protocol	SJI 628154
36	"Steps to a Proper and Legal Investigation"	SJI 704873-78
37	Investigation Procedures Refresher	SJI 59056-58
38	theSource, Wage and Salary Administration	SJI 10885-86
39	theSource, Compensation Administration Management Guidelines	SJI 10883-84
40	Business Process Overview, Merit Increases	SJI 1269912-17
41	Report of Dr. Louis Lanier	
42	Wage Generator Override Analysis	SJI 1256256-84
43	Excerpts from Deposition of Robert Berger (Feb. 13, 2013)	
44	Excerpts from Deposition of William Luth (Apr. 4, 2013) ("Luth III")	
45	Email, To: Tryna, Kochanek, From: Mike Lynch (Oct. 26, 2010)	SJI 239338
46	Report of Dr. Kathleen Lundquist	
47	Excerpts from Deposition of Lisa McConnell (Sept. 27, 2012)	
48	Spring 2006 Field Merit Increases Report	SJI 894-931
49	Excerpts from Deposition of Mary Ellen Mennett (Mar. 21, 2013)	
50	Employee Counseling Report, Diane Thielker (Aug. 3, 2007)	CL-STR 8971-72
51	Email, To: Michael Lynch, From: Mary Ellen Mennett (Apr. 8, 2009)	SJI 1020337

52	Corporate Communication, Subject: Colorado Wage Transparency Act (Feb. 20, 2009)	SJI 30616-17
53	Succession Management District Manager Lesson Plan	SJI 32416-67
54	theSource Promotion/Transfer	SJI 10882
55	Module 4, District Manager Development Program - Recruiting and Succession Planning	SJI 28892-31
56	Email, Subject; Succession Plan Email - Everton (Sept. 2, 2009)	SJI 237270-71
57	Email, Everton FY13-2012 Succession Plan - 2012 Revision (Feb. 23, 2012)	SJI 550445
58	Succession Plan Table	SJI 837575-77
59	Email, To: Joe Beck, From: John Liebler (Apr. 8, 2011)	SJI 1046228
60	Email, To: Ann Burdette, From: On behalf of Sher Pappapietro (Feb. 26, 2012)	SJI 515782-83
61	Excerpts from Deposition of John Liebler (Feb. 8, 2013)	
62	Excerpts from Deposition of David Everton (Feb. 8, 2013)	
63	Email, To: Graceanne Nicholson, From: Barry Fernholz (Jan. 29, 2009)	SJI 130911-12
64	Email, To: Laurie Farris, From: Barry Fernholz (Jan. 30, 2009)	SJI 130982
65	Email, To: Joseph Gifford, From: Joe Beck (July 11, 2007)	SJI 559737
66	Email, To: Laurie Farris, From: Joe Beck (Nov. 5, 2010)	SJI 89122
67	Phase 2 District Manager Development Program Succession Management Leader's Guide	SJI 35478-530
68	Management Skills Listings for Mall Stores	SJI 1255976-79
69	Management Skills Listings for Jared Stores	SJI 1255980-83
70	Succession Plan Directions	SJI 207570-78
71	CAR Powerpoint Presentation	SJI 723150-93
72	Excerpts from Deposition of Michael Lynch (Jan. 23, 2013)	
73	Email, To: Bill Luth, From, Michael Lynch (Dec. 13, 2007), Lynch Ex. 13	SJI 286305-6
74	Divisional VP Administrative Assistant Manual	SJI 189687-95
75	Email, To: Laurie Farris, From: Graceanne Nicholson (Sept. 11, 2008)	SJI 76416

76	Email, To: Graceanne Nicholson, From: Susan St. Raymond (Aug. 3, 2009)	SJI 82175
77	Email, To: Judy Martin, From: Laurie Farris (June 26, 2008)	SJI 90858
78	Email, To: Randy Rubeis, From: Laurie Farris (Sept. 8, 2008)	SJI 91681
79	Email, To: Joe Gorsd, From: Graceanne Nicholson (Aug. 23, 2009)	SJI 103755
80	Email, To: Joseph Gifford, From: John Braunsdorf (Nov. 18, 2009)	SJI 69115
81	Email, To: Ann Burdette, From: Laurie Farris (Feb. 4, 2011)	SJI 72859
82	Email, To: Ann Burdette, From: John Liebler (Nov. 12, 2008)	SJI 77464
83	Email, To: John Liebler, From: Laurie Farris (Sept. 5, 2008)	SJI 91618
84	Email, To: Jeff Bourbon, From: Perry Bignotti (June 9, 2008)	SJI 66234
85	Email, To: Graceanne Nicholson, From: Laurie Farris (Sept. 3, 2008)	SJI 104915
86	Email, To: Ann Burdette, From: Laurie Farris (July 27, 2009)	SJI 93094
87	Excerpts from Deposition of Mark Light (Mar. 20, 2013)	
88	Letter from G. Maatman to J. Sellers (Apr. 18, 2013)	
89	Email, To: Tryna Kochanek, From: Mary Ellen Mennett (Nov. 11, 2011)	SJI 489716-19
90	Email, To: Joe Beck, From: Nancy Lex (Jan. 17, 2012)	SJI 489738
91	"Fernholz Mall Division," Presentation (Feb. 26, 2009)	SJI 192635-92
92	Memo, To: Dawn Souto-Coons, From: Mark Light, CC: Bill Mooney (Apr. 29, 1996)	CL-STR 1986
93	January 2012 Scorecard	SJI 524074
94	Excerpts from Deposition of Tom Parks (Mar. 8, 2013)	
95	Regional HR Specialist Position Description	SJI 1256061-62
96	Excerpts from Deposition of Dale Bowling (Feb. 19, 2013)	
97	Memo, To: Barry Ferholz, From: Susan Hale (Apr. 21, 2009)	SJI 242053-56

98	Employee Relations Handbook	SJI 470098-188
99	Top 10 Ways to Avoid Employment Law Pitfalls, Landmines, and Liability	SJI 274992-32
100	Maximizing Your Success Winning Through Effective Liability Prevention	SJI 274155-247
101	Excerpts from Deposition of Joseph Spagnola (Feb. 12, 2013)	
102	RESOLVE Program Brochure	SJI 3769-3780
103	Outtz Report	
104	Stipulation Regarding Versions of RESOLVE Program Agreement (Feb. 14, 2013)	
105	Finkelstein & Levin, Statistics for Lawyers (1991)	
106	Gastwirth and Bura, "Some Important Issues Courts Should Consider in their Assessment of Statistical Analyses Submitted in Class Certification Motions: Implications for Dukes v. Wal-Mart" (2011)	
107	House Summary	
108	Jock Summary	
109	Maddox Summary	
110	McConnell Summary	
111	Meierdiercks Summary	
112	Pagan-Huff Summary	
113	Reed Summary	
114	Rhodes Summary	
115	Shahmirzadi Summary	
116	Smith-Murphy Summary	
117	Souto-Coons Summary	
118	Wolf Summary	
119	Team Member Handbook	SJI 3347-78
120	Spagnola Letter to House (Nov. 6, 2006)	
121	Spagnola Letters to Huff (Apr. 8, 2008)	
122	Spagnola Letters to Jock (May 31, 2006)	
123	Spagnola Letter to Maddox (Apr. 8, 2008)	
124	Spagnola Letter to McConnell (Apr. 8, 2008)	
125	Spagnola Letter to Meierdiercks (July 13, 2006)	
126	Spagnola Letter to Reed (May 30, 2006)	
127	Spagnola Letter to Rhodes (May 30, 2006)	
128	Spagnola Letter to Shahmirzadi (Apr. 10, 2008)	
129	Spagnola Letter to Smith-Murphy (Sept. 1, 2006)	
130	Spagnola Letter to Souto-Coons (May 30, 2006)	

131	Spagnola Letter to Wolf (May 30, 2006)	
132	Declaration of Joseph Sellers (May 31, 2013)	
133	<i>Pryor v. Overseas Administrative Services</i> , JAMS Ref. No. 1100052926 (Apr. 28, 2011)	
134	<i>Pryor</i> , JAMS Ref. No. 1100052926 (Aug. 24, 2012)	
135	"Types of Effective Feedback"	SJI 35058
136	District Manager Development Program, Phase 2, Module: Facilitation Skills, Participant's Guide	SJI 35596-606
137	Managing Interpersonal Relationships Participant Guide	SJI 34596-789
138	Creating the Ultimate Work Environment VP/Trainer Script	SJI 34364-85
139	Sterling Jewelers Lesson Plan - Store	SJI 34118-35
140	Management Training System Recruitment & Selection Phase 1	SJI 10764-96
141	Sterling Jewelers Talent Acquisition Mall Career Development School	SJI 28045-72
142	Jared Performance Appraisal, Sales	SJI 468383-85
143	Jared Performance Appraisal, Inventory Control Clerk	SJI 468386-88
144	Jared Performance Appraisal, Department Manager	SJI 468379-81
145	Jared Performance Appraisal, Assistant General Manager	SJI 468374-77
146	Jared Performance Appraisal, General Manager	SJI 468369-72
147	Store Performance Appraisal, Sales Support	SJI 468365-67
148	Store Performance Appraisal, Sales	SJI 468360-63
149	Store Performance Appraisal, Assistant Manager	SJI 468355-58
150	Store Performance Appraisal, Store Manager	SJI 10628-31
151	Complaint, EEOC v. Sterling Jewelers Inc., No. 08-cv-0706 (W.D.N.Y. Sept. 23, 2008)	
152	Claimants' First Amended Class Action Complaint, Jock v. Sterling Jewelers, AAA No. 11 160 00655 (AAA June 26, 2008, Roberts, Kathleen, Arb.)	
153	Sterling Jewelers Inc., Talent Acquisition Mall CDS Facilitator's Guide	SJI 10682-712
154	Sterling Jewelers Store Satisfaction Survey	SJI 55987-6075
155	Email, Re: HR Basics, with attachment, From: Susan Hale	SJI 187712-37
156	Current Original Personnel Policy Manual as of 5/05	SJI 2120-2527

157	Plaintiffs' First Amended Class Action Complaint, Jock v. Sterling Jewelers, No. 2:08-cv-02875-JSR (S.D.N.Y. Apr. 23, 2008)	
158	Declarant Interview Form (Blank)	
159	Declarant Interview Form of Natalyn Belanger	
160	Declarant Interview Form of Jodi-Lynn Hartman	
161	Declarant Interview Form of Theresa Lauria	
162	Declarant Interview Form of Diane Acampora	
163	Declarant Interview Form of Cathy Malone	
164	Declarant Interview Form of Darlene Cerlanek	
165	Declarant Interview Form of Heather Ballou	
166	Declarant Interview Form of Sarah Converse	
167	Declarant Interview Form of Tina McDonald	
168	Declarant Interview Form of Richard Sumen	
169	Winning Through Effective Liability Prevention	SJI 630069-75
170	Career Path at Sterling Jewelers	SJI 51029
171	Career Path at Jared the Galleria of Jewelry	SJI 10611
172	Minimum Criteria & Validation Info, Career Advancement Register, 10/28/09, Luth Ex. 30	SJI 8621-24
173	Jared Commission Structure	SJI 10607
174	Sterling Commission Structure	SJI 39815
175	Corporate Communication, Re: New Hire Process Update (Aug. 30, 2007)	SJI 10651-52
176	Training Task Force- Wage Rate Training	SJI 279281-89
177	Wage Rate Generator - Phase 1 Roll-Out	SJI 759056-57
178	Wage Rate Generator Presentation, Beck Ex. 12	SJI_EEOC 129291-312
179	Memo, Re: 200 Spring Performance Appraisals and Merit Increases, Beck Ex. 13	SJI EEOC 289777
180	Summary Highlights Pay Practices Discussion (May 24, 2006), Beck Ex. 14	SJI_EEOC 121132
181	Memo, Re: MIW Placement Improvement, Fernholz Ex. 10	SJI 712196-211
182	Field Spring 2002 Merit - Everton Spreadsheets with attachment, Everton Ex. 7	SJI_EEOC 22307
183	Correspondence, To: Tryna Kochanek, From: Barry Fernholz	SJI/EEOC 77362-63
184	Email, To: Jean Templet, From: Dave Everton (May 12, 2010), Everton Ex. 15	SJI_EEOC 479055
185	Resume, Diane Dietrick, Spagnola Ex. 33	SJI 682309-11
186	Wage Rate Generator, Berger Ex. 4	SJI 440-46
187	The HR Basics 2008, Presentation, Parks 5	SJI 187713-37

188	Field Human Resources Overview, Menett Ex. 23	SJI 595606-23
189	Starting Wage Rate Generator Field Compensation Presentation, Luth Ex. 6	SJI 477-97
190	Email, To: Dave Everton, From: Gretchen Grawunder (Oct. 25, 2012), Luth Ex. 13	SJI 1035022
191	Merit Increase Guidelines, Luth, Ex. 14	SJI 403
192	Store Performance Appraisal, Laryssa Jock (Oct. 1, 2009), Luth, Ex. 17	SJI 9332-35
193	Wage Rate Generator Presentation, Luth Ex. 35	SJI 1046400-25
194	Wage Generator (FIS Version), Luth Ex. 36	SJI 3431-43
195	Email, To: Tryna Kochanek, From: Mike Lynch, Luth Ex. 39	SJI 239338-40
196	Promotion/Transfer Policy	SJI 2164-65
197	Resolve Program Alternative Dispute Resolution (ADR) Policy	SJI 2284-85
198	Sexual Harassment Policy	SJI 2859-60
199	Take it Personally, Sterling	SJI 4014-17
200	Memo, To: All Stores, From: Tryna Kochanek and Stever Becker, Re: Promotion Opportunities	SJI 8763-65
201	Email, Corporate Communication, Re: New Hire Process Update	SJI 10651-52
202	Interview Checklist - District Manager Candidate	SJI 56261-303
203	Wage Rate Generator Presentation	SJI 1904044-69
204	Wage Rate Generator Announcement (July 9, 2009)	SJI 759056-57
205	Fall 2006 Jared Performance Appraisal Guide	SJI 395-402
206	Field Performance Appraisal Guide	SJI 84-94
207	Store Performance Appraisal, Judy Reed (July 30, 2003)	SJI 9759-61
208	Jared Performance Appraisal, Marie Wolf (Feb. 21, 2008)	SJI 10477-79

I. INTRODUCTION

For more than ten years, Sterling has systematically paid female employees in its stores less than their male counterparts and promoted these female employees less frequently and after a longer wait than their male counterparts. Accordingly, Claimants seek certification of a class of female employees challenging sex discrimination in compensation and promotions against women who were employed by Sterling Jewelers Inc. throughout its retail stores. Claimants allege discrimination under both the intentional pattern or practice and the disparate impact theories of liability under Title VII and the Equal Pay Act. Claimants challenge policies or practices that have operated uniformly throughout Sterling's retail operations and consistently during the proposed class period.

Gender bias at Sterling begins with the Company's top executives, including the CEO, as the record reveals numerous and explicit incidents of conduct that are demeaning to women and which have sent a powerful and unmistakable message that women are less valued than men in Sterling's workforce. Compounding the toxic effect of this conduct, Sterling affords its managers who make pay and promotion decisions discretion in interpreting the common standards governing those decisions, creating the opportunity for this widespread antipathy toward women to influence the pay and promotion decisions throughout the Company. In addition, Claimants challenge discrete features of Sterling's pay and promotion policies on grounds that they have had an adverse effect on women employees and are neither consistent with the requirements of the jobs to which they apply, nor justified by business necessity. Finally, Claimants challenge disparities in pay under the Equal Pay Act for women working in substantially similar jobs as male employees in the same stores within each district.

Throughout the proposed class period and across all of Sterling's retail operations, its workforce data shows disparities adverse to women in pay and promotion decisions that cannot

be attributed to legitimate, non-discriminatory factors. There are disparities in pay at hire and for incumbent employees throughout their tenure. These disparities are the product of a system that sets starting pay rates using prior job experience and that relies upon factors that are not job related and permit the intrusion of bias.

Rather than correcting these disparities at the time of annual merit increases, because Sterling applies a percentage increase to employees' base compensation, its merit increase process perpetuates and magnifies disparities in the compensation of employees in Sterling's stores. Sterling's companywide policy of prohibiting employees from discussing the amounts of their compensation with each other concealed these disparities and thus prevented putative class members from discovering pay inequities, insulating Sterling from challenge.

Throughout the time period covered by this case, Sterling also promoted men more frequently and quickly than similarly-situated women, meaning that fewer women are promoted than men and women who are promoted worked and waited longer for such promotions than similarly situated men. These promotions into and within management at its stores have been made pursuant to Sterling's Succession Planning system, which operates consistently throughout the Company. Pursuant to the Succession Planning system's common set of criteria, candidates for promotion are identified, groomed and selected for promotion. These promotion criteria and the grooming process used to develop candidates for promotion have led to the promotion of male candidates more quickly and frequently than their female counterparts. Those differences reach statistically significant levels.

After Claimants filed their companywide claims challenging the preferences accorded to male employees in promotions, Sterling adopted a Career Advancement Register ("CAR"), which allows employees to register their interest in promotional opportunities. However, instead

of creating a neutral source of candidates from which selections could be made, Sterling continued to favor male candidates for promotion through the Succession Planning system and used registration in CAR as a mere formality for many candidates, requiring candidates to register in the CAR, but only once the promotion had already been decided upon.

The Named Claimants timely filed charges with the EEOC and complaints with Sterling's RESOLVE Program, alleging they were adversely affected by one or more of these challenged practices, arising under Title VII and the Equal Pay Act ("EPA"), and have vigorously and steadfastly advanced the interests of members of the proposed class. Indeed, in response to the charges filed with the EEOC, the Commission issued a determination that Sterling "subjected charging parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation."¹ The EEOC found that "[s]tatistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees."²

Claimants, therefore, seek certification of a class comprised of women who have worked in Sterling's retail stores as Sales Associates, Department Managers, or in any Assistant Manager, or Store Manager position³ ("Retail Sales Employees" or "the putative class") for the

¹ EEOC Letter of Determination (Jan. 3, 2008), CL-STR 6466-68 at 6468, attached as Ex. 1.

² EEOC Letter of Determination at 3, Ex. 1.

³ In the Jared Division, Assistant Managers are called Assistant General Managers, and Store Managers are called General Managers. *See* Mall Stores Store Manager Job Description, SJI 2079-82; Jared General Manager Job Description, SJI 2099-101, attached as Exs. 2 and 3. In this brief, Mall Assistant Managers and Jared Assistant General Managers will be referred to as "Assistant Managers." Similarly, Mall Store Managers and Jared General Managers will be referred to as "Store Managers."

period from June 2, 2002 to the first day of trial.⁴

In support of their motion, Claimants offer evidence that Sterling's pay and promotion practices have operated uniformly and with adverse effect on members of the proposed class. The record is replete with evidence of behavior demeaning to women by executives and managers from the CEO down, including by those who were involved in decisions regarding

⁴ The temporal scope of the pay and promotion claims of the putative class is derived from the applicable statute of limitations.

For the claims alleging discrimination in compensation brought under Title VII, the class relies upon the charge of Named Claimant Laryssa Jock to establish commencement of the class period. Ms. Jock filed a timely charge of discrimination on behalf of herself and other women similarly situated asserting discrimination in compensation because of their sex in violation of the EPA and Title VII on May 18, 2005. *See* SJI_EEOC 50442-43, attached as Ex. 4. Therefore, the starting point for class membership of women asserting compensation claims under Title VII begins July 22, 2004. 42 U.S.C. § 2000e-5 (setting 300-day period for discrimination claims filed with a local agency).

For the claims alleging discrimination in compensation brought under the EPA, the class again relies upon Ms. Jock's EEOC charge, which Sterling received on June 2, 2005. SJI_EEOC 50442-43, Ex. 4. This charge put Sterling on notice as to the pay disparities and invoked the EPA. Jock's charge tolls the statute of limitations for the compensation claims of the putative class under the EPA going back three years to June 2, 2002. *See* 29 U.S.C. § 255(a) (setting three-year period for willful violations of EPA). While Jock also alleged systematic violations in compensation in violation of Title VII, because the EPA limitations period is broader, Claimants rely on the EPA to define the onset of the class period for the compensation claims.

Rather than require that women who wish to participate in the EPA claim file consents to join Ms. Jock's claim in order to toll the limitations period governing their claims, as is typically required of claims pursued in court, the AAA's Supplementary Rules for Class Arbitrations, which govern this action, permit women to rely upon Ms. Jock's claim to participate in the class EPA claim she filed and to rely upon the tolling afforded Ms. Jock's claim. *See Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 352-53 (4th Cir.), *cert. denied*, 555 U.S. 815 (2008) (an employer that submits claims to arbitration is bound by the AAA rules, which subject class claims to the Rule 23 opt-out process even where the claims arise under the FLSA, which ordinarily prescribes an opt-in process); *see also Johnson v. Morton's Rest. Group, Inc.*, AAA No. 111600153105 (AAA 2007, Golick, Roberta, Arb.), at 19, n.28, attached as Ex. 5; *Bryant v. Joel Antunes, LLC*, AAA No. 1116001178305 (AAA 2007, Pratt, George C., Arb.), at 2, attached as Ex. 6. The Arbitrator has determined that other claimants do not need to file a RESOLVE claim in order to participate in the class arbitration. *See* Clause Construction Clarification Order (June 26, 2009).

For the claims alleging discrimination in promotions brought under Title VII, the class relies upon the charge of Named Claimant Dawn Souto-Coons, who filed a timely charge of discrimination on October 3, 2005 on behalf of herself and other women similarly situated asserting discrimination in promotions because of their sex in violation of Title VII. Relying upon the 300-day period under Title VII within which members of the class advancing promotion claims must have been able to file their own charges, the commencement of the class period for the promotion claims is December 7, 2004. 42 U.S.C. § 2000e-5 (setting 300-day period for discrimination claims filed with a local agency).

compensation and promotion, and of a dysfunctional Human Resource department that abdicated its responsibilities and utterly failed to curb or address the ongoing discrimination. In addition, 233 witnesses, who worked for Sterling in 35 states in more than 450 stores, have offered testimony in support of the claims in this case, including testimony regarding at least 410 specific instances of alleged pay discrimination and at least 267 instances of alleged promotion discrimination.⁵ Taken together, this evidence presents a compelling case for certifying the claims of the Named Claimants and the class they seek to represent pursuant to AAA Supplementary Rule 4 and Fed. R. Civ. P. 23.

II. STATEMENT OF FACTS

A. Corporate Structure of Sterling Jewelers Inc.

1. Field Operations

Sterling Jewelers Inc., a wholly-owned subsidiary of Signet Jewelers, operated approximately 1,450 stores nationwide as of year-end 2012, consisting of its Mall Division, which includes the national Kay Jewelers brand, and its free-standing Jared The Galleria of Jewelry (“Jared”) stores.⁶ Operation and oversight of these stores is known as “field operations” and is concentrated under Senior Vice President of Operations (“SVPO”), Tryna Kochanek.⁷

⁵ Declaration Appendix Chart, attached as Ex. 7. These figures include discrimination testified to by the 12 Named Claimants in their depositions.

⁶ 30(b)(6) Deposition of Tryna Kochanek (Oct. 25, 2012) at 12:18-13:12, 70:9, attached as Ex. 8. Signet Jewelers was formerly domiciled in the United Kingdom, but recently changed its domicile to Bermuda. *See Company History*, SIGNETJEWELERS.COM, <http://www.signetjewelers.com/sj/pages/aboutus/history> (last visited June 18, 2013). In addition to Kay Jewelers, Sterling’s Mall Division includes Marks & Morgan, JB Robinson, Belden Jewelers, Friedlanders Jewelers, Goodman Jewelers, LeRoy’s Jewelers, Osterman Jewelers, Rogers Jewelers, Shaw’s Jewelers, and Weisfield Jewelers. Kochanek Dep. 12:13-13:1, Ex. 8. These stores are located primarily inside shopping malls. Kochanek Dep. at 12:18-13:12, Ex. 8. Approximately 85% of Sterling’s stores are Mall stores. Deposition of Joseph Beck (Jan. 24, 2013) at 10:10-11:12, attached as Ex. 9. The remainder, approximately 200, are Jared stores. Deposition of Barry Fernholz (Feb. 6, 2013) at 8:9-16, attached as Ex. 10; Kochanek Dep. at 70:13-24, Ex. 8.

⁷ Kochanek Dep. at 12:13-14, Ex. 8; Organizational charts, SJI 1929-36, 1948-49, attached as Exs. 11 and 12; *see* Glossary of Sterling Executives, attached as Ex. 13.

Kochanek, who has held this position since 2000,⁸ has responsibility and oversight for three divisions, each overseen by a Divisional Vice President (“DVP”): the Mall Division, the Jared Division, and Operations Administration.⁹ DVPs Joseph Beck and Barry Fernholz oversee the Mall and Jared Divisions, respectively.¹⁰ They provide functionally the same oversight and are responsible for performance and training in their divisions.¹¹ DVP Bill Luth currently oversees Operations Administration and has done so since 2000.¹²

As of year-end 2012, 14 Vice Presidents of Regional Operation (“VPROs”) reported to Beck and Fernholz, 11 in the Mall Division and three in the Jared Division.¹³ And, each Region contained between seven and nine Districts. Of these, 91 are Mall Districts, containing approximately between 11 and 15 stores, and 21 are Jared Districts, containing 10 or fewer stores.¹⁴ District Managers (“DMs”) report to the VPROs, and their duties are the same across the Company.¹⁵

⁸ Kochanek Dep. at 15:1-16, Ex. 8.

⁹ *Id.* at 14:23-25, Ex. 8. Operations Administration is dedicated to assisting field operations in day-to day activities and is housed at Sterling’s headquarters. *Id.* at 53:7-18, Ex. 8.

¹⁰ *Id.* at 53:7-18; 61:4-14, Ex. 8. For approximately 18 months beginning in early 2008, John Liebler, who is currently a Vice President of Regional Operations (“VPRO”), served as a DVP alongside Fernholz and Beck, overseeing some Mall operations. *Id.* at 62:12-63:18, Ex. 8.

¹¹ *Id.* at 54:3-56:12, 67:18-68:11, Ex. 8; Fernholz Dep. at 42:2-43:8, Ex. 10.

¹² Kochanek Dep. at 53:7-18, Ex. 8; 30(b)(6) Deposition of William Luth (Nov 12, 2012) (“Luth I”) at 11:5-8 (explaining that he has held the position of VP of Operations and Administration since 2000), attached as Ex. 14. Bill Luth was deposed twice as a 30(b)(6) witness on Sterling’s compensation and promotion policies and procedures and once in his individual capacity. Those depositions are referred to as Luth I, II, and III.

¹³ Kochanek Dep. at 15:23-16:2, Ex. 8; Beck Dep. at 10:7-10, Ex. 9; Fernholz Dep. at 27:1-6, Ex. 10. Prior to February 2004, Sterling did not distinguish between Divisional and Regional Vice Presidents; instead employing 10 Vice Presidents, each of whom oversaw a region and reported directly to Kochanek. Kochanek Dep. at 59:10-19, Ex. 8. Liebler, Beck, and Fernholz were among these 10 Vice Presidents.

¹⁴ Store Lists, SJI 181771-72; 1242081-91; 1255868 are voluminous (collectively over 50,000 pages if printed) and are therefore not attached as exhibits.

¹⁵ Luth I Dep. at 75:15-76:5, Ex. 14. All DMs share a single position description. Kochanek Dep. at 161:23-162:21 (explaining that DM duties are consistent in Jared and Mall Divisions and have not changed during the class period), 162:22-164:5 (describing DM job duties), Ex. 8.

The offices of the SVPO, the three DVPs and 14 VPROs are all located at Sterling's headquarters in Akron, Ohio, and these executives meet regularly regarding the oversight and performance of Sterling's field operations.¹⁶ The DMs, with VPRO oversight, are largely responsible for determining compensation of Retail Sales Employees. DMs set starting pay rates for new Retail Sales Employees, determine merit increases, and set pay rates upon promotion, with VPRO oversight. DMs and VPROs have performed these responsibilities since at least 2002.¹⁷ In awarding promotions, DMs are charged with identifying, grooming, and recommending candidates for their VPROs' review and approval.¹⁸ VPROs must approve all management-level promotions, subject to the final approval of the DVPs.¹⁹ Indeed, Sterling has multiple checks within a companywide system to confirm and memorialize the approval of VPROs and DVPs, including the use of forms called Manager Change Forms ("MCFs"), on which VPROs and DVPs indicate their written consent.²⁰

¹⁶ Kochanek Dep. 76:12-14, Ex. 8; Fernholz Dep. at 49:8-9 (describing how Fernholz and Beck's offices are close to each other in Home Office), 100:20-102:2, 105:2-7 (describing regular operations meetings that have taken place the entire time that Fernholz has been a DVP), Ex. 10; Beck Dep. at 15:4-16:9 (describing regular one-on-one meetings with VPROs and operations meetings of VPROs and DVPs), Ex. 9.

¹⁷ Luth I Dep at 230:16-22, 235:19-236:17 (merit pay ranges set by HR; DM determines percentage given to employees), 93:8-94:11 (VPROs oversee DMs and work to determine ranges for setting starting pay), attached as Ex. 14; Kochanek Dep. at 94:22-95:6 (DMs set starting pay for sales employees), 97:3-98:2 (VPROs provide oversight for setting pay), Ex. 8; *see* SJI 291798-19 (email from DM to VPRO regarding pay for potential new hires); SJI 160099; SJI 183093-94; SJI 280041-42; SJI 586813 (emails between DMs and VPROs regarding pay upon promotion), attached as Exs. 15-18..

¹⁸ *See infra* Sec. II.C.2 at 22 (describing Succession Planning policy).

¹⁹ Fernholz Dep. at 139:5-7, Ex. 10.

²⁰ Kochanek Dep. 103:23-104:11, Ex. 8. VPRO and DVP approval is much more than *pro forma*. *See* SJI 81130-31 (email from DVP to VPRO declining to approve proposed promotion without more info); SJI 112836-37 (email from DVP to VPRO questioning promotion of candidate who is down on sales goal); SJI 977506-07 (email from DVP to VPRO questioning promotion of candidate with poor standards); SJI 63892 (email from DVP to VPRO requesting more information on a candidate because he doesn't "promote people who are down [on standards]."), attached as Exs. 20-23.

In the stores, the highest-ranking employee is the Store Manager.²¹ Below the Store Manager is an Assistant Manager, whose duties are essentially the same in Mall and Jared stores.²² Jared stores employ a third tier of management-level employees, Diamond and Timepiece Department Managers. All Sterling stores have Sales Associates, whose duties are virtually identical in the Mall and Jared Divisions.²³

Sterling maintains uniform job descriptions for all of these positions that are applicable companywide. Employees are allowed to move between stores within the same district, across districts, and between the Mall and Jared Divisions.²⁴ Sterling's personnel policies, including those relating to compensation and promotion, are common to all store-based Sterling employees.²⁵

2. Human Resources

Sterling's Human Resources ("HR") department operates out of corporate headquarters in Akron and is overseen by Steven Becker, Senior Vice President of HR. HR contains a Training division, responsible for promulgating uniform training for field operations throughout the

²¹ See Mall Stores Store Manager Job Description, SJI 2079, Ex. 2; Jared General Store Manager Job Description, SJI 2099, Ex. 3; Kochanek Dep. at 168:1-178:25 (confirming that Jared GM and Mall SM have same duties), Ex. 8.

²² See Jared Assistant General Manager Job Description, SJI 1597-98; Mall Assistant Store Manager Job Description, SJI 1614-16, attached as Exs. 24 and 25.

²³ See Jared Sales Associate Job Description, SJI 1606-07; Mall Sales Associate Job Description, SJI 1617-18, attached as Exs. 26 and 27.

²⁴ Sterling's Career Advancement Register 2009, SJI 8744-62 at 8751, Luth Ex. 33 ("Team members move frequently from store to store and across districts and regions"), attached as Exhibit 28; 30(b)(6) Deposition of William Luth (Nov. 13, 2012) ("Luth II") at 213:22-218:22, Ex. 29; Kochanek Dep. at 178:2-25 (explaining that employees move between Mall and Jared Divisions and across states), Ex. 8.

²⁵ Kochanek Dep. at 184:11-190:23 (personnel policies are consistent across field operations), Ex. 8; Luth Dep. I at 14:4-19:5 (Operations Administration partners with HR to develop promotion policies), Ex. 14; Code of Conduct, SJI 2380-85 (companywide), attached as Ex. 30; Team Member Handbook, SJI 289808-23 (companywide), attached as Ex. 31; see also Memorandum, SJI 2528-29 (regarding updates to personnel policies from Sr. VP of HR to all managers, attached as Ex. 32.

Company.²⁶ Training is an integral part of Sterling’s corporate culture and is consistent throughout the field.²⁷ For example, every Sales Associate is required to complete Associate Training System Phases 1 and 2.²⁸ HR also contains an Employee Relations division, overseen by Vice President of Employee Relations, Michael Lynch. Employee Relations “provid[es] employee relations support to the field organization,” including management and non-management employees.²⁹ Maryellen Mennett is the Director of Field HR. Under the direction of Lynch and Mennett, Regional HR Specialists provide HR service to employees in the field, including providing advice, interpreting personnel and HR policies, and receiving and investigating complaints. Each specialist is assigned to serve employees in one or more regions.³⁰ These Regional HR Specialists follow a common set of guidelines for responding to and investigating employee complaints.³¹

B. Sterling’s Compensation Policies

Sterling has systematically paid members of the putative class less than male counterparts and has applied policies that have had an adverse impact on members of the putative class. For the entire period covered by this case, Sterling’s policies governing compensation have been the same for all Retail Sales Employees, including members of the putative class, in each of

²⁶ Kochanek Dep. 74:9-76:11, Ex. 8. Until 2012, training was housed under Luth in Operations Administration. *Id.*

²⁷ *Id.* at 146:21-151:8, Ex. 8.

²⁸ *Id.*, Ex. 8.

²⁹ 30(b)(6) Deposition of Steven Becker (Dec. 4, 2012) at. 51:4-17, attached as Ex. 33.

³⁰ *Id.* at 51:8-52:10, Ex. 33.

³¹ *See, e.g.*, Instructions for drafting Internal Investigation Summary, SJI 238039; Guidelines for investigation closure, SJI 628154; Steps to a Proper and Legal Investigation, SJI 704873-78; Investigation Procedures Refresher, SJI 59056-58, attached as Exs. 34-37.

Sterling's stores Companywide.³² Under these policies, Sterling's DMs are responsible for making determinations about the compensation of Retail Sales Employees.³³

The compensation policies at issue in this case are: (1) Sterling's policy of setting starting pay of Sales Associates based on prior job experience and (2) Sterling's policy of setting merit increases as a percentage of base pay. Claimants challenge the following aspects of Sterling's compensation process:

- *Setting Starting Pay:* Throughout the period covered by this case, Sterling has directed DMs to set starting pay for newly hired Sales Associates using prior job experience, including prior management experience, as the touchstone. But Sterling has afforded its DMs considerable discretion in determining how to value prior job experience in setting starting pay rates. As a result, the process for setting starting pay rates is susceptible to the influence of bias. Even when Sterling identified particular types of experience to credit in setting starting pay rates, some, such as prior management experience, have no bearing on performance as a Sales Associate and should not have been considered in setting starting pay.
- *Annual Merit Increases:* Sterling's policy is to award annual merit increases based on the employee's performance. By formulating the amount of the merit increase as a percentage increase to an employee's base compensation, Sterling perpetuates, and in some cases magnifies, the prior disparities in base pay rates. Rather than correcting these disparities at the time of annual merit increases, through out-of-cycle adjustments, Sterling has consistently failed to address these wage disparities.
- *Compensation is Unrelated to Performance:* Notwithstanding that female Retail Sales Employees outperform similarly-situated men, the women have consistently received lower base rates, and accordingly lower merit increases. There are two measures of performance primarily used at Sterling. First, Sterling evaluates the performance of employees annually. These performance evaluations are used to set annual merit increases. Women consistently have received higher performance evaluations on average than men. Second, Sterling pays sales employees a fixed commission based on the amount of merchandise they sell. Women on average receive higher commissions than men who work in the same stores.

³² See, e.g., Sterling Wage and Salary Administration, SJI 10885-86 and Compensation Administration Management Guidelines, SJI 10883-84, attached as Exs. 38 and 39.

³³ See, e.g., Business Process Overview, Merit Increases, SJI 1269912-17, attached as Ex. 40; Luth I Dep. at 93:8-94:11 (using wage engine, VPROs oversee DMs to set starting pay), 230:16-19 and 232:11-22 (percentages for merit pay increases signed off by DMs), Ex. 14.

Operating within uniform, companywide policies, DMs have made compensation decisions that consistently have paid female Retail Sales Employees less than their male counterparts.

1. Pay Disparities Originate with Starting Pay Rates of Sales Associates

Throughout the class period, female Retail Sales Employees have been paid less than men performing substantially the same work in the same facilities.³⁴ These disparities in pay are attributable, in large part, to Sterling’s method of setting starting pay for Sales Associates.³⁵ Throughout the proposed class period, Sterling has consistently directed that starting pay levels for Sales Associates be based on the nature and amount of prior job experience they possess at the time of hire.³⁶ The criteria Sterling has selected for evaluating prior job experience, which are common across the Company, do not correlate with success in the sales positions and have had an adverse impact on starting pay levels for female new hires.³⁷ In fact, an internal study confirms that higher-paid employees do not generate higher sales.³⁸ Additionally, the discretion Sterling has provided its DMs in valuing prior job experience for setting starting pay levels has

³⁴ Report of Dr. Louis Lanier at Tbl. 7, attached as Ex. 41.

³⁵ Virtually all new Retail Sales Employees are hired for Sales Associate positions, and virtually all promotions are made from incumbent employees, due to Sterling’s promotion-from-within policy. Luth I Dep. at 126:20-25; 127:1-17, Ex. 14; *see infra* Sec. II.C.1 at 21 – 22 (discussing promote-from-within policy).

³⁶ *See, e.g.*, Wage and Salary Administration Guidelines, Ex. 38; Compensation Administration Management Guidelines, Ex. 39; Luth I Dep. at 183:10-25 (previous experience primary driver for setting starting pay for past decade); 189: 17-190:2 (prior to WRG, managers were entrusted within certain constraints to give credit to prior work experience they regarded as relevant), Ex. 14.

³⁷ Lanier Report at Tbl. 9, Ex. 41.

³⁸ *See* Wage Generator Override Analysis, SJI 1256256-84, attached as Ex. 42. Sterling examined the efficacy of VPRO overrides of WRG-generated rates to attract “highly qualified candidates.” The analysis found that overrides were most often offered to candidates with “previous management experience,” yet also found that employees hired at rates set by the WRG were more likely generate sales that supported their pay rates than those hired at “override” rates. In other words, employees who were compensated more highly because of prior management experience did not justify that higher pay rate.

been used to set starting pay rates for women Sales Associates at levels lower than for men doing substantially the same work.³⁹

The benchmark for setting starting pay rates and the group of senior managers and executives charged with setting those rates have remained constant throughout the proposed class period. Throughout this period, prior job experience has remained the touchstone,⁴⁰ and Sterling has consistently relied upon DMs to assess candidates' prior job experience in setting starting pay rates for Sales Associates.⁴¹

Before 2009, Sterling directed its DMs to set starting pay for Sales Associates "with no applicable experience" "at the minimum rate assigned to their job."⁴² Higher starting pay rates could be awarded to new hires with prior job experience that the DMs regarded as relevant.⁴³ Sterling provided limited guidance as to which prior job experience warranted pay rates above the minimum level. As a consequence, the DMs were left to determine, for example, whether to credit prior job experience that did not involve sales.⁴⁴

In July 2009, Sterling instituted a computer-based algorithm called the Wage Rate Generator ("WRG"), which computed the starting pay rates that could be offered to new Sales Associates based upon the nature and amount of their prior job experience, the location of the

³⁹ Lanier Report at Tables 8a-8c and Table 9, Ex. 41.

⁴⁰ *See supra* at 11, n.36.

⁴¹ *See supra* at 11, n.36; Deposition of Robert Anthony Berger (Feb. 13, 2013) at 67:2-12 (in development of WRG, recognition by VPROs that prior job experience should be credited in setting starting pay), 96:9-20 (WRG task force was setting a uniform set of criteria for setting starting pay, not changing prior practice in other ways), attached as Ex. 43.

⁴² Compensation Administration Management Guidelines, Ex. 39.

⁴³ *Id.*, Ex. 39; Luth I Dep. at 196:13-17 (credible prior job experience has additional value that warrants adjustment above base pay), Ex. 14.

⁴⁴ *See, e.g.*, Luth I Dep. at 197:15-198:6 (prior to WRG a school teacher may be in a position to get some credit for prior job experience based on discretion of manager), Ex. 14.

store, and the cost of living in the area.⁴⁵ The WRG was designed to address an admitted lack of guidance for DMs in the types of prior job experience to credit in setting starting pay rates for Sales Associates.⁴⁶ Remarkably, determinations about which prior job experience to credit in setting starting pay rates were based on the idiosyncratic and personal experiences of Sterling's executives.⁴⁷

From July 2009 through the end of 2011, the WRG prescribed three starting pay rates that could be offered to each new hire: 1) recommended market wage; 2) plus rate; and 3) wage maximum.⁴⁸ The rates were computed by the WRG algorithm, based on the value that it credited for the prior job experience entered by the DMs for each candidate. In an effort to suppress the wage rates being offered to new hires, in late 2010, Sterling required DMs to obtain approval from their VPROs before offering either of the two higher rates and, beginning in late 2011 or early 2012, Sterling modified the WRG to provide DMs with only a single base rate, formulated by the same algorithm used since 2009.⁴⁹

At no time did Sterling conduct a job analysis of the Sales Associates positions to determine and weight professionally and systematically the types of prior job experience that

⁴⁵ Luth I Dep. at 154:18-155:17 (explaining that WRG was a more sophisticated take on coupling experience, store and geographic area, and store volume), Ex. 14.

⁴⁶ See Berger Dep. at 63:9-14 (explaining that WRG was designed to ensure that there was consistency in the factors the district managers considered in setting those starting pay rates for sales associates), Ex. 43. In their discussion of Rule 23(a)(2)'s requirements below, Claimants explain how the discretion afforded by Sterling's compensation policies was exercised in a common way. See *infra* Sec. III.B.2. at 80-85.

⁴⁷ Deposition of William Frank Luth (Apr. 4, 2013) ("Luth III") at 52:6-54:17, 57:22-64:4 (describing personal experience with sales employees in different retail settings, bank tellers, service industry employees in determining what prior job experience is relevant to setting starting pay at Sterling), attached as Ex. 44.

⁴⁸ Luth I Dep. at 153:23-154:17, Ex. 14.

⁴⁹ *Id.* at 156:3-158:15, Ex. 14; Berger Dep. at 139:7-17, Ex. 43.

correlate most closely with successful performance in these starting jobs.⁵⁰ Nor, did Sterling conduct any studies comparing the starting pay rates of male and female hires to determine whether gender disparities existed.⁵¹

An analysis of Sterling's workforce data shows that, on average throughout the relevant period, women have consistently been assigned lower starting pay rates as compared to similarly-situated men.⁵² Moreover, an analysis of a representative sample of job applications from candidates hired for Sales Associate positions shows that the types of prior job experience identified by Sterling's WRG do not fully explain the disparities in starting pay rates adverse to female Sales Associates and that Sterling's use of prior management experience had an adverse effect on female Sales Associates.⁵³ In addition, Sterling's use of prior job experience, as defined in its current Wage Rate Generator, is a poor predictor of sales productivity.⁵⁴

2. Sterling Perpetuated Pay Disparities through Merit Increase Practices

Sterling's policy governing merit raises provides that pay adjustments may be made once each year based upon the results of documented performance in a written performance appraisal.⁵⁵ Sterling's merit increase process requires that DMs propose a merit increase based upon the employee's aggregate performance appraisal score.⁵⁶ The proposed merit increase

⁵⁰ Luth II Dep. at 45:19-24, 170:2-171:12, Ex.29; Becker Dep. at 15:23-16:19, Ex.33; Deposition of Michael Lynch (Jan. 23, 2013) at 44:17-25, 47:18-50:23, attached as Ex. 72; *see* Email re: prior job experience (Oct. 26, 2010), Luth Ex. 39, SJI 239338, attached as Ex. 45.

⁵¹ Becker Dep. at 25:14-27:13, Ex. 33; Berger Dep. at 155:8-156:7, Ex. 43; Lynch Dep. at 45:14-47:17, 195:5-197:13, Ex. 72.

⁵² Lanier Report at Tbls.7, 8a-8c, 9, Ex. 41.

⁵³ *Id.*, Ex. 41; Report of Dr. Kathleen Lundquist at 37-36, attached as Ex. 46.

⁵⁴ Lanier Report ¶¶37-39 and Tbl. 9, Ex. 41.

⁵⁵ Business Process Overview, Merit Increases (All full-time and part-time employees, with at least 10 months of service at Sterling, are eligible to receive an increase once a year), Ex. 40.

⁵⁶ *Id.* at SJI 1269914 (explaining that DMs propose merit increases; VPROs review and "appropriate changes are made."), Ex. 40.

must be approved by top executives at the Company before it becomes final.⁵⁷ Rather than utilize the merit increase process to ensure women were paid equally for substantially the same work, Sterling used a formulaic process for awarding raises that has perpetuated the disparities in pay adverse to women from the time of hire. Despite the fact that women perform better than men holding the same jobs using Sterling's own performance appraisal process,⁵⁸ women have consistently received lower base pay. Because female Retail Sales Associates have lower base pay rates to which percentage merit increases are applied, they are systematically paid less than similarly situated males.⁵⁹ Therefore, where a male employee and female employee receive the same performance appraisal score where the male is paid a higher base rate, the percent by which each employee's base pay will increase is the same. However, because her base rate is lower than his, the amount by which his base pay will increase is larger than the amount by which her base rate will increase. Thus, Sterling's policy for awarding annual merit increases has perpetuated the disparities adverse to women in starting pay rates.⁶⁰

Even after the EEOC issued a Companywide cause finding, based on the determination that Sterling systematically compensated female Retail Sales Employees less than their male counterparts throughout the Company, Sterling made no effort to correct disparities in base pay between men and women Retail Sales Employees through the merit increase process.⁶¹

⁵⁷ Luth I Dep. at 232:11-234:3, 233:18-234:3, 234:25-235:7 (confirming that executive management team approves budgetary determinations, including aggregate merit increase amount), Ex. 14.

⁵⁸ Lanier Report at ¶23, Tbl. 3, Ex. 41; *see infra* Sec. II.D. at 27.

⁵⁹ Lundquist Report at 37-38 (explaining how over time "effect is compounded," increasing disparities), Ex. 46; Lanier Report at ¶¶42-45, Ex. 41.

⁶⁰ Lanier Report at ¶45, Tbls. 10a, 10b, Ex. 41. For Sales Associates, the merit increase process at Sterling has not only perpetuated disparities in compensation between females and males, it has exacerbated the problem. *See* Lanier Report at ¶43, Ex. 41.

⁶¹ Lundquist Report at 15-16 (Sterling has failed to follow basic HR practices like monitoring or studying fairness of compensation decisions), Ex. 46; *see infra* Sec II.F.1 at 43 (discussing Sterling's HR Department); *see also* EEOC Letter of Determination, Ex. 1.

Moreover, even where Sterling occasionally admitted that particular pay disparities adverse to women could not be justified by merit, it refused to rectify them fully. For example, Named Claimant Lisa McConnell testified that her Store Manager, Brad Bartl, told her that male Assistant Managers in other stores were earning more than her when she worked as his Assistant Manager.⁶² Bartl apologized that males made more money than females at Sterling.⁶³ Later, the DM acknowledged that McConnell was underpaid for her position.⁶⁴ Rather than eliminate an unjustified pay disparity, the DM told McConnell that Sterling could authorize an additional raise to her base pay of only \$1.00 per year to gradually “catch her up to bridge the gap.”⁶⁵ The disparities continued; McConnell never caught up.⁶⁶

Nor did Sterling use processes already available to rectify the disparities in pay adverse to women beginning with their hire. Exceptions to the merit increases warranted by an employee’s performance may be granted upon approval by Steve Becker, the Senior Vice President of HR, the VP of Compensation and Benefits, and the Compensation Manager.⁶⁷ At times Sterling also made pay adjustments outside the merit increase process, for reasons including an employee having “low pay.”⁶⁸ Rather than correct pay disparities adverse to women, either by one of these mechanisms already available to, and used by, managers to address pay anomalies or by addressing pay disparities more systematically, Sterling simply perpetuated these unlawful pay disparities every year.

⁶² Deposition of Lisa McConnell (Sept. 27, 2012) at 105:5-106:18, attached as Ex. 47.

⁶³ *Id.* at 20:15-21:6, Ex. 47.

⁶⁴ *Id.* at 92:5-17, 97:7-24, Ex. 47.

⁶⁵ *Id.*, Ex. 47.

⁶⁶ McConnell Summary, attached as Ex. 110.

⁶⁷ Business Process Overview, Merit Increases at SJI 1269913, Ex. 40.

⁶⁸ See Spring 2006 Field Merit Increases report, SJI 894-931 at SJI 900, 903-905, 930, attached as Ex. 48.

3. Sterling's Policy Prohibiting Employees From Discussing Pay Largely Concealed Pay Disparities From Detection

Throughout the period covered by this case, Sterling has prohibited employees Companywide from discussing their compensation with their co-workers.⁶⁹ This practice or unwritten policy prohibiting the discussion of pay shielded from routine scrutiny the pay decisions made for store-based employees, depriving most employees of any ability to compare their compensation and to expose the frequent and widespread disparities that this litigation has uncovered. Although Sterling now disavows such a policy,⁷⁰ the record is to the contrary and demonstrates that Sterling managers consistently and repeatedly communicated that it was Sterling's practice to prohibit discussion of pay throughout the Company and that discussing pay could lead to disciplinary action, up to and including termination. Sworn statements from more than 200 current and former employees, from managers to the rank-and-file, spanning the entire period covered by this case, and from employees located throughout the Company, confirm that Sterling prohibited employees from discussing their pay.⁷¹ VPROs and DMs admonished managers and employees alike that Sterling policy prohibited discussion of their pay.⁷² At least 50 Store Managers have attested they were directed to enforce Sterling's policy against discussing pay.⁷³

⁶⁹ See *infra* at nn.69-80.

⁷⁰ Kochanek Dep. at 194:6-195:2, Ex.8; Deposition of Maryellen Mennett (Mar. 21, 2013) at 218:21-24, attached as Ex. 49.

⁷¹ See Declaration Appendix Chart, Ex. 7; See Named Claimant Summaries, attached as Exs. 107-118.

⁷² See, e.g., Adair Decl. ¶4 (admonished by VPRO Davis); H. Ballou Decl. ¶3 (admonished by VPROs Mooney, McFarland-Smith, and Martz); Congin Decl. ¶6 (admonished by VPRO Glazer); DiGrazia Decl. ¶5 (admonished by DM Alan Ruffner, who said that the rule came from VPRO Everton); Padureanu Decl. ¶5 (VPRO Judy Martin informed her of policy); see also Orlando Decl. ¶4 (VPRO Liebler reiterated Company policy), Ex. 7, Tabs A 3, 12, 54, 77, 181 and 177.

⁷³ See Declaration Appendix Chart, Ex. 7.

Sterling has enforced this policy by disciplining employees who discuss their pay with each other.⁷⁴ For example, Diane Thielker, who worked in Massachusetts, was threatened with termination for speaking about a male employee's pay in 2007.⁷⁵ An internal disciplinary record, known as a Counseling Report, confirms that Thielker was disciplined for discussing pay rates with her coworkers, which the Report found was in "direct violation of Sterling's Code of Conduct,"⁷⁶ and warned that a recurrence could lead to termination.⁷⁷ Thielker's Store Manager at the time, Christopher Newton, confirms that he was instructed to counsel her by his DM and that the DM "dictated" the contents of the counseling.⁷⁸ Newton also explained that another female employee was terminated for discussing pay in approximately 2003 or 2004.⁷⁹ Sanya Douglas, who worked in New York, was disciplined by DM Aluk Kumar in approximately 2005 because she told a female Sales Associate seeking promotion to Assistant Manager what the previous job holder had been paid.⁸⁰ In yet another example, Tina McDonald, who worked in Florida, was directed by her DM, Dale Bowling, in 2005, to discipline two employees who had been discussing their pay with each other.⁸¹

Even communications within Sterling's HR Department confirm the existence of such a policy or practice. An email between executives managing the HR Department admits an experienced Regional HR Specialist had advised a Store Manager: "it's against Sterling policy

⁷⁴ J. Bailey Decl. ¶3; Douglas Decl. ¶4; Fearn Decl. ¶3; Hartman Supp. Decl. ¶3; Arena Decl. ¶4; Mantia Decl. ¶5; T. McDonald Decl. ¶5; Newton Decl. ¶¶3-5; Thielker Decl. ¶¶5-6; H. Thompson Decl. ¶¶4-5; Turek Decl. ¶5; Waring Decl. ¶9, Ex. 7, Tabs A 9, 84, 93, 122, 7, 156, 160, 169, 232, 234, 237 and 240.

⁷⁵ Thielker Decl. ¶¶5-6; Newton Decl. ¶5 (discusses being instructed by DM to discipline Thielker), Ex. 7, Tabs A 232 and 169.

⁷⁶ Employee Counseling Report, Diane Thielker (Aug. 3, 2007), CL-STR8971-72, Ex. 50.

⁷⁷ *Id.*, Ex. 50.

⁷⁸ Newton Decl. ¶5, Ex. 7, Tab A 169.

⁷⁹ *Id.* ¶4., Ex. 7, Tab A 169.

⁸⁰ Douglas Decl. ¶4, Ex. 7, Tab A 84.

⁸¹ T. McDonald Decl. ¶5; *accord* Hartman Supp. Decl. ¶3, Ex. 7, Tabs A 160 and 122.

to discuss wages.”⁸² Similarly, in the wake of the enactment of the Colorado Wage Transparency Act in 2008, which prohibits limitations on employees discussing their pay, Sterling’s HR Department felt compelled to warn managers overseeing stores in Colorado against limiting discussions about pay between employees.⁸³ No such warning would have been necessary, of course, had Sterling allowed employees to discuss their pay in the past.

C. Sterling’s Promotion Policies

Sterling has systematically promoted women less frequently and less quickly than male Retail Sales Employees and has applied policies that have had an adverse impact on members of the putative class. Throughout the period covered by this case, Sterling has used the same program, known as “Succession Planning” or “Succession Management,”⁸⁴ to make all promotions into and within management positions in its stores.⁸⁵ The key features of the Succession Planning program are:

- *Promotion from Within:* Rather than hiring employees into management from outside the Company, Sterling strongly favors promotions into and within management from among incumbent employees. A small group of employees are hired into “manager in waiting” positions, from which they typically move into management shortly after their hire. All other store-based management vacancies are filled with incumbent employees.
- *Sterling Directs DMs to Identify, Groom, and Select Candidates for Promotion.* Sterling provides DMs with common criteria for identifying, grooming, and

⁸² Email from Mennett to Lynch (Apr. 8, 2009), SJI 1020337, attached as Ex. 51. Mennett’s concern and Sterling’s reluctance to recognize the existence of this widespread practice may be prompted by its belated recognition that prohibiting employees from discussing their wages with each other violates the National Labor Relations Act. *Nat’l Labor Relations Bd. v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537-538 (6th Cir. 2000) (holding that rule, whether written or unwritten, prohibiting employees from discussing pay violates NLRA).

⁸³ Corporate Comm. (Feb. 20, 2009), SJI 30616-17, attached as Ex. 52. “DRM” stands for District Repair Manager.

⁸⁴ Luth II Dep. at 69:3-70:18 (explaining that Succession Planning is “is a strategy to understand candidates that would be considered promotion ready for any open vacancies in [a market] as a district manager”), Ex. 29.

⁸⁵ *Id.* at 69:3-70:18, Ex 29.

selecting candidates for promotion, the most important of which is that the candidate meet goals for sales of merchandise. But, Sterling does not provide DMs with guidance as to how to apply these criteria to select candidates for grooming and eventual promotion or the relative weights of each factor. The recommendations made by DMs must be approved by VPROs. The promotion criteria and grooming process Sterling uses to develop candidates for promotion have led to the promotion of male candidates more quickly and frequently than their female counterparts.

- *No Posting of Management Vacancies:* Sterling has consistently refused to post job vacancies, depriving employees interested in management positions of the chance to learn about and express interest in particular vacancies. Instead, Sterling has consistently relied upon a “tap-on-the-shoulder” system by which DMs notify the candidates they favor of vacancies and ensure they are qualified for the positions the DMs would like them to fill.
- *Sterling’s Career Advancement Register (“CAR”):* Before 2007, no formal process existed for employees to register their interest in advancement. In 2007, Sterling implemented a new program, called the Career Advancement Register, (“CAR”), which was supposedly designed to allow employees to register their interest in certain types of promotional opportunities. Rather than genuinely using the CAR as an independent and neutral source of candidates for promotion, Sterling has continued to use its Succession Planning system to hand-pick and groom candidates for promotion, regardless of whether they have registered in the CAR at the time their grooming begins or selection occurs. While Sterling requires registration in the CAR as a prerequisite for promotion, the actual pool of candidates considered for promotion is in no way limited to the population of employees registered in the CAR. In reality, registration in the CAR has been merely a formality for many candidates who have been groomed and pre-selected for promotion before their CAR registration.

Sterling’s promotion process begins with the DMs, who are granted the discretion to identify and groom candidates they favor for promotion, using the same tap-on-the-shoulder procedures that operate throughout the Company. Final promotion selections are made, like the identification and grooming of candidates, by recommendations from the DMs that are subject to approval by the VPROs and DVPs.⁸⁶ VPROs must approve every promotion for Retail Sales

⁸⁶ Fernholz Dep. at 138:3-140:16 (confirming promotions are not finalized until he approves them), 147:11- 148:13 (describing DVPs’ review of proposed promotions), Ex. 10; Luth II Dep. at 142:18-145:1 (testifying that VPROs “partner with the district manager, to have a firsthand understanding of the district manager’s market and attempt to mentor, guide, manage, oversee the district manager’s performance and how they’re managing their own district and market”), 189:12-17 (explaining that DVPs finalize promotions “to ensure that the [regional] vice president and the district manager have taken the proper steps to validate the candidate and have verified from the procedural standpoint that all looks in

Employees.⁸⁷ While Sterling identifies the factors used in identifying candidates for grooming and selecting them for promotion, it fails to define some of them or prescribe the relative importance they have. Some factors, such as performance in selling merchandise, are objective and easily measured while others, such as communication, teamwork, and integrity, are subjective and susceptible to idiosyncratic interpretation. As a consequence, Sterling's system for making promotions operates pursuant to established procedures and criteria which, because of the wholly subjective nature of some of the factors and the absence of weighting or defining the factors, provides a ready vehicle for bias to enter the decisions.⁸⁸ The disparities adverse to women in the frequency with which they receive promotions and the length of time awaiting promotion observed in Sterling's workforce data are fully consistent with these infirmities in the promotion process.⁸⁹

1. Management Selections are Made Largely from Promotions of Candidates Within Sterling

Sterling has consistently followed a policy of generally promoting internal candidates into and within management, rather than hiring candidates for management positions from outside the Company.⁹⁰ Sterling has identified promotion from within as part of its "corporate

order"), Ex. 29; Succession Management District Manager Lesson Plan, SJI 32416-67, Ex. 53; Module 4, DM Development Program-Recruiting and Succession Planning, SJI 28892-31, attached as Ex. 55.

⁸⁷ See Luth II Dep. 35:3-37:23 (VPRO approval of all promotions of Retail Sales Associates has been in place for at least the last decade), Ex. 29.

⁸⁸ See Lundquist Report at 42-43, Ex. 46; *infra* Sec. II.E. at 32 (describing conduct by senior executives, including VPROs and DMs, that devalues women as members of workforce); *infra* Sec. II.G.2 at 57 - 60 (discussing report of Dr. James Outtz).

⁸⁹ Lanier Report at ¶49, Tbl. 12a (showing consistent disparities in rates of promotion by job along gender lines), 14a, 14b (showing length of time prior to promotion in terms of years with Sterling and years in prior job less for males than females at statistically significant levels), Ex. 41.

⁹⁰ Luth II Dep. at 41:17-22, 70:16-18 (testifying that "Sterling strongly believes in promotion from within wherever possible," and this has been consistent for past decade), Ex. 29 (quoting Luth Ex, 23, SJI 10882, attached as Ex. 54); *see also* Luth II Dep. at 70:16-18 (succession planning has been in place consistently for the last decade); 87:9-88:23 (the promote-from-within culture at Sterling is a "guiding principle" in the promotion process), Ex. 29; Succession Management District Manager Lesson

strategy” and culture, and Succession Management is the program Sterling uses to implement this strategy.⁹¹

2. Succession Management Directs Managers to Select and Groom Candidates for Promotion

As Sterling’s own materials explain, “Succession Management is the ongoing, dynamic process of identifying talented employees then training and coaching them in order to prepare them for future, higher-level positions.”⁹² Under this policy it is a “core responsibility of a District Manager to initiate a succession plan,” as “District Managers are responsible for building store leadership teams.”⁹³ VPROs must closely monitor each District’s Succession Plan, which DMs are required to regularly update and submit to VPROs.⁹⁴ Sterling always has a ready stable of “promotables” who can fill current and future management needs.⁹⁵ Sterling places authority for identifying, grooming, and ultimately selecting employees to fill store-based management vacancies in the hands of DMs, VPROs and DVPs.⁹⁶

Plan, SJI 32416-67 at SJI 32421-22, Luth Ex. 26 (training provided by DMs to SMs describes promote-from-within culture of Sterling as “corporate strategy”), Ex. 53.

⁹¹ See Succession Management District Manager Lesson Plan at SJI 32421-22, 28, (explaining that promotion-from-within culture is “corporate strategy” and that Succession Management “protects” this culture), Ex. 53.

⁹² *Id.* at 32427 (characterizing Succession Planning as a “systematic process.”), Ex. 53.

⁹³ See Module 4, District Manager Development: Recruiting and Succession Planning at SJI 28894, Ex. 55; Luth II Dep. at 141:11-17 (explaining that management positions are filled by DM in consultation with VPRO); 141:23- 142: 17 (explaining that DMs become familiar with candidates to fill vacancies), Ex. 29.

⁹⁴ See SJI 237270 (2009 email instructing DMs in VPRO Dave Everton’s region to submit succession plans on a monthly basis); SJI 550445 (same, for 2012); SJI 837575-77 (Swartz district succession plan to VPRO Waidmann, January 2006); SJI 515782-83 (Pappapietro succession plan), attached as Exs. 56-58, 60. DVPs monitor succession plans as well. See SJI 1046228-29 (Liebler Succession Plan to Beck), attached as Ex. 59.

⁹⁵ Succession Management District Manager Lesson Plan at SJI 32425, 27 (must have candidates, “promotables,” ready for promotion at any time), Ex. 53.

⁹⁶ Luth II Dep. at 69:6-9 (describing Succession Planning); 140:20-142:17 (describing DM’s role in Succession Planning as “ensuring that employees are ready and able to move into management positions...” and engaging in training and “one-on-one interactions”), Ex. 29; Liebler Dep. at 119:19-120:2 (describing decisionmaking process for selecting candidates for DM Training as “collective

Sterling provides training in Succession Planning that describes the process of identifying promotable candidates and grooming them for promotion.⁹⁷ Sterling's training materials cultivate in the DMs "the feeling of pride when [their] own protégés are promoted."⁹⁸ Sterling directs the DMs to consider seven criteria in identifying the candidates groomed for promotion.⁹⁹ Among those criteria are performance metrics, which Sterling calls "standards" and which are also used in the annual performance evaluations. These performance metrics or standards include each employee's volume of jewelry repairs sold, various credit instruments sold and, the most important factor, the amount of merchandise sold.¹⁰⁰ In addition to these readily-measured factors, the managers are also instructed to consider such discretionary factors as integrity,

process" with DM, VPRO and DVP), Ex. 61; Deposition of David Everton (Feb. 8, 2013) at 79:18-80:1 (explaining that for promotions from Store and General Manager to DM, he interviews and recommends candidates and presents them to DVP for review), attached as Ex. 62. DMs and VPROs sign off on selections of Department Managers and Assistant Managers. VPROs and DVPs sign off on selections of Store Managers and DMs. Luth II Dep. at 35:3-36:22, Ex. 29. VPROs must approve every promotion for Retail Sales Employees. *Id.* at 35:3-37:23, Ex. 29. With the exception of the addition of the DVP position in 2004, this process has been the same for the last decade. *Id.* at 35:23-36:23, Ex. 29; Kochanek Dep. at 59:10-60:19, Ex. 8. Since the DVP position was created, DVPs have approved or rejected promotions. Luth II Dep. at 189:1- 191:9, Ex. 29. There are innumerable examples of email exchanges in which DVPs reject or approve promotions proposed by VPROs. *See, e.g.*, SJI 81130; 112836; 130911; 130982; 977506; 559737; 89122; 63892, attached as Exs. 20-23, 63-66.

⁹⁷ Module 4, Luth Ex. 8 at SJI 28894, Ex. 54; Luth II Dep. at 93:17-95:1 (describing use of Luth Ex. 8), Ex 29.

⁹⁸ Succession Management Lesson Plan, Luth Ex. 26 at SJI 32428 (Succession Management protects Sterling's promote-from-within culture "because it promotes the idea of each of us finding one . . . or each of us finding two."), Ex. 53.

⁹⁹ Phase 2 DM Development Program Succession Management Leader's Guide, SJI 35478-530 at 35493-95 (Phase 2 Succession Management Training; lists seven characteristics of a successful candidate as 1) customer 1st perspective; 2) rewards; 3) return on assets; 4) continuous improvement; 5) teamwork; 6) integrity; 7) communication; states promotables must have 5 of 7 of these characteristics), attached as Ex. 67, Module 4, Luth Ex. 8, at SJI 28909 (considering "mission statement and leadership behaviors"), Ex. 55; Management Skills Listings for Mall and Jared Stores, SJI 1255976 and 1255980 (including subjective factors), attached as Exs. 68 and 69; Luth II Dep. at 219:6-220:23, Ex. 29.

¹⁰⁰ Module 4, Luth Ex. 8, at SJI 28900 (Top candidates are 5/6 or 6/6 in standards; sales must be one of the standards they are performing at or above expectations), Ex. 55; Succession Management Lesson Plan, Luth Ex. 26, at SJI 32438 ("**The sales standard is a must-have**") (emphasis in original), Ex. 53; Luth II Dep. at 106:14-20, 129:7-18, 153:13-154:6 (sales performance is "At the heart and is the cornerstone of whether someone should be qualified to move forward or not"), 154:20-155:2 (meeting sales goals is "cornerstone"), Ex. 29; Luth III Dep. at 111:8-9 (merchandise sales goal is the fact that "bears the most weight"), Ex. 44.

teamwork, and communication, none of which is clearly defined nor its relative importance prescribed. Relying upon these factors, the DMs identify and groom candidates for promotion. Then, as vacancies arise, rather than publicize them, the DMs are charged with tapping on the shoulder those candidates they recommend for promotion; their selections are subject to review and approval by the VPROs and DVPs.¹⁰¹

No studies were conducted of whether these seven factors correlate with successful performance in the jobs being filled, nor was any effort made to ensure the managers construe these latter factors in a valid manner.¹⁰² Use of these factors in the Succession Planning process has resulted in women receiving fewer promotions than expected from their representation in the Sterling workforce population eligible for promotion and taking longer to receive promotions into and within management.¹⁰³

3. Managers Pre-Select Candidates for Promotion

a. *Career Advancement Register (“CAR”)*

Sterling has never posted job vacancies for management positions in the field. Until 2007, Sterling had no formal mechanism for offering candidates for promotion formal notice and an opportunity to apply or register their interest in promotion. Before 2007, employees were expected to express their interest in promotion to their managers, which may or may not have

¹⁰¹ See Succession Planning Directions, SJI 207570-78 (centralized instructions), attached as Ex. 70; Everton Dep. at 74:21-76:7 (explaining that, as VPRO, he received regular “Projected and Potential” charts to track potential candidates for promotion into management), 78:9-80:13 (DMs make recommendation of candidate to VPRO when vacancy arises), Ex. 62. DMs also track candidates being groomed on centrally-developed forms. Luth II Dep. at 127:19-128:20, 129:19-130:12 (describing Career Path Summary form), Ex. 29; Module 4, Luth Ex. 8 at SJI 28908, Ex. 55.

¹⁰² See Lundquist Report at 42-43 (describing how Succession Planning relies on factors that are not job-related and fails to provide criteria or guidance in how to weight various factors to be considered), Ex. 46; see Becker Dep. at 164:24-165:3, Ex. 33; Luth I Dep. at 277:15-279:13, Ex. 14:

¹⁰³ See *infra* Sec. II.D. at 31.

been recorded or communicated to other managers when vacancies arose.¹⁰⁴ Recognizing that it lacked a formal, regular process for employees to express their interest in promotion after pattern or practice charges were filed in 2005 with the EEOC, Sterling created a system for the registration of interest known as the Career Advancement Register (“CAR”) in 2007.¹⁰⁵ If properly used, the CAR might have provided a forum in which employees could formally register their interest in advancement, and a source from which managers with vacancies to fill could identify candidates for consideration.¹⁰⁶

b. CAR Has Been Manipulated

In reality, the CAR, while described as a system permitting formal registration of interest, did not appreciably change the tap-on-the-shoulder process used by the Succession Planning program. Sterling simply used registration in the CAR as a formality before a promotion could be finalized. Sterling’s rules require that all candidates selected for promotion have registered with the CAR.¹⁰⁷ While this requirement is technically observed, the CAR has principally operated as a formal step candidates must satisfy after they have already been selected for promotion, rather than a neutral and independent source of candidates for promotion. Instead of relying upon the CAR to provide the pool of candidates from which promotion selections may be made, Sterling has used the grooming process central to its Succession Planning program to pre-

¹⁰⁴ See Luth II Dep. at 64:6-65:13 (describing process for tracking employees’ interest in promotion before 2007), Ex. 29; SJI 10882, Luth Ex. 23, (“In the field, employees should make their Store/Shop Manager and District or Regional Management aware of their desire to be considered for future vacancies/promotional opportunities.”), Ex. 54.

¹⁰⁵ See CAR Powerpoint Presentation, SJI 723150-93 at SJI 723153-54 (describing the new CAR as a “uniform and consistent system for all associates that wish to advance within the company” and explaining that it is “[b]eing implemented to ensure all Associates are given fair, equitable, and objective consideration for advancement . . .”), attached as Ex. 71; see also Lynch Dep. at 212:18- 215:16 (“It was my opinion that promoting individuals who had not registered could be discriminatory in nature and should not be tolerated.”), Ex 72; Email from Lynch to field operations (Dec. 13, 2007), SJI 286305, Lynch Ex. 13 (failure to use CAR gives rise to liability risk), attached as Ex. 73.

¹⁰⁶ Luth II Dep. at 61:17-62:15 (CAR provided a single location for eligible candidates), Ex. 29.

¹⁰⁷ Luth III Dep. at 82:13-15 (must register in CAR to be eligible for promotion), Ex. 44.

select candidates for promotion.¹⁰⁸ Indeed, the DVPs, whose job is to give final approval to promotions, have assigned their administrative assistants the task of back-dating the date on which candidates register in CAR to ensure it pre-dates the date of their promotion.¹⁰⁹ DVPs have even directed their assistants to alter the promotion date in order to ensure it follows the date of registration in the CAR.¹¹⁰ Not surprisingly, more than forty percent of the promoted employees in the CAR first registered less than a month before their promotion was dated, confirming that the CAR is little more than a venue for candidates already selected to have their “ticket punched” before the promotion is finalized.¹¹¹

D. Patterns of Discrimination: Analyses Conducted by Dr. Louis Lanier

Dr. Louis Lanier performed a statistical investigation into whether gender is related to the compensation and promotion practices at Sterling.¹¹² Dr. Lanier has significant experience and is well qualified to perform this analysis. Dr. Lanier is a Senior Economist and Managing Director at Econ One Research, Inc., an economic consulting firm.¹¹³ He holds a Ph.D. in Applied Economics and has significant experience in the area of labor economics.¹¹⁴ Dr. Lanier has provided expert testimony in several class and collective actions.¹¹⁵

¹⁰⁸ See Luth II Dep. at 226:14-22 (Succession Planning is independent of CAR), Ex. 29; See Newton Decl. ¶7 (describing how CAR was manipulated), Ex. 7, Tab A 169.

¹⁰⁹ See Divisional VP Administrative Asst. Manual, SJI 189687-95 at 189690-91, Fernholz Ex. 3, attached as Ex. 74; SJI 76416, 82175, 90858, 91681, 103755, 69115, 72859 (emails from DVPs’ administrative assistant instructing VPRO that candidate must post in CAR before promotion can be finalized), attached as Exs. 75-81; SJI 77464, 91618, 66234 (emails stating effective date of promotion must be changed such that it falls after date on which candidate posted in CAR), attached as Exs. 82-84; SJI 104915; 93094 (emails addressing need for candidate to post in CAR and subsequent adjustment to effective date), attached as Exs. 85-86.

¹¹⁰ See *supra* n.108.

¹¹¹ Lanier Report ¶52, Tbl. 13, Ex. 41.

¹¹² *Id.* ¶4, Ex. 41.

¹¹³ *Id.* ¶ 1, Ex. 41.

¹¹⁴ *Id.* ¶1-2, Ex. 41.

¹¹⁵ *Id.* ¶2, Ex. 41.

1. Analysis of Compensation Disparities

Dr. Lanier conducted a detailed multiple regression analysis that isolated gender differences in regular base pay from the effects of other employee characteristics.¹¹⁶ Dr. Lanier found that females who have worked as part-time and full-time Sales Associates, Department Managers, Assistant Managers, and Store Managers at Sterling during the years 2003 to 2012 received less regular base pay than male employees working in the same jobs and in the same stores, who had the same amounts of company and job tenure, same potential years spent at other companies after age 18, and the same levels of performance as measured by sales commissions and performance reviews.¹¹⁷ The disparities identified through his regression analysis are all statistically significant at standard deviations ranging from 4.7 to 9.8.¹¹⁸ In this analysis, Dr. Lanier allowed his control variables to interact in each Sterling District to control for the DMs being responsible for setting pay rates in the Sterling stores.¹¹⁹

Having found robust statistical disparities in each job category in the putative class, Dr. Lanier examined whether male employees outperform female employees at Sterling, which might have provided some justification for the pay disparities. Dr. Lanier found that female employees were more likely than male employees to receive higher performance ratings, a finding that is statistically significant at 15.6 standard deviations (meaning the probability that this relationship between sex and performance ratings was measured by chance is effectively

¹¹⁶ *Id.* ¶27 and Tbl. 7, Ex. 41.

¹¹⁷ *Id.*, Ex. 41.

¹¹⁸ *Id.* at Tbl 7, Ex. 41; Roughly two or more standard deviations (a 0.5 level of statistical significance) are considered statistically and legally significant and may be sufficient to establish a *prima facie* case of discrimination. *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 301-11 & nn.14, 17 (1977).

¹¹⁹ *Id.* ¶28.

zero).¹²⁰ Dr. Lanier also performed a multiple regression analysis to determine whether female employees in the same store and same jobs earned sales commissions that were greater on average than similarly-situated male employees.¹²¹ Dr. Lanier found that women in full-time Sales Associate positions earned higher sales commissions than men on average (a statistically significant finding at 2.2 standard deviations) and that in other positions women performed equally well or better than men.¹²²

Dr. Lanier examined whether differences in the prior job experience of male and female employees could explain the disparities he observed at Sterling. To do so, Dr. Lanier worked with Dr. Kathleen Lundquist and APTMetrics to analyze a random sample of the applications of approximately 6,000 male and female employees at Sterling during the years 2003 to 2012.¹²³ APT Metrics determined the amount of prior experience that each employee had in the six criteria that Sterling currently uses in its Wage Rate Generator: jewelry sales, jewelry store management, jewelry other management, non-jewelry sales, non-jewelry store management, and non-jewelry other management.¹²⁴ Dr. Lanier then performed multiple regression analyses during the four different timeframes when Sterling used different methodologies for setting starting pay for Sales Associates designed to measure whether prior experience could explain the initial pay disparities between male and female Sales Associates at Sterling.¹²⁵ Controlling for the same job, same hire year, same district, and the same amounts and types of prior job

¹²⁰ Lanier Report ¶23, Ex. 41.

¹²¹ *Id.* ¶25 and Tbl. 5, Ex. 41

¹²² *Id.*, Ex. 41.

¹²³ *Id.* ¶30, Ex. 41; Lundquist Report at 30, Ex. 46.

¹²⁴ Lanier Report ¶¶30-33 and Tbl. 8a, Ex. 41.

¹²⁵ *Id.* ¶31, Ex. 41. The four time periods are the wage-engine only period (1/1/2004 – 8/29/2007), the wage-floor period (8/30/2007 – 7/12/2009), wage generator with three rates period (7/13/2009 – 1/4/2012), and wage generator with one rate (1/5/2012 – 12/31/2012). *See id.* at Tbl. 8a, Ex. 41.

experience as Sterling uses in its Wage Rate Generator, Dr. Lanier found that in the period January 1, 2003 to July 12, 2009, female employees are paid less than male employees on average at statistically significant levels and that these disparities cannot be explained by including the same types of experience that Sterling currently uses in its Wage Rate Generator.¹²⁶ In the period during which the Wage Rate Generator has been in use, July 13, 2009 to the present, Dr. Lanier found that female Sales Associates were paid less than male Sales Associates, but that these disparities were not statistically significant.¹²⁷

Dr. Lanier also considered whether Sterling's use of prior management experience in setting the pay of Sales Associates adversely affected female employees. In Tables 8b and 8c, Dr. Lanier shows that the statistical disparities increase in each of the four timeframes when prior non-jewelry management experience is removed from the regression analysis (Table 8b), and when all prior jewelry management experience is removed from the regression analysis (Table 8c).¹²⁸

Dr. Lanier also analyzed whether the recommended rate established by Sterling's Wage Rate Generator is an accurate predictor of an employee's first year sales productivity.¹²⁹ Using two separate measures of productivity, Dr. Lanier showed that the Wage Rate Generator is a poor predictor of an employee's first-year sales productivity. In fact, the Wage Rate Generator assigned a lower annual pay rate of between \$779 and \$1,172 to female employees, which are statistically significant at 5.2 and 6.6 standard deviations.¹³⁰

Having determined that Sterling sets initial pay rates for female Retail Sales Employees

¹²⁶ *Id.* ¶¶33 and Tbl. 8a, Ex. 41.

¹²⁷ *Id.*, Ex. 41.

¹²⁸ *Id.* ¶¶33-36 and Tbl. 8b and 8c, Ex. 41.

¹²⁹ *Id.* ¶¶37-40 and Tbl. 9, Ex. 41.

¹³⁰ *Id.* ¶39, Ex. 41.

at rates that are statistically significantly lower than similarly situated males, Dr. Lanier analyzed whether Sterling used its merit review process to correct the initial pay disparities or whether the merit review process results in a continuation of the disparate pay of female employees.¹³¹ Dr. Lanier found that the merit review process used by Sterling did not correct initial pay disparities; instead, the merit review process resulted in female associates who worked in the same job, same store, and with the same performance rating as male associates getting lower raises in pay compared to similarly situated males working in Sales Associate and Store Manager positions and slightly larger raises than males in Department Managers and Assistant Manager positions.¹³² These small differences in merit raises do not correct the pay disparities found in each of these positions.¹³³

2. Analysis of Promotion Disparities

Finally, Dr. Lanier analyzed whether Sterling's promotion practices discriminate against female Retail Sales Employees. Dr. Lanier conducted a regression analysis designed to isolate the extent to which the likelihood of promotion correlates with gender.¹³⁴ In the regression, Dr. Lanier controlled for length of tenure within the Company and within a particular job; potential years spent not employed by Sterling after the age of 18; employee performance, as shown by commissions and performance review ratings; and store and year of employment. Controlling for these factors, Dr. Lanier determined that gender correlates with the probability of promotion at all levels within Sterling stores.¹³⁵ The likelihood of promotion from Sales Associate, Assistant Manager, and to a larger store for Store Managers, each show statistically significant

¹³¹ *Id.* ¶¶42-45, Ex. 41.

¹³² *Id.* ¶¶42-43, Ex. 41.

¹³³ *Id.* ¶¶43-45, Ex. 41.

¹³⁴ *Id.* ¶47 and Tbl. 12a, Ex. 41.

¹³⁵ *Id.* ¶47-49, Ex. 41.

disparities adverse to women, while the Department Manager to Assistant Manager and Store Manager to District Manager disparities are shy of statistical significance, though also negative.¹³⁶ Dr. Lanier found similar statistical disparities in the rate of promotion from Sales Associate and Assistant Manager among employees who expressed interest in being promoted using Sterling's CAR.¹³⁷ Dr. Lanier discounted the value of the CAR data as an accurate predictor of employee interest in promotions because he observed that employees promoted for a large number of the promotions made after CAR was implemented were registered in CAR for only a short amount of time and because he reviewed a memorandum prepared by an administrative assistant for the two DVPs at Sterling that showed that Sterling delayed the effective date of promotions to give a preselected candidate the opportunity to register in CAR.¹³⁸

Dr. Lanier also analyzed whether any disparity existed in the time it took for male and female employees to get promoted at Sterling.¹³⁹ Dr. Lanier found that female employees were employed with the Company longer than similarly situated male employees when they received promotions and that female employees also spent more time in the job prior to promotion than similarly situated males.¹⁴⁰

In his promotion regressions, Dr. Lanier allowed his control variables to interact at the Region level to isolate the effects of these controls in each Region of Sterling because promotion decisions are controlled at the Region level by VPROs.¹⁴¹

¹³⁶ *Id.* ¶49 and Tbl. 12a, Ex. 41.

¹³⁷ *Id.* ¶50 and Tbl. 12b, Ex. 41.

¹³⁸ *Id.* ¶¶52-53, Ex. 41; *see supra* at Sec. II.C.3 at 26, n.104.

¹³⁹ *Id.* ¶54-56 and Tbls. 14a and 14b, Ex. 41.

¹⁴⁰ *Id.*, Ex. 41.

¹⁴¹ *Id.* ¶48, Ex. 41.

3. Pay and Promotion Decisions are Widespread

Dr. Lanier also conducted a statistical analysis to determine whether the pay and promotion disparities that he observed were widespread in terms of the number of districts and regions where disparities were adverse to female employees and whether they occurred in each year in the 2003 to 2012 time period of his statistical study. Dr. Lanier found that the pay and promotion disparities are widespread.¹⁴² For example, with respect to base pay for full-time Sales Associates, 71.0 percent of all Districts show adverse impacts on females, while 100 percent of the ten years of the available pay data show adverse impacts on females.¹⁴³ With respect to annual promotion rates for full-time Sales Associates, 89.5% of all Regions show adverse impacts on females, while 100% of the nine years of the available promotion data show adverse impacts on females.¹⁴⁴

E. Intentional Mistreatment of Women by Sterling Executives

Executives at the highest level of Sterling and many of those involved in the pay and promotion decisions at the heart of this case have engaged in intentional conduct demeaning to women, sending the clear message that women are less valued members of the Sterling workforce, consistent with Dr. Lanier's findings of disparities in compensation and promotion adverse to women. This widespread behavior has been open and notorious and is widely known throughout the Company. As Dr. James Outtz, an expert in industrial organizational psychology, explains in his report, this behavior demeaning to women exhibited by executives throughout the Company is fully capable of setting the standards for conduct of managers at all levels and

¹⁴² *Id.* ¶¶57-62 and Tbl. 15, Ex. 41.

¹⁴³ *Id.* ¶59, Ex. 41.

¹⁴⁴ *Id.* ¶61, Ex. 41.

influencing their exercise of discretion in making pay and promotion decisions.¹⁴⁵ As the substantial record plainly reveals, this evidence of conduct demeaning toward women originates with the CEO, DVPs, and VPROs and is perpetuated by similar conduct exhibited by DMs throughout the Company beginning in the early 1990s and continuing to the present. The conduct has occurred in settings that are public and private, ranging from banter in hallways and elevators to interactions within Sterling stores and at the mandatory annual meeting of all Company managers held in Orlando, Florida.¹⁴⁶ This behavior includes frequent references to women in sexual and vulgar ways; groping and grabbing women; soliciting sexual relations with women, sometimes as a *quid pro quo* for employment benefits; creating an environment at often-mandatory Company events in which women are expected to undress publicly, accede to sexual overtures and refrain from complaining about the abusive treatment to which they have been subjected. It has even included sexual assault and rape. This pattern of conduct has polluted the Company's workplace environment, inevitably establishing *de facto* standards for assessing the value of female employees less than male employees at Sterling in routine compensation and promotion decisions.

1. Conduct of Executives

REDACTED

¹⁴⁵ See *infra* Sec. II.G.2 at 57 (describing findings of Dr. James Outtz).

¹⁴⁶ Attendance at the annual Managers' Meeting in Orlando is a requirement for Store Managers. Kochanek Dep. at 167:23-178:1, Ex. 8; SJI 2079-82, SJI 2099-101, Exs. 2,3. Spouses are not invited. Deposition of Mark Light (Mar. 20, 2013) at 150:19-22, attached as Ex. 87.

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2. Direct Evidence of Gender Discrimination and Other Stereotyped Remarks About Women Employees

Along with this evidence of abusive treatment and sexualization of women employees, the record is replete with evidence of gender stereotypes invoked to justify biased pay and promotion decisions. Dr. Outtz has described the practical impact such behavior can have on the pay and promotion decisions at Sterling.¹⁸² These stereotypes have been expressed by managers at all levels of the Company and throughout the entire period covered by this action.

REDACTED

¹⁸² “The comments and behaviors attributed to Sterling senior managers and executives are demeaning to and devalue women in the company. This means that the underlying attitudes and organizational culture associated with this behavior will influence decisions regarding the worth of women to the company. Decisions regarding pay and promotions fall squarely within this category.” Report of Dr. James Outtz at 39, attached as Ex. 103.

No level of management has been exempt from the use of gender stereotypes to justify pay and promotion decisions. Even Sterling's highest-ranking female Operations employee, Senior Vice President of Operations Tryna Kochanek, has invoked gender stereotypes to justify personnel decisions that disfavor women employees. In response to a female Store Manager's inquiry in the mid-1990s as to why a male Store Manager doing the same job was paid more than she, Kochanek answered that "he has a family to support."¹⁸³ There is evidence that other executives echoed the same types of gender stereotypes. When Don Davison was an Assistant Manager in 1998, then-DM, Barry Fernholz, who is now a DVP, told Davison: "Well, I'll tell you Don. I can get some dumb girl or single mom who will work her ass off, and I can get her cheaper than you."¹⁸⁴ Similarly, Dean Huffman, then a Store Manager, was told by VPs Dale Citron and Joe Beck that, "it was better to hire female employees because the company did not have to pay them as much as males."¹⁸⁵ Likewise, VPRO Dave Everton, then a DM, explained: "Why pay women more when they just get pregnant and have families? We need people who are hungry."¹⁸⁶ In 2010, VPRO John Liebler told other employees that his wife, who had been a Sterling employee, was "at home waiting for me where she's supposed to be."¹⁸⁷

Other Sterling executives have based pay and promotion decisions that disfavored women employees on gender stereotypes. In 2010, DM John Grande justified passing over a female employee for promotion to Store Manager in favor of a less-experienced male employee, by saying the male "had a family to support" and had been selected as a Store Manager to justify

¹⁸³ Small Decl. ¶20, Ex. 7, Tab A 215.

¹⁸⁴ Davison Decl. ¶7, Ex. 7, Tab A 72.

¹⁸⁵ Huffman Decl. ¶7, Ex. 7, Tab A 128.

¹⁸⁶ Sumen Decl. ¶9, Ex. 7, Tab A 225.

¹⁸⁷ V. White Decl. ¶21, Ex. 7, Tab A 242.

the high salary he requested.¹⁸⁸ Another manager, Scott Smith, who served as a Store and District Manager in 2002 and 2003, reported that other managers similarly justified paying male employees more than their female counterparts because the male employees had “mouths to feed.”¹⁸⁹ In 2004, in yet another example, Don Davison, who had become a Store Manager, was instructed by his DM to fire a female employee who, at the time, had the best sales record in the store but was not meeting her year-to-date sales goal, because “[s]he’s gonna have a baby and not be around anyhow.”¹⁹⁰ Similarly, in 2002, when female Store Manager Mel Small asked her DM, Rick Schmidt, why she was not promoted to a vacant similar position at a higher-volume store, Schmidt explained that Small was denied the promotion because she was pregnant when the vacancy occurred.¹⁹¹ Reflecting a similar stereotype, DM Richard Sumen was reported in 2003 to respond to women who expressed an interest in promotion that male employees were just better managers.¹⁹² And when Store Manager Joseph Kabbas asked DM Julio Chinchilla in 2004 or 2005 why Sterling generally paid female employees less than their male counterparts after his pay recommendation for a female applicant was denied, Chinchilla explained: “that’s the way it has to be because that’s the way Sterling wants it.”¹⁹³ These stereotypes reflecting that women were of lesser value than men in the workplace and could be paid less and passed over for promotion without consequence were hardly new at Sterling. There is abundant evidence that those same views were offered to justify paying women less than men and favoring men

¹⁸⁸ V. White Decl. ¶11, Ex. 7, Tab A 242.

¹⁸⁹ S. Smith Decl. ¶5, Ex. 7, Tab A 220.

¹⁹⁰ Davison Decl. ¶15, Ex. 7, Tab A 72.

¹⁹¹ Small Decl. ¶10, Ex. 7, Tab A 215.

¹⁹² Mantia Decl. ¶5, Ex. 7, Tab A 156.

¹⁹³ Kabbas Decl. ¶10, Ex. 7, Tab A 135.

over women in promotions beginning at least as early as the 1990s.¹⁹⁴ Moreover many of the managers and executives about whom there is substantial evidence of demeaning behavior against women have been working together for many years.¹⁹⁵

F. Human Resources and Employee Relations Permit, Rather than Protect Against, Sex Discrimination

Throughout the period covered by this case, Sterling has had a Human Resources (“HR”) Department that has oversight over the entire Company, including Retail Sales Employees.¹⁹⁶ Among the policies the HR Department has been responsible for are those prohibiting discrimination and fraternization between managers and employees under their supervision.¹⁹⁷

¹⁹⁴ See, e.g., Adair Decl. ¶17; Glaude Decl. ¶8 (males paid more because they were supporting a family); S. Crump Decl. ¶9 (female employee paid less on assumption her husband could support her); R. Jewart Decl. ¶ 9 (promotion of female employee questioned because she had a baby); *supra* Sec. II.E.1- at 35 (describing Light, Beck and Citron laughing at crude joke about women Store Managers in elevator at Managers’ Meeting in 1990s), Ex. 7, Tabs A 3, 105, 68 and 132. Some members of Sterling’s senior management stated that it was Sterling’s policy to pay women low salaries. D. Huffman Decl. ¶6 (when requesting a \$1 per hour raise for three high-performing female employees, Huffman was told by then-VP Ian Goldsmith that “we don’t pay women that much money.”); Lloyd Decl. ¶7 (Goldsmith implied Lloyd’s wages were lower than a male counterpart because hers was a second income), Ex. 7, Tabs A 128 and 150.

¹⁹⁵ See Glossary of Sterling Executives (showing tenure of executives), Ex. 13. Almost all of the VP level or higher Sterling executives about whom Claimants have obtained testimony regarding their demeaning treatment of women held executive-level positions long before the class period. Mark Light began working for Sterling in 1978 and held a President-level position as of the late 1980s. Light Dep. at 24:18-19, 18:18-21, Ex. 87. Tryna Kochanek began working for Sterling in 1986 and rose to the vice president-level in 1997. Kochanek Dep. at 27:18-19, 15:8-16, Ex. 8. Joe Beck has worked for Sterling since 1978 and in a vice-president level position since the late 1980s. Beck Dep. at 7:2-3, 19:14-20:9, Ex. 9. Barry Fernholz began working at Sterling in 1990 and attained a vice president position in 2000. Fernholz Dep. at 7:19-20, 14:3-10, Ex. 10. John Liebler began working at Sterling in 1989 and rose to the vice president-level in 2000. Liebler Dep. at 10:25-11:1, 14:15-3, Ex. 61. Rick Davis was a Sterling vice president as of the early 1990s. Goldberg Supp. Decl. ¶8, Ex. 7, Tab A 109. David Everton rose to the level of DM in 1998. Small Dec. ¶7, Ex. 7, Tab A 215. Robert Glaser was working for Sterling in 1998 as a vice president. Kohr Supp. Decl. ¶9, Ex. 7, Tab A 142. Jim Mix worked for Sterling as a vice president as of the mid-1980s. Szlag Decl. ¶6, Ex. 7, Tab A 226. Bill Mooney worked for Sterling as early as 1996. CL-STR 1986 (Memo from Mooney to Dawn Souto-Coons, dated 1996), attached as Ex. 92. Greg Waidmann was working for Sterling as a DM as early as 1997 or 1998. A. Christy Decl. ¶5, Ex. 7, Tab A 44. Claimants have also offered evidence that Bignotti, Gifford, and Martz behaved in ways demeaning toward women, and yet each rose to hold a VPRO position after 2002.

¹⁹⁶ Becker Dep. at 139:13-140:12, Ex. 33.

¹⁹⁷ *Id.* at 142:17-144:5, Ex. 33; Kochanek Dep. at 206:13-17, Ex. 8.

Notwithstanding the existence of this department and a constellation of written policies allegedly prohibiting the conduct challenged by this litigation, Sterling's HR program has been so poorly designed and implemented that it has wholly failed to curb the widespread practice of sex discrimination within its stores. As such, neither Sterling's HR Department nor its written policies prohibiting discrimination serve as a counterweight against the strong inference of discrimination created by the record herein. To the contrary, Sterling's failure to enforce its written policies prohibiting discrimination in its workplace reinforces, rather than belies, the evidence of a general policy of pay and promotion gender discrimination.

1. Sterling's HR Department Has Been Understaffed and Unprepared to Address Discrimination in the Workplace

The Regional HR Specialists who work in the Employee Relations Office of HR, and are dedicated to working with field employees, are charged with interpreting Company personnel policies, counseling managers and employees in the field about problems brought to the attention of the office, investigating complaints of workplace misconduct, including allegations of discrimination, and recommending to field managers what action, if any, should be taken in response to such complaints.¹⁹⁸ While there are currently five employees serving in the Regional HR Specialist position, until 2005 only three people performed this role.¹⁹⁹ Nearly all of the interactions between Employee Relations and field employees are initiated by calls or complaints from the field, rather than by the HR Specialists, and largely occur by telephone or email, with in-person interviews a rarity.²⁰⁰ The HR Specialists have a crushing workload, leaving them little time to devote significant attention to any particular matter. For example, in 2005, the year in which the complaints giving rise to this action were filed, the Employee Relations office

¹⁹⁸ Lynch Dep. 7:2-9:1, 18:18-20:6 (explaining duties of Employee Relations Office), Ex. 72.

¹⁹⁹ Menett Dep. at 12:8-14:9, Ex. 49.

²⁰⁰ Becker Dep. at 101:6-25, Ex 33.

handled 14,982 calls about field employment matters, which meant each Specialist handled about 3,746 calls per year.²⁰¹ The number of calls has persisted at this level in subsequent years; in 2010 there were 15,926 calls regarding field employment matters, and in 2011 there were 18,047.²⁰²

Although HR has been charged with interpreting and enforcing the policies prohibiting employment discrimination, the managers and employees entrusted with this responsibility have been woefully unprepared to discharge it effectively. None of the Regional HR Specialists, including the manager of that office, possessed the minimum qualifications for the jobs when they filled them.²⁰³ Nor were HR staff familiar with the terminology and tools routinely used by professionals in this area to ensure personnel decisions are merit-based and not the product of bias. The Senior Vice President for HR, Steven Becker, for example, was only generally familiar with the Uniform Guidelines on Employee Selection Procedures,²⁰⁴ the fundamental set of rules published 35 years ago to ensure workplace selection procedures are job-related,²⁰⁵ and Michael Lynch, the Vice President of Employee Relations, who oversees all field HR services, knew nothing about them.²⁰⁶ Moreover, Lynch knew nothing about the four-fifths rule, the benchmark against which human resource professionals initially assess whether particular selection procedures have had an adverse effect on a protected group.²⁰⁷

²⁰¹ Becker Dep. at 96:4-97:17, Ex. 33.

²⁰² January 2012 HR Scorecard, SJI 524074, attached as Ex. 93.

²⁰³ Deposition of Tom Parks (Mar. 8, 2013) at 57:4-58:15, attached as Ex.94; Mennett Dep. at 43:21-50:18, Ex. 49; Regional HR Specialist Position Description, SJI 1256061-2, Parks Ex. 2 and Mennett Ex. 1, attached as Ex. 95.

²⁰⁴ Becker Dep. at 15:23-16:19, Ex. 33

²⁰⁵ See Lindemann, Grossman & Weirich, EMPLOYMENT DISCRIMINATION LAW (4th ed), Ch 4, § I.D.2, at 171-83 (2007).

²⁰⁶ Lynch Dep. at 44:17-25, Ex 72.

²⁰⁷ See Lindemann, Grossman & Weirich, EMPLOYMENT DISCRIMINATION LAW (4th ed), Ch 3, § III.A.1, at 128-32 (2007); Lynch Dep. at 47:6-17, Ex. 72.

Unequipped with these basic tools needed to perform the human resource role with which they were charged, the HR staff, not surprisingly, conceded they have conducted no studies of Sterling's pay and promotion policies to ensure they are professionally valid and that the decisions are based on merit. Becker was unaware of any study used to ensure Sterling's promotion decisions are based on valid criteria.²⁰⁸ Likewise, Lynch admitted he had never used the results of any study of Sterling's pay or promotion practices in his daily work²⁰⁹ or performed any job analysis for any field positions.²¹⁰ Nor has the HR Department conducted any studies of compensation by gender.²¹¹

2. Sterling's Handling of Complaints Discourages Employees From Challenging Discrimination and Fails to Detect or Address Much of the Discrimination That Exists

In several significant respects, the manner in which Sterling handles complaints discourages challenges to discrimination and creates obstacles for employees in securing protection from discrimination.

First, Sterling fails to protect the identity of employees who lodge complaints from disclosure to the subjects of the complaints. Notwithstanding that Kochanek, among others, has assured complainants that their identities would remain confidential,²¹² Sterling's policy or practice is to provide no such assurance of confidentiality to employees who lodge complaints.²¹³ This failure to protect the identities of complainants has led to their disclosure to the subjects of

²⁰⁸ Becker Dep. at 19:3-6, Ex. 33.

²⁰⁹ Lynch Dep. at 45:14-47:17, Ex. 72.

²¹⁰ Lynch Dep. at 47:18-50:23, Ex. 72.

²¹¹ Becker Dep. at 25:14-26:18, Ex. 33; Berger Dep. at 155:8-156:7, Ex. 43; Lynch Dep. at 45:24-47:5, 64:10-65:18 195:5-197:13, Ex. 72.

²¹² SJI 489716-19, Menett Ex. 4 (Kochanek assures employee confidentiality), attached as Ex. 89.

²¹³ Becker Dep. at 156:12-161:5 (Deposition taken pursuant to Rule 30(b)(6), Ex. 33.

the complaints and adverse consequences that swiftly follow.²¹⁴ And, while Sterling offers a TIPS hotline maintained by a third-party vendor in which it assures callers anonymity, the complaint and the identity of the complainant, whether made through TIPS or directly to HR, are often not kept confidential.²¹⁵ In fact, the identities of the complainants are frequently disclosed to managers and witnesses during the investigation of the complaint.²¹⁶ This practice has generated widespread fear that employees who lodge complaints can, and will, be subject to reprisal with impunity,²¹⁷ leading employees to avoid use of the complaint process.²¹⁸ Not surprising, as Dr. Lundquist explains, this practice conflicts with generally accepted human

²¹⁴ See, e.g., K. Henry ¶¶17-22 (attesting that she was fired within days of reporting unwelcome advances by her DM to the TIPS line); J. Highfill Decl. ¶20 (describing how, within minutes of calling TIPS Line to complain about conduct of drunk DM, Brian Land, she received a call from Land confirming that TIPS had notified him of her complaint and telling her he would find out immediately if she called again), Ex. 7, Tabs A 125 and 126; Deposition of Dale Bowling (Feb. 19, 2013) at 125:14-16 (Feb. 19, 2013) (referencing complaint by employee Kim Hyde that Store Manager retaliated against her for calling HR), attached as Ex. 96.

²¹⁵ Becker Dep. at 156:12-161:5, Ex. 33; see Case Decl. ¶9 (Store Manager shared her complaint with other employees in store); Oliver Decl. ¶15 (after calling HR to report the object of the complaint confronted her upset with her for calling HR), Ex. 7, Tabs A 37 and 174.

²¹⁶ Menett Dep. at 115:14-116:16, Ex. 49; see Report from Regional HR Specialist, SJI 242053-56, Menett Ex. 12 (identifying anonymous T.I.P.S. caller), attached as Ex. 97; See Ferreri Decl. ¶10 (after calling TIPS about harassing behavior, learned from her DM that Sterling had asked DM if she was a “troublemaker”); Anderson Decl. ¶¶6-7 (told by AM that AM know name of employee who had called TIPS), Ex. 7, Tab A 6, 94. Often employees are called at the store as part of HR investigations. See Parks Dep. at 141:3-143:12, Ex. 94; V. White Decl. ¶22 (following supposedly anonymous TIPS call, Sterling representatives investigated complaint by calling complaints in the store where they worked, often alongside the harasser), Ex. 7, Tab A 242.

²¹⁷ See, e.g., Contaldi Decl. ¶¶17-18; Delorey Decl. ¶11; K. Henry Decl. ¶¶17-22; Highfill Decl. ¶20; Ferreri Decl. ¶9; Osborn Decl. ¶11; V. White Decl. ¶22; Williams Decl. ¶¶8-9; Storm Decl. ¶¶6-7, Ex. 7, Tabs A 55, 73, 125, 126, 94, 180, 242, 244 and 224.

²¹⁸ See, e.g., Roberson Decl. ¶10 (explaining that TIPS was underutilized because it was widely known that it was not confidential); C. Mantia Decl. ¶11 (explaining she did not submit a complaint through TIPS because she heard stories that other female employees were fired after reporting complaints to TIPS); D. Call Decl. ¶22 (stating that she did not call TIPS or contact HR because concerned about retaliation) Ex. 7, Tabs A 196, 156 and 34; see also Roland Decl. ¶6; Williams Decl. ¶¶8-9; T. Flippin Decl. ¶8; Case Decl. ¶9; Melton Decl. ¶10, Ex. 7, Tabs A201, 244, 97, 37 and 162.

resource practices and also violates the minimum standards for human resource programs recommended by the EEOC.²¹⁹

Second, Sterling imposes an evidentiary burden on employees who lodge complaints that exceeds the requirements of Title VII. Sterling has had a longstanding standard for evaluating complaints that in order to be credited, allegations of misconduct, such as discrimination and sexual harassment, must be supported by accounts from at least two witnesses.²²⁰ Indeed, the Senior VP for HR conceded that, absent a corroborating witness, complaints are not likely to be sustained by the Company's investigations.²²¹ In contrast, of course, Title VII has no corroborating witness requirement.²²²

Finally Sterling Managers and HR staff have discouraged employees from complaining about discrimination and harassing behavior and have punished and berated them for doing so.²²³ Thus, even when employees are brave enough to complain, the complaints are often ignored, and

²¹⁹ Lundquist Report at 19-20, Ex. 46.

²²⁰ Employee Relations Handbook, SJI 470098-188 at SJI 470119, attached at Ex. 98; Parks Dep. at 61:8-62:16, Ex. 94.

²²¹ Becker Dep. at 204:24-206:6, Ex. 33.

²²² See, e.g., *Carmell v. Texas*, 529 U.S. 513, 574-575 (2000) (explaining that ultimate measure of testimonial worth is quality and not quantity when gauging conflicting evidence); *O'Sullivan v. City of Chicago*, 474 F. Supp. 2d 971, 988 (N.D. Ill. 2007) (rejecting employer's attempt to "import[] into Title VII a requirement of corroboration that is not part of the statute").

²²³ See e.g., Cisneros-McMillan Decl. ¶¶12, 15 (following complaint about harassing behavior of SM, DM advised her, "if you are not happy here you should consider employment somewhere else." HR told her, "this is over – we are moving forward" and "we are done with this."); M. Corey Decl. ¶26 (when male employee complained about another male employee who was sexually harassing female employees, VPRO Mooney told him to be quiet, that Sterling will "handle it." Complainant's hours were then cut); Digennaro Decl. ¶11 (complained to TIPS about harassing behavior, received call from HR reprimanding her for doing so); Mantia Decl. ¶9 (complained to SM about being repeatedly propositioned by DM, John Grande, now a VPRO, SM told her to "just get over it."); Sargent Decl. ¶19 (After complaining unsuccessfully to SM and then calling TIPS, DM berated her: "You should have gone through us first," harasser was just having "harmless fun," and she needed to "grow some thick skin."), Ex. 7, Tabs A 47, 61, 76, 156 and 205.

the harassing behavior continues, and may even escalate as a result.²²⁴

Taken together, Sterling's failure to assure complainants anonymity and its imposition of a heightened burden for sustaining complaints undermines employee confidence in the Company's treatment of complaints and conceals the presence of discrimination that could serve as the basis for liability.

3. Sterling Uses its Human Resources Program to Manage Litigation Risk Rather Than to Expose and Address Workplace Problems

Repeatedly in the programs used to train managers about its HR operations, Sterling offers mitigation of litigation risk as the rationale for its rules prohibiting discrimination.²²⁵

Indeed, in response to a harassment complaint a woman wanted to make against Lynch for his behavior at a Managers' Meeting, revealed that the Company's complaint process is designed to insulate it from liability.²²⁶

²²⁴ See, e.g., Chegini Decl. ¶11 (following complaint to HR, harasser continued to harass complainant); Lavelly Decl. ¶38-41 (complained to Mennett about harassing behavior, HR didn't respond to follow-up call re investigation, harassing behavior continued); Spink Decl. ¶6 (following investigation into harassing behavior, employee was temporarily moved to another store and then reinstated as SM; complainant was moved); V. White Decl. ¶22 (Sterling failed to take remedial action against harasser, who was subsequently promoted to higher volume store). Ex. 7, Tabs A 41, 146, 222 and 242.

²²⁵ SJI 274992-032 ("Top 10 Ways to Avoid Employment Law Pitfalls, Landmines, and Liability"), attached as Ex. 99; SJI 630069-75 ("Winning Through Effective Liability Prevention"), attached as Ex. 169; SJI 274155-247 (same), attached as Ex. 100.

²²⁶ See Mantia Decl. ¶¶15- 16, Ex. 7, Tab A 156. During the 2005 Managers' Meeting, an apparently drunk Lynch tried to force Mantia to dance with him and became angry when she refused and tried to get away with the help of her friends. Mantia, afraid of losing her job, did not file a complaint. In February 2006, Sterling terminated Mantia. She called Lynch and asked if he was the person with whom she should discuss her termination. He confirmed that he was. When she explained that she wanted to discuss both her termination and the incident during the Managers' Meeting, Lynch said he would not discuss anything further. He said: "*you will not win a sexual harassment or wrongful termination case against Sterling.*" He said, "*Sterling is highly protected, we have our own resolution program which means you cannot hire an attorney.*" He continued to tell her, "*You're not going to win.*" *Id.* (emphasis added). Notably, Lynch is the "go-to guy" during Managers' Meetings for concerns about conduct that violate Sterling's Code of Conduct or Managers' Meeting rules, which include the responsible consumption of alcohol and sleeping in one's own hotel room. See Lynch Dep. at 221:25-223:10, 225:5-12, 226:4-9, 228:14-229:7, 232:2-4, Ex. 72.

Perhaps no feature of Sterling's HR program illustrates better its single-minded design to insulate the Company against liability than its RESOLVE Program. The RESOLVE Program is a binding, mandatory three-stage ADR program through which all employees are required to bring and adjudicate workplace claims, including claims of discrimination.²²⁷ Unlike its TIPS line, which is maintained by a third-party, every feature of the RESOLVE Program is controlled by Sterling. The Company, therefore, investigates claims lodged against it and determines whether the claims have merit.²²⁸ Not surprisingly, it is extremely rare for Sterling to find claims have merit in Step 1 of the process, during which it investigates the claims.²²⁹

In Step 2 of the RESOLVE process, Sterling, at its election, either submits the claim to mediation or for review by a panel chosen from Sterling employees pre-selected by Company management.²³⁰ Where the panel reviews claims, counsel for Sterling addresses the panel, but the claimant and her counsel are not given the opportunity to do so.²³¹ In fact, the claimant is not even informed of what questions Sterling has presented to the panel for decision.²³² The panel is expressly prohibited from rendering a decision that would alter, change or otherwise modify or negatively comment on Sterling's policies.²³³ In the event the claim is submitted to mediation instead of adjudication by a panel, Sterling selects the mediator,²³⁴ and, as an examination of one

²²⁷ Deposition of Joseph Spagnola (Feb. 12, 2013) at 52:1-18, 91:21-94:20 (confirming that agreeing to RESOLVE procedure and waiving a right to bring a lawsuit in court is a mandatory condition of employment at Sterling), attached as Ex. 101.

²²⁸ Typically, this task is performed by the RESOLVE Program Administrator; however, all Step 1 claims submitted by Claimants in this case were investigated by Lynch or Mennett. Spagnola Dep. at 38:1-45:17, Ex. 101. Further, of the 107 Step 1 claim forms submitted by Claimants not one was found to have merit. *See id.* at 89:23-90:8, Ex. 101.

²²⁹ *Id.* at 136:2- 8 (confirming "Many of the claims are resolved in Step 1"), Ex. 101.

²³⁰ RESOLVE Program Brochure, SJI 3769-80, Ex. 102; Spagnola Dep. at 94:21-93:12, Ex. 101.

²³¹ *Id.* at 102:3-104:6; 179:15-18; 179:22-180:5; 204:19-23, Ex. 101.

²³² *Id.* at 179:15-180:5, 202:20-204:23, Ex. 101.

²³³ *Id.* at 108:1-11; 109:1-110:3; 179:22-180:19, Ex. 101.

²³⁴ *Id.* at 106:22-107:5, Ex. 101.

of the mediators reveals, rather than serving as a neutral, third-party, the mediators may have ongoing business relationships with Sterling which are not disclosed to the claimants.²³⁵

Step 3 of the RESOLVE Program permits arbitration of the claims. Notwithstanding that hundreds of complaints are made to HR each year, very few claims have been filed in RESOLVE.²³⁶ Indeed, only two claims submitted to RESOLVE between its inception in 1998 and 2010 have resulted in a judgment on the merits in Arbitration.²³⁷

As a result of Sterling's distorted view of how HR should function, the HR Department fails to take an active role in the management of the Company's workforce. HR plays no regular role in compensation or promotion decisions made in the field.²³⁸ Nor does HR routinely analyze employee pay rates and merit increases in order to recommend or make adjustments to address unjustified pay disparities.²³⁹ HR does not provide regular reports to the Company's executives about the results of complaints made or investigations undertaken. Even Becker and Lynch, who head HR and Employee Relations, receive only reports of general statistics about the number and type of complaints received and investigations conducted.²⁴⁰ Sterling's HR Department doesn't even draw upon the types of conduct that are the subject of complaints to inform changes to company personnel procedures. This remarkable lack of interest in the outcome of complaints undoubtedly begins at the top with CEO Mark Light, as demonstrated by this excerpt from his deposition about his review of witness statements:²⁴¹

²³⁵ *Id.* at 171:19-173:19, 186:5-192:4, 192:11-193:9, Ex. 101.

²³⁶ January 2012 Scorecard, "Resolve Program Activity," SJI 524074, attached as Ex. 93. Between 1998 and 2010, only 474 Step 1 claims were filed and only 204 Step 3 claims were filed. *Id.*

²³⁷ *See* Spagnola Dep. at 135:1-7, Ex. 101.

²³⁸ Becker Dep. at 14:2-4; 15:4-14, Ex. 33.

²³⁹ *Id.*, Ex. 33.

²⁴⁰ Lynch Dep. at 195:5-14, Ex. 72; Spagnola Dep. at 68:15-69:12, Ex. 101.

²⁴¹ Light Dep. at 176:18-177:10, Ex. 87; *see* Declaration Appendix, attached as Ex. 7.

Q: Mr. Light, you said that you had a chance to read the various sworn statements that we produced to Sterling, some of which I've read excerpts from, correct?

A: Yes.

Q: Has your review of those statements, those sworn statements, led you to recommend any changes in company policy or deployment of its resources?

A: No.

....

Q: Has your review of those sworn statements in any way led you to modify any of your behavior at the company?

A: No.

The insularity and passivity of HR reflects an abdication of the more robust responsibilities normally associated with such operations. Drawing upon extensive knowledge of the practices of employers around the country, including large retailers like Sterling, Dr. Lundquist has found “a remarkable lack of proactivity on the part of Human Resources at the company” and that “little was done to ensure the consistent implementation of policies and procedures.”²⁴² Indeed, the course of action that HR Specialists formulate following their investigation of complaints are merely non-binding recommendations to the field managers which they are free to disregard,²⁴³ leading Dr. Lundquist to find it “striking” that “HR has no role in determining disciplinary actions for issues such as harassment, beyond making recommendations to the field.”²⁴⁴ Ultimately, Dr. Lundquist has concluded that the “responsibilities that are commonly assumed by a Human Resources department—such as monitoring and ongoing analyses to ensure that pay, performance ratings, promotions, and succession readiness judgments are fair and gender-neutral—are not regularly performed at Sterling.”²⁴⁵

²⁴² Lundquist Report at 14-15, Ex. 46.

²⁴³ Becker Dep. at 80:6-84:5, Ex. 33; Menett Dep. at 131:2-7, Ex. 49; Parks Dep. at 78:24-81:14, Ex. 94; Fernholz Dep. at 85:23-87:14, Ex. 10.

²⁴⁴ Lundquist Report at 15, Ex. 46.

²⁴⁵ *Id.* at 16, Ex. 46.

These profound shortcomings in Sterling’s HR Program have woefully failed to protect against discrimination in the workplace and, on some occasions, have bred contempt for the very policies prohibiting discrimination. DMs and Store Managers have retained their managerial authority even after being accused of engaging in sexually harassing behavior.²⁴⁶ For example, Alaine Gough was the subject of repeated comments about her breasts and her clothes from her DM Dan Gregorio,²⁴⁷ and when she lodged a complaint in approximately 2005 with Employee Relations, Lynch informed her that he was “sick and tired of this Dan Gregorio stuff” and to stop “rehashing old news.”²⁴⁸

While the continued presence in managerial positions of employees accused of discrimination undermines confidence in the HR Program, the frequent contempt for the policy prohibiting managers from fraternizing with employees under their supervision has reduced the Company’s rules prohibiting discrimination to empty rhetoric. Since 1996, Sterling has had in place as a key component of its Code of Conduct, on which the Company’s culture purports to rest, a policy prohibiting executives and managers at all levels from “fraternizing” with employees in their chain of command.²⁴⁹ While violations of the policy prohibiting fraternization can serve as grounds for discipline, violations typically occur with impunity.

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²⁴⁶ Gough Decl. ¶¶10-17, Ex. 7, Tab A 112.

²⁴⁷ *Id.* ¶¶10, 17, Ex. 7, Tab A 112.

²⁴⁸ *Id.*, Ex. 7, Tab A 112.

²⁴⁹ Light Dep. at 82:23-85:19; 88:1-24; 89:16-19, Ex. 87; Becker Dep. at 173:23-175:23; 144:25-146:12 (confirming that Statement of Standards of Conduct in Business Ethics, which includes policy prohibiting fraternization, binds everyone at Sterling, from the CEO down), Ex. 33; Kochanek Dep. at 198:7-204:9; 205:15-206:12 (confirming that sexual harassment policy applies to everyone from CEO down and has been applied consistently for at least the last decade), Ex. 8; *see* Fraternization Policy, SJI 2380-85, at 2383-84, Kochanek Ex. 9, attached as Ex. 30.

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G. Expert Reports of Dr. Kathleen Lundquist & Dr. James Outtz

1. Dr. Kathleen Lundquist

Dr. Lundquist is an Industrial/Organizational psychologist who, over more than 30 years,

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has advised employers, both private and governmental, on matters related to the selection, evaluation and compensation of employees, including the design of related human resource processes, the analysis of job contents and job requirements, and the validation of employee selections and compensation procedures.²⁵⁶ During her professional career she has performed consulting work for companies in many areas, including retail, has served as an expert witness on behalf of both plaintiffs and defendants in numerous cases and also as a court-appointed expert in several cases where she was charged with assuring that provisions of Consent Decrees were properly implemented.²⁵⁷

Dr. Lundquist explained that the role of IO psychologists is to apply scientific methods to analyze jobs and design selection and compensation systems that serve the legitimate business purpose of making job-related, “valid,” selection and other employment decisions that identify and compensate the candidates who are more likely to successfully perform the job. In doing so, Dr. Lundquist described the applicable professional standards and legal guidelines that rely upon those standards.²⁵⁸ Moreover, Dr. Lundquist explained the most important principles in developing job-related selection and compensation measures include: (a) the necessity for basing employment decision-making upon a job analysis that identifies important work behaviors and/or tasks; (b) use of a validation process whereby an empirical analysis is used to determine whether the employment measure will likely predict and/or further better job performance; (c) the development of a standardized and monitored process in order to assure the

²⁵⁶ Lundquist Report at 5, Attachment A (Curriculum Vitae), Ex. 46.

²⁵⁷ *Id.* at 5-6, Ex. 46.

²⁵⁸ Soc’y for Industrial and Organizational Psychology, Inc., The Principles for the Validation and Use of Employees Selection Procedures (4th ed. 2003) (“SIOP Principles”); Am. Psychological Ass’n, Nat’l Council on Measurement in Educ., Am. Educ. Research Ass’n, The Standards for Educational and Psychological Tests (2d ed.1999) (“APA Standards”); and Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 et seq. (“Uniform Guidelines”). The Uniform Guidelines, which were jointly promulgated by five federal agencies including the EEOC, are “built upon . . . the standards of the psychological profession,” 29 C.F.R. § 1607.1.C, such as the SIOP Principles and the APA Standards.

reliability of the application of the employment measure, that is its use in a consistent manner, free of measurement error; (d) monitoring of the selection and compensation process in order to evaluate whether it has adverse impact upon a protected group; (e) if there is pay inequity that there is an evaluation of measures to resolve and eliminate such inequity; and (f) if a selection procedure results in adverse impact that there is an investigation of whether there is an alternative procedure that would have less or no adverse impact with a substantially equivalent level of validity.²⁵⁹

Dr. Lundquist explained in detail that Sterling's selection and compensation practices failed to meet basic professionally accepted standards. Sterling prepared no job analysis, did not conduct any validity study, applied unreliable measures, and did no evaluation of whether its compensation system resulted in women receiving unequal pay or whether its promotion process had an adverse impact on women.²⁶⁰

Furthermore, Dr. Lundquist explained that Sterling's HR managers lacked knowledge concerning professional standards and legal requirements.²⁶¹ In addition, these HR managers did not undertake basic tasks routinely performed by HR managers at other companies and that are essential for assuring the fair and non-discriminatory application of personnel practices. For example, Sterling's HR department did no studies to assess the job-relatedness of its procedures, conducted no adequate oversight of the application of Sterling's promotions and compensation practices, and did little to implement these practices.²⁶² Lastly, the HR Department failed to assure the application of minimum standards required for the operation of an effective system for

²⁵⁹ Lundquist Report at 8-13, Ex. 46.

²⁶⁰ Lundquist Report at 17-18 (no job analysis), 17 (no validation study), 18 (no reliability), 16 (no pay study), 16 (no analysis of adverse impact), Ex. 46.

²⁶¹ Lundquist Report at 17-18, Ex. 46.

²⁶² Lundquist Report at 15-18, Ex. 46.

the resolution of harassment and discrimination complaints.²⁶³

Finally, Dr. Lundquist found female applicants hired by Sterling were significantly less likely to have experience as store managers and had significantly fewer years of experience in store management than their male counterparts.²⁶⁴ Dr. Lundquist found that because Sterling gave “strong consideration of management experience” when setting starting salaries of Sales Associates, the difference in prior management experience “undoubtedly had a negative impact on female employees’ initial pay rates.”²⁶⁵ In addition, Dr. Lundquist found Sterling’s hiring criteria disadvantaged women because even though females had either similar or greater jewelry-specific sales experience than males, Sterling’s failed to capture jewelry specific sales experience in its Wage Rate Generator algorithm unless documentation of such sales was provided.²⁶⁶

Dr. Lundquist concluded that:

“It is my professional opinion that the promotion and compensation decisions made for the retail sales and management jobs at Sterling lack sufficient reliability and validity to be considered job-related. Moreover, the lack of consistency and structure permitted measurement error to occur, including intentional or unintentional biases. Additionally, barriers to the advancement and equitable compensation of female employees increased the likelihood of gender discrimination in promotions and compensation at Sterling.”²⁶⁷

2. Dr. James Outtz

For over 30 years, Dr. Outtz has worked as an Industrial-Organizational Psychologist. During that time he has served in prestigious professional and governmental positions including

²⁶³ Lundquist Report at 19-20, Ex. 46.

²⁶⁴ *Id.* at 36-37, Ex. 46.

²⁶⁵ *Id.*, Ex. 46.

²⁶⁶ *Id.*, Ex. 46.

²⁶⁷ *Id.* at 44, Ex 46.

several National Academy of Sciences' committees.²⁶⁸ Recently, Dr. Outtz edited a volume on the measurement and minimization of the adverse impact of employment measures upon women and minorities.²⁶⁹ Throughout his professional career Dr. Outtz has consulted with private and governmental employers in the development of personnel practices.²⁷⁰ On numerous occasions, Dr. Outtz has served as an expert witness for both plaintiffs and defendants.²⁷¹

Dr. Outtz' report addresses three issues critical to the evaluation of whether female employees at Sterling were fairly and lawfully treated: (a) whether the behavior of Sterling executives and senior managers may establish patterns of conduct that guide the behavior of lower-level managers; (b) whether the record evidence describing the behavior of Sterling's executives and senior managers is sufficient to have established workplace norms guiding the behavior of lower-level managers towards female employees; and (c) whether the record evidence indicates that the behavior and comments of senior managers toward women was capable of influencing the exercise of discretion adversely to women regarding compensation and promotion decisions made by managers even though women held some managerial positions and Sterling had in place a written policy prohibiting sex discrimination and prohibiting managers from "fraternizing" with employees under their supervision.

Dr. Outtz analyzed these three issues by reviewing Sterling's practices and the record evidence in light of his professional experience and relevant professional research. Given the substantial research evaluating the impact of negative conduct by leaders of an organization, there is a substantial "basis" for concluding that the negative or "abusive" behavior of leaders of

²⁶⁸ Outtz Report at Appendix 2, (Curriculum Vitae), Ex. 103.

²⁶⁹ Outtz Report at 2-3, Ex. 103.

²⁷⁰ Outtz Report at 3, Ex. 103.

²⁷¹ Outtz Report at 4, Ex. 103.

an organization will “trickle down” to influence lower level managers to engage similarly in “abusive” or negative behavior.²⁷²

Dr. Outtz concludes that Sterling has an explicit practice of “leading by example” that reinforces the pattern of lower-level managers modeling their actions upon the conduct of Sterling executives and senior managers.²⁷³ The abusive conduct, including unwanted sex-related behavior, engaged in by the CEO, Mark Light, other executives and senior managers has resulted in a “climate and culture at Sterling in which female employees and their work are devalued when compared to male employees.”²⁷⁴ The devaluation of women resulting from the conduct of executives and senior managers can influence their value, as perceived by lower-level managers, both at the time of hire and as employees and adversely affect the way that these managers exercised their discretion in making compensation and promotion decisions.²⁷⁵

The existence of women in managerial ranks cannot by itself overcome the discriminatory consequences of the devaluation of women resulting from the abusive conduct of Sterling executives and senior managers. For example, the failure of a company, as is true at Sterling, to take harassment and discrimination complaints seriously by investigating those complaints and disciplining offenders, has been shown by research to have substantially more of an impact on whether there is a non-discriminatory workplace than whether or not women occupy some managerial positions.²⁷⁶ Dr. Outtz concluded that abusive conduct towards women by Sterling’s executives and upper-level managers, including unwanted sexual behavior, and the devaluation of women at Sterling likely impacted the conduct of lower-level managers in their

²⁷² Outtz Report at 9-10, Ex. 103.

²⁷³ Outtz Report at 10-17, Ex. 103.

²⁷⁴ Outtz Report at 18, Ex. 103.

²⁷⁵ Outtz Report at 29, 38, Ex. 103.

²⁷⁶ Outtz Report at 21-29, Ex. 103.

evaluation in making compensation and promotion decisions in a way that adversely affected the employment opportunities of women.

III. ARGUMENT

For reasons set forth below, Claimants satisfy the requirements for certification of their proposed class under Federal Rule of Civil Procedure 23 and AAA Supplementary Rule 4.

A. Legal Standard

1. Federal Rule of Civil Procedure 23(a) and AAA Supplementary Rule 4(a)

The party or parties seeking to certify a class must satisfy each of the subsections of Rule 23(a), which provides that:

One or members of a class may sue or be sued as representative parties on behalf of all class 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.

The American Arbitration Association’s Supplementary Rules for Class Arbitrations provide that an arbitrator must consider the criteria enumerated in Supplementary Rule 4 “and any law or agreement of the parties the arbitrator determines applies to the arbitration.”²⁷⁷ Rule 4(a) tracks the language of Fed. R. Civ. P. 23(a) closely, but not identically. Rule (4)(a)(1) contains minor differences, which do not change the inquiry here: “(1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable. . . .” Rule 4(a)(2)-(4) are identical to Rule

²⁷⁷ AAA Supplementary Rule for Class Arbitrations 4.

23(a)(2)-(4) precisely. Rule 4 also includes requirements that “counsel selected to represent the class will fairly and adequately represent the interests of the class,” which is typically part of the Rule 23(a)(4) inquiry, and that “each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.”²⁷⁸ The parties have stipulated to satisfaction of this last requirement.²⁷⁹

2. Federal Rule of Civil Procedure 23(b) and AAA Supplementary Rule 4(b)

The party or parties seeking to certify a class must also satisfy AAA Supplementary Rule 4(b), which is identical to Rule 23(b)(3), substituting “arbitrator” for “court.” Rule 23(b)(3) and Rule 4(b) permit certification of a class where the arbitrator “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.” Both Rules specify four factors that must be considered in determining whether these standards are met, the wording of which is nearly the same. “The matters pertinent to these findings” under Rule 4(b) include: “(1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations,”²⁸⁰ (2) “the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class,”²⁸¹ “(3) the desirability or undesirability of concentrating the

²⁷⁸ AAA Supplementary Rule for Class Arbitrations 4(a)(5)-(6).

²⁷⁹ See Stipulation Regarding Versions of RESOLVE Program Agreement (Feb. 14, 2013), attached as Ex. 104.

²⁸⁰ Rule 23(b)(3)(A): “the class members’ interests in individually controlling the prosecution or defense of separate actions. . .”

²⁸¹ Rule 23(b)(3)(B): “the extent and nature of any litigation concerning the controversy already begun by or against class members. . .”

determination of the claims in a single arbitral forum,”²⁸² and “(4) the difficulties likely to be encountered in the management of a class arbitration.”²⁸³

3. The Arbitrator’s Inquiry

To determine whether a class may be certified, the Arbitrator must conduct a “rigorous” analysis to ascertain whether each sub-part is satisfied.²⁸⁴ There may be some overlap with the merits of the underlying claims.²⁸⁵ However, the Supreme Court has recently cautioned that “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”²⁸⁶

4. The Proposed Class

Claimants, therefore, seek certification of a class comprised of women who have worked in Sterling’s retail stores as Sales Associates, Department Managers, any Assistant Manager position, or any Store Manager position (“Retail Sales Employees” or “the putative class”) for the period from June 2, 2002 to the first day of trial.²⁸⁷

B. Claimants Satisfy the Requirements of Rule 23(a) and Equivalent AAA Supplementary Rule 4(a)

1. Numerosity: Claimants Satisfy the Requirements of Rule 23(a)(1) and AAA Supplementary Rule 4(a)(1)

²⁸² Rule 23(b)(3)(C): “the desirability or undesirability of concentrating the litigation of the claims in a particular forum. . .”

²⁸³ Rule 23(b)(3)(D): “the likely difficulties in managing a class action. . .”

²⁸⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). As described by Judge Garaufis, the Second Circuit’s standard remains applicable after *Wal-Mart*: courts must determine whether each of these prerequisites has been established by a “preponderance of the evidence, but “a district court should not assess any aspect of the merits unrelated to a Rule 23 requirement.” *United States v. City of New York*, 276 F.R.D. 22, 28 (E.D.N.Y. 2011), quoting *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

²⁸⁵ *Wal-Mart*, 131 S. Ct. at 2551.

²⁸⁶ *Am-Gen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

²⁸⁷ *See supra* Sec. I at 3-4, n.4.

The proposed class is so numerous that “joinder of all members is impracticable.”²⁸⁸ The putative class is estimated to include at least 44,000 women.²⁸⁹ “Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers.”²⁹⁰ However, courts in the Second Circuit routinely conclude that the numerosity requirement is satisfied when the class comprises 40 or more members and unlikely to be satisfied “when the class comprises 21 or fewer.”²⁹¹ There should be no dispute, therefore, that the numerosity requirement has been satisfied here.

2. Commonality: Claimants Satisfy the Requirements of Rule 23(a)(2) and AAA Supplementary Rule 4(a)(2)

a. *The Standard for Commonality Following Wal-Mart v. Dukes*

Rule 23(a)(2) and AAA Supplementary Rule 4(a)(2) require that Claimants show there are questions of law or fact common to the class. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court clarified the standards for proof of commonality in Title VII cases. The Court held that, while “a single [common] question” is enough to satisfy Rule 23(a)(2), litigation of that common question must “produce a common answer to the crucial question *why was I disfavored*.”²⁹² Class members’ claims “must depend upon a common contention” that is “capable of classwide resolution.” The determination of this issue “will resolve an issue that is central to the validity of each of the claims in one stroke.”²⁹³

²⁸⁸ Fed. R. Civ. P. 23(a)(1).

²⁸⁹ See Lanier Report ¶9, Ex. 41.

²⁹⁰ *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993); see also *Novella v. Westchester Cnty.*, 661 F.3d 128, 143-44 (2d Cir. 2011) (“This ‘numerosity’ requirement’ does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate.”) (citing *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 504 F.3d 229, 244–45 (2d Cir. 2007)).

²⁹¹ *Novella*, 661 F.3d at 144.

²⁹² *Wal-Mart*, 131 S. Ct. at 2552, 2556 (internal quotation marks omitted) (emphasis in original).

²⁹³ *Id.* at 2545.

In pattern or practice disparate treatment cases, *Wal-Mart* requires “significant proof that [an employer] operated under a general policy of discrimination.”²⁹⁴ For disparate impact claims, the plaintiffs must typically identify a specific employment practice or practices that adversely affected those advancing the claim.²⁹⁵ Where the disparate impact claim challenges discretionary decision-making, the continuing vitality of which the *Wal-Mart* Court expressly endorsed,²⁹⁶ those seeking certification must also show evidence of a “common mode of exercising [this] discretion.”²⁹⁷

Lower courts interpreting the *Wal-Mart* decision have found that claims and evidence similar to those presented here satisfy the commonality requirement. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Seventh Circuit reversed an order denying class certification involving employment policies authorizing use of discretion alleged to have an adverse impact on African-American brokers. Unlike the practices challenged in the *Wal-Mart* case, which involved only “the delegation of discretion,”²⁹⁸ the Seventh Circuit found discrete personnel policies applicable companywide within which employees were permitted broad discretion to satisfy the commonality requirement of Rule 23. As Judge Posner explained for a

²⁹⁴ *Id.* at 2553.

²⁹⁵ *Id.* at 2555-56.

²⁹⁶ *See Id.* at 2554 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)); *see also Calibuso v. Bank of Am. Corp.*, 893 F. Supp. 2d 374, 390 (E.D.N.Y. 2012) (*Dukes* “did not foreclose all class action claims where there is a level of discretion afforded to individual managers and supervisors”); *Kassman v. KPMG, LLP*, No. 1:11-cv-03743-LGS, 2013 WL 452913, at *6 (S.D.N.Y. Feb. 7, 2013) (“Significantly, however the Court [in *Dukes*] did not close the door altogether on the possibility of certifying a class based on a policy of giving discretion to lower-level supervisors.”). Both Dr. Lundquist and Dr. Outtz explain the ways in which the exercise of discretion in the implementation of Sterling’s compensation and promotion policies gave rise to disparate impact in this case. *See* Lundquist Report at 36-37, 39, 44, Ex. 46; Outtz Report at *passim*, 39, Ex. 103. The jurisprudence is in accord with their professional judgment. *See, e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th Cir. 2011), *cert denied*, 133 S. Ct. 338 (U.S. 2012) (decisionmakers “tend to base decisions on emotions and preconceptions, for want of objective criteria,” which can lead them to choose “people who are like themselves.”).

²⁹⁷ *Wal-Mart*, 131 S. Ct. at 2554-55.

²⁹⁸ *Wal-Mart*, 131 S. Ct. at 2556.

unanimous panel, the existence of a companywide personnel policy distinguished the employment practices challenged in *McReynolds* from the “delegation of discretion” in *Wal-Mart*, which failed to qualify as a discrete, company personnel policy.²⁹⁹ Notably, while the policies at issue in *McReynolds* permitted the exercise of discretion, which plaintiffs contended contributed to discrimination, the Seventh Circuit found dispositive that the discretion was exercised “within a framework established by the company.”³⁰⁰ This framework distinguished the case from the delegation of discretion challenged in *Wal-Mart*. The policies at issue in *McReynolds*, one which permitted brokers to form teams pursuant to criteria of their choice and the other which permitted the allocation of departing brokers’ accounts pursuant to criteria of the remaining brokers’ choice, constituted discrete personnel policies that permitted those administering them broad discretion in how to implement them.³⁰¹ The Seventh Circuit concluded challenges to these policies presented questions about their adverse effect that could generate answers common to the class.³⁰²

Similarly, in *Ellis v. Costco* (“*Costco*”), the U.S. District Court for the Northern District of California certified challenges to discrete employment policies under both pattern or practice and disparate impact theories of liability.³⁰³ Like *McReynolds*, the *Costco* court found that the

²⁹⁹ *McReynolds*, 672 F.3d at 488-89. In *In re Countrywide Financial Mortgage Lending Practices Litigation*, the Sixth Circuit held that the plaintiffs had failed to satisfy the requirements for commonality laid down in *Wal-Mart*. However, as the Sixth Circuit noted, its decision is not at odds with *McReynolds*. *In re Countrywide Fin. Mortgage Lending Litig.*, 708 F.3d 704, 708-09 (6th Cir. 2013); see also *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 897 (7th Cir. 2012) (finding that the broad delegation of discretion with no identification of top-down direction or discrete challenged policies did not meet *Wal-Mart*’s standards for establishing commonality). Here, Claimants have provided evidence of top-down direction and have specifically identified challenged practices, distinguishing their claims from those in *Countrywide* and *Bolden*. See *infra* Sec. III.B.2.

³⁰⁰ *McReynolds*, 672 F.3d at 488.

³⁰¹ *Id.* at 488-89.

³⁰² *McReynolds*, 672 F.3d at 490-91.

³⁰³ *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), *appeal dismissed*, 657 F.3d 970 (9th Cir. 2013).

exercise of discretion in decisions made pursuant to discrete company policies satisfied the commonality requirement of Rule 23.³⁰⁴ A constellation of policies, which are also present here, were at issue: a promotion-from-within preference, a practice against posting management job vacancies, and the absence of a formal application process for promotions to assistant general manager and general manager positions.³⁰⁵ In concluding that the plaintiffs had shown “a general policy of discrimination” supporting certification of their pattern or practice claim, the court found significant that high-level employees were involved in the promotion process; and that there were (1) common, but unvalidated, criteria for promotion, (2) anecdotal and statistical evidence showing disparities adverse to women, and (3) evidence of gender stereotyping within the upper management ranks.³⁰⁶ Relying upon evidence of executive involvement in the relevant decisions and recognition of a clear policy regarding promotions companywide, to which discretionary decisions were tethered, the court also concluded that the company’s management “utilizes a common mode of exercising discretion.”³⁰⁷ The court found satisfaction of the commonality requirement “even clearer” for the disparate impact claim, as the plaintiffs had “identified specific employment practices they allege have caused” the challenged disparity.³⁰⁸

b. Claimants Have Satisfied the Standard for Commonality

³⁰⁴ *Costco*, 285 F.R.D. at 518.

³⁰⁵ *See id.* at 511.

³⁰⁶ *See id.* at 511-20.

³⁰⁷ *Id.* at 510 (citing *Wal-Mart*, 131 S.Ct. at 2553, 2554).

³⁰⁸ *Costco*, 285 F.R.D. at 518-19; *see also Calibuso v. Bank of America, Corp.*, 893 F. Supp.2d 374, 390 (E.D.N.Y. 2012) (“*Dukes* did not foreclose all class action claims where there is a level of discretion afforded to individual managers . . . [H]ere plaintiffs allege that the implementation of companywide procedures [including the compensation system] results in a disparate impact on women because the criteria used by individuals managers is flawed.”); *Moore v. Napolitano*, No. 00-953(RWR/DAR), 2013 WL 659111, at *14-15 (D.D.C. Feb. 25, 2013) (holding that plaintiffs’ identification of defendant’s promotions policy, coupled with anecdotal and statistical evidence demonstrating the adverse impact to African Americans caused by the policy, was sufficient to establish commonality).

Consistent with these authorities, Claimants have set forth evidence that satisfies the requirements of commonality for their compensation claims under the EPA and for their compensation and promotion claims under both disparate impact and pattern or practice disparate treatment theories of liability under Title VII.

First, Claimants have satisfied the commonality standard for their EPA claims, as more fully described below, as both proof of their *prima facie* case and any defense Sterling may assert would be proven using evidence common to the class. Evidence that women have been systematically paid less than men doing substantially the same work in the same establishments can be adjudicated in a manner common to the class.

Second, Claimants have satisfied the commonality requirement for their Title VII disparate impact claims challenging compensation and promotion policies under a disparate impact theory of liability. Claimants challenge discrete employment policies to which all members of the proposed class have been subject and which they show have resulted consistently in significant disparities adverse to women. In particular, Claimants challenge: 1) The manner in which Sterling has used prior job experience, including prior management experience, in setting starting pay rates for Sales Associates and 2) Sterling's policy for awarding merit increases as a percentage of base pay. Claimants also challenge the Succession Planning process that Sterling has used to identify, groom and select candidates for promotion into and within management jobs at the retail stores. Together, the Claimants' challenge to these policies and the evidence of disparities adverse to women they have caused satisfy the commonality requirement of AAA Supplemental Rule 4(a)(2).

Claimants have also satisfied the commonality requirement for their Title VII claims alleging a pattern or practice of discrimination in the compensation and promotion decisions in

Sterling's retail stores. These claims can be adjudicated in a manner common to the class relying upon evidence of statistical analyses showing significant disparities adverse to women in compensation and promotion as well as evidence of widespread conduct demeaning to women and evidence of stereotyping attributable to senior executives and other decision-makers. Together this evidence demonstrates the presence of a general policy of discrimination in satisfaction of AAA Supplementary Rule 4(a)(2).³⁰⁹

These claims, and the common evidence on which they rely, give rise to the following questions common to the class: (1) whether Sterling's use of prior job experience in setting starting pay for Sales Associates has had the effect of, and has been used with the intention of, denying women compensation equal to men performing substantially the same work; (2) whether Sterling's policy of setting merit increases as a percentage of base pay has had the effect of, and has been used with the intention of, causing pay disparities adverse to women; (3) whether Sterling's Succession Planning process has had the effect of, and has been used with the intention of, denying women the same opportunities for promotion into and within management positions; and (4) whether any of these policies or practices is justified by business necessity or any of the statutory defenses available under the EPA.

i. Claimants' Equal Pay Act Claims Present Issues of Fact and Law Common to the Class

The establishment of a *prima facie* case under the EPA requires demonstrating two elements, both of which can be established here using evidence common to the class. The Equal Pay Act requires that men and women be paid equally for performing substantially the same

³⁰⁹ Although the Supreme Court has not explained precisely what constitutes significant proof of a general policy of discrimination sufficient to satisfy the commonality requirement for class certification, the evidence Claimants have offered here would be enough to satisfy the requirements of *Teamsters* for merits, requirements endorsed by the Court in *Wal-Mart*, and must therefore be sufficient to satisfy the commonality standard. *See infra* Sec. III.B.2 at 81 (describing commonality standard for pattern or practice disparate treatment claims against backdrop of *Teamsters*).

work in the same place of business or establishment.³¹⁰ The employer is liable for differences in pay by gender for those doing substantially similar work,³¹¹ unless the employer can satisfy one of the defenses provided by the EPA.³¹² No evidence of intent is required to prove liability under the EPA.³¹³ The claims arising under the EPA present issues common to the class, as detailed more fully below, and can be adjudicated using evidence common to the class:

(a) Claimants’ Prima Facie Case Can Be Established Using Evidence Common to the Class

First, the EPA requires the determination whether the men and women whose compensation is being compared work in substantially the same jobs, which turns on an inquiry into skills, levels of responsibility, and working conditions of these employees.³¹⁴ Here, Claimants seek to certify a class of female Retail Sales Employees—women who have held a handful of job titles, in a company where job descriptions are uniform across all stores.³¹⁵ Therefore, determining whether the jobs worked by the male and female employees whose compensation is being compared are substantially similar is an issue common to the class and readily determined by evidence common to the class.

³¹⁰ Equal Pay Act of 1963, 29 U.S.C. § 206(d).

³¹¹ In *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 261, 265-67 (3d Cir. 1970), the court established that “equal work on jobs” under the EPA requires that jobs be “substantially equal” but not necessarily identical. The Second Circuit, and other courts, adopted this standard. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995), *abrogated on other grounds*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

³¹² See *infra* Sec. III.B.2. at 72 - 73 n.314 (describing employer’s high burden).

³¹³ This has led the Second Circuit to characterize the EPA as creating strict liability for employers who pay similarly situated employees different compensation. See *Tomka*, 66 F.3d at 1310 (“The Equal Pay Act creates a type of strict liability”); *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999); see also *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 640 (2007), *overturned on other grounds by legislative action*, U.S. Pub. L. No. 111-2 January 29, 2009 (“ . . . EPA does not require the filing of a charge with the EEOC or proof of intentional discrimination.”).

³¹⁴ *Tomka*, 66 F.3d at 1310.

³¹⁵ See *supra* Sec. II.A.1 at 8 (describing common job descriptions across Sterling).

Second, as the EPA requires a comparison between the compensation paid to employees working in the “same establishment,” the scope of the organizational unit of Sterling that qualifies as an “establishment” raises another question common to the class.³¹⁶ As the evidence shows, employees within the same District work in the same establishment. Several factors, provided for in the EEOC’s regulations, support the conclusion that employees who work at stores in the same District work within the same establishment within the meaning of the EPA.³¹⁷ At Sterling, all members of the putative class have been subject to the same compensation policies for the entire period covered by this action.³¹⁸ Those policies establish that DMs set starting pay and also make merit increase decisions.³¹⁹ In addition, Store Managers within the same District report to the same DM; employees are permitted to and do move between stores within the same District and between the Mall and Jared Divisions; and employees throughout the District are performing the same type of duties.³²⁰ Whether Sterling’s Districts qualify as

³¹⁶ *Tomka*, 66 F.3d at 1310 (setting forth *prima facie* case); *Moore v. Publicis Grp. SA*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 2574742, at *11 (S.D.N.Y. June 29, 2012) (explaining that the scope of “establishment” may be a common issue).

³¹⁷ “[U]nusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment. For example, a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be virtually identical and performed under similar working conditions.” 29 C.F.R. § 1620.9(b).

³¹⁸ *See supra* Sec. II.B.1-2 at 10 - 11 (starting pay and merit increase policies are identical across Sterling).

³¹⁹ *See supra* Sec. II.A.1, B.1 at 11 - 12 (role of DMs in setting starting pay and merit increases).

³²⁰ *See Rehwaldt v. Elec. Data Sys. Corp.*, No. 95-876, 1996 WL 947568, at *7 (W.D.N.Y. Mar. 28, 1996) (citing facts that separate divisions reported to same vice president and that plaintiff was able to move between divisions as support for using multiple locations as the “establishment”). Where, as here, there is evidence of centralized decisionmaking and an interrelationship among entities within the district, courts routinely define establishment at the district level. *See supra* Sec. II.A.1 at 6 n. 242 (describing movement of employees within District, regular communication among Store Managers and DM) and 243 (describing centralization of starting pay and merit increases policies at Sterling); *Rehwaldt*, 1996 WL 947568 at *6 (“[T]he remedial purpose of the FLSA would be emasculated, and common sense would be ignored, if the same employer could operate two plants performing the same essential functions under the same management across the street from one another, but have each plant be deemed a separate establishment for Equal Pay Act claims.”); *see also Brownlee v. Gay & Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan. 1985) (“where central supervision exists and where pay standards apply for an entire

establishments under the EPA is a question that can and should be adjudicated on the basis of evidence common to the class.

Finally, statistical analyses of Sterling’s workforce data show that women have been consistently paid less than men performing substantially the same work. These analyses rely upon regression equations that account for all factors that are relevant to compensation, including potential years spent not employed with Sterling after age 18, company tenure, job tenure, annualized incentive compensation, latest performance review rating, and store and year.³²¹ The proof supporting and refuting these statistical analyses will be common to the class.³²²

Moreover, because the challenged pay decisions were made pursuant to policies in operation throughout all the retail stores, their effect can and should be assessed across the class.³²³

business entity regardless of where the employee is located, individuals should be compared on the basis of their employment function and not geographic location”), *aff’d*, 861 F.2d 1222 (10th Cir. 1988); *Grumbine v. United States*, 586 F.Supp. 1144, 1148 (D.D.C. 1984) (declining to give “establishment” a geographic meaning because “this reasoning has little relevance to the Equal Pay Act” and should not apply “where typically central supervision exists and pay standards apply for an entire system irrespective of where the employee happens to be located”); *Collins v. Dollar Tree Stores*, 788 F. Supp. 2d 1328, 1341-42 (N.D. Ala. 20011) (holding that a company’s district, all stores under a single district manager, constitutes a relevant establishment). At least at least one district court, when confronted with facts very similar to those here, endorsed a definition of establishment even broader than that proposed here. *See Chapman v. Fred’s Stores of Tenn., Inc.*, No. 2:08-cv-01247-HGD, 2013 WL 1767791, at *10-11 (N.D. Ala. Mar. 15, 2013), report and recommendation adopted, No. 2:08-cv-01247-HGD, 2013 WL 1760000 (N.D. Ala. Apr. 22, 2013) (defining establishment to be nationwide where there was evidence of centralized job control, centralized job assignment descriptions and functions, and salary administration through pay scale set at corporate level but with some review by regional managers). Here, Claimants merely seek to define “establishment” at the District level.

³²¹ Lanier Report at Tbl. 7, Ex. 41.

³²² *Id.* at ¶¶57-62, Tbl. 15, Ex. 41.

³²³ *See* Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* 242-43 (Springer, 1st ed.1990) (“A composition of the aggregation and disaggregation points of view is to *disaggregate* when there is a risk of bias, but then to *combine the evidence* from the various sources or strata. That is, having disaggregated to reduce bias and increase validity, we then seek a statistic that sums up the situation in an appropriate way.”) (emphasis in original), attached as Ex. 105; Joseph L. Gastwirth, et al., *Some Important Issues Courts Should Consider in Their Assessment of Statistical Analyses Submitted in Class Certification Motions: Implications for Dukes v. Wal-Mart*, 10 *Law, Probability & Risk* 225 (2011), attached as Ex. 106; Lanier Report at ¶28, Ex. 41. The jurisprudence is in accord with the principle that patterns can be considered across organizational units. *See Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (“it is a generally accepted principle that aggregated statistical data may be used where it is

Accordingly, the results of pay decisions can and should be analyzed within each District and then across Districts using evidence common to the class.³²⁴ Therefore, analysis of whether disparities in pay exist can and should be determined on a class-wide basis for both starting pay and merit increases.

(b) Defenses can be Adjudicated on a Basis Common to the Class

Once Claimants have established a prima facie case that the EPA has been violated using evidence common to the class, Sterling may offer any of four affirmative defenses under the EPA.³²⁵ Sterling's proof and Claimants' rebuttal of any of these defenses would also raise issues common to the class. However, only two defenses are even remotely available here, and only one is even possible on the record³²⁶—whether disparities in compensation between men and

more probative than subdivided data"); *see also Kirkland v. N.Y. State Dept. of Corr. Servs.*, 520 F.2d 420, 425 (2d Cir. 1975) (affirming district court's refusal to "fractionalize the examination" because of employees' mobility, uniformity in requirements and similarity in job classifications). At this stage of the litigation, analysis of the aggregate data across Sterling's Districts is appropriate to demonstrate the existence of common issues. *Gutierrez v. Johnson & Johnson*, No. 01-5302 (WHW), 2006 WL 3246605, at *4 (D.N.J. Nov. 6, 2006) ("The issue . . . is not whether the [aggregated analysis] demonstrates commonality; the issue is whether the Court may consider the [aggregated analysis] in determining whether there are sufficient common issues of law and fact to support class certification. . . aggregated analysis may be highly relevant together with other evidence tending to show a pattern and practice of discrimination.").

³²⁴ Lanier Report at ¶28, Ex. 41.

³²⁵ 29 U.S.C. § 206(d)(1). The "[b]urden of establishing one of the four affirmative defenses is a heavy one. . . because the statutory exemptions are narrowly construed." *Ryduchowski v. Port Auth. of N.Y. & New Jersey*, 203 F.3d 135, 143 (2d Cir. 2000) (internal citations and quotations omitted); *see Osborn v. Home Depot U.S.A., Inc.*, 518 F. Supp. 2d 377, 387 (D. Conn. 2007). "[W]here there is a discrepancy in wages and the employer offers its established policy as an explanation, the inquiry must focus on whether that policy has been used reasonably . . . , in light of the employer's stated purpose for the policy and in light of the employer's other practices." *Belfi*, 191 F. 3d at 136.

³²⁶ Two EPA defenses concern differences in pay based upon a "seniority system," or a "merit system." 29 U.S.C. § 206(d). Sterling has neither a "seniority system" nor a "merit system," and thus these defenses are not applicable. The third EPA defense applies to a system "which measures earnings by quantity or quality of production." 29 U.S.C. § 206(d)(1); *see Bence v. Detroit Health Corp.*, 712 F2d 1024, 1029 (6th Cir. 1983) (explaining that, to raise this defense, employer must pay employees "equal dollar per unit" compensation rates"); *Diamond v. T. Rowe Price Assoc.*, 852 F. Supp. 372, 391 (D. Md. 1994) ("a compensation system qualifies for the affirmative defenses of quantity/quality of production . . . if the employer determines bonuses, commissions, or salaries according to performance-based or other

women working substantially similar jobs within an establishment are justified by a “factor other than sex.”³²⁷ To satisfy its high burden, Sterling would have to show that it had a valid business justification for the pay disparity between female and male Retail Sales Employees; that is, the factor driving the pay disparity was, in fact, job related.³²⁸ In the event Sterling offers this defense, arguing that its use of prior job experience to set starting pay rates for Sales Associates is a “factor other than sex” justifying disparities in compensation within the meaning of the EPA, this would raise questions common to the class, whose resolution will also be common to the class because Sterling has directed the use of the same factor in setting starting pay, namely prior job experience, consistently across its stores throughout the period covered by this case.³²⁹

Even a cursory review of the evidence shows any defense that pay disparities are justified by prior experience can and should be adjudicated in a manner common to the class. Among the types of prior job experience that Sterling credits in setting starting pay rates for Sales Associates is prior management experience. Claimants contend that prior management experience is not

objectively verifiable criteria”); *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208 (S.D.N.Y. 2003) (finding that defendant successfully raised defense where plaintiff’s department underperformed comparators). Should Sterling attempt to offer this defense, it could be proven using evidence common to the class as Sterling’s compensation policies apply companywide. *See supra* Sec. II.A.1 at 7. Claimants rebuttal of that defense would also be common to the class, as female Retail Sales Employees outperform males in performance appraisals, which can be established using evidence common to the class. *See Lanier Report* at ¶23 and Tbl. 3, Ex. 41.

³²⁷ 29 U.S.C. § 206(d)(1); *Belfi*, 191 F.3d at 136 (“[T]he ‘factor other than sex’ defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.”) (quoting *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir.1988)); *Sandor v. Safe Horizon, Inc.*, No. 08-CV-4636 ILG, 2011 WL 115295, at *15-16 (E.D.N.Y. Jan. 13, 2011) (concluding that defendant failed to establish the factor other than sex defense where record did not show that the man actually had the unique prior experience that the company claimed and where he failed to meet minimum qualifications of job).

³²⁸ *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 526-27 (2d Cir. 1992) (holding that to establish this defense “an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential.”); *see Belfi*, 191 F.3d at 136 (holding that an employer “must demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential.”).

³²⁹ *See supra* Sec.II.B.1 at 11 (describing consistent policy for setting starting pay based on prior job experience).

related to successful performance in the Sales Associate job for which it is considered.³³⁰

Because the Sales Associate position has a common job description and is subject to a common policy for setting starting pay rates, adjudicating whether prior management experience is a valid factor in setting starting pay rates can be undertaken for the class as a whole.³³¹ Moreover, Drs. Lundquist and Lanier have established that Sterling has credited prior job experience in a way that it does not qualify as a factor other than sex and have done so on a classwide basis, supporting Claimants' position that the proof and rebuttal of a factor-other-than-sex defense may be undertaken on a classwide basis.

ii. Claimants' Disparate Impact and Disparate Treatment Claims under Title VII Present Issues Common to the Class

(a) Claims of Disparate Impact in Compensation and Promotion

(1) Compensation

As with Claimants' EPA claims, their claims under Title VII that rely upon a disparate impact theory of liability do not require proof of intent. As the *Costco* court observed, “[b]ecause the question under this theory is whether [d]efendant’s policies and practices have a discriminatory impact on the [c]lass as a whole without regard to intent, the *Dukes*-identified problem of decentralized and discretionary individual managers’ decisions presents less of a

³³⁰ Lundquist Report at 26-28, Ex. 46.

³³¹ Expert testimony from Dr. Kathleen Lundquist explains why prior management experience is not job related for hiring into a Sales Associate position at Sterling and therefore is not a valid factor other than sex within the meaning of the EPA. *See* Lundquist Report at 26-29, Ex. 46. This finding is reinforced by Dr. Lanier’s and Dr. Lundquist’s analyses of the manner in which Sterling has credited prior job experience. Lanier Report at ¶¶30-41, Tbls. 8a-8c (use of prior experience does not explain pay disparities—in fact, use of prior management experience increases pay disparities adverse to women), Ex. 41; Lundquist Report at 36-37, (results of study of how Sterling credited prior job experience), Ex. 46. Moreover, Sterling has used prior job experience to set starting pay in other ways that were not the product of job analyses. *See supra* Sec. II.B.1 at 12 (describing use of personal experience of Luth and others to credit prior job experience); Lundquist Report at 25 (set starting pay without undertaking job analysis), Ex. 46. Sterling did not value or credit prior job experience in a manner aligned with the responsibilities of the Sales Associate position and did so in a way that favored men.

hurdle to certification if the plaintiffs identify *specific companywide employment practices* responsible for the disparate impact.”³³²

Claimants assert that two discrete policies governing compensation of Retail Sales Employees at Sterling have had a disparate impact on members of the putative class: (1) the manner in which Sterling has used prior job experience to set starting pay rates of Sales Associates, and (2) the application of a merit increase process where raises are provided as a percentage to the employees’ base pay rate. Claimants will show at trial that each of these policies has had an adverse impact on women. Additionally, Claimants will show that managers have engaged in a common mode of exercising discretion afforded them in implementing these policies.

Claimants challenge the consistent companywide manner in which Sterling has relied upon prior job experience as having a disparate impact on women and failing to be related to the job in question and consistent with business necessity.³³³ In so doing, Sterling has used criteria for evaluating prior job experience, namely valuing prior management experience, that do not correlate with success as a Sales Associate at Sterling.³³⁴ In addition, Claimants challenge the discretion afforded managers in identifying and crediting the types of prior job experience used in setting starting pay rates for Sales Associates. In so doing, the managers have engaged in a common mode of exercising discretion, as they are applying and interpreting the same company policy; that is, that prior job experience be used to set starting pay rates.³³⁵

Claimants also challenge the use of a system for determining merit increases. By

³³² *Costco*, 285 F.R.D. at 531 (citing *Wal-Mart*, 131 S. Ct. at 2554).

³³³ Lanier Report at ¶¶30-41, Tbls. 8a-8c, 9, Ex. 41; Lundquist Report at 39, Ex. 46.

³³⁴ *See supra* Sec. II.B.1 at 11 (describing disconnect between performance and compensation); Lundquist Report at 25-26, Ex. 46.

³³⁵ *See supra* Sec. II.B.1 at 11-12 (describing DM role in setting starting pay).

applying a percentage to the base pay of employees in awarding merit increases, Sterling merely perpetuates the disparities in base pay rates that began at the time of hire. Notwithstanding that women perform better than men in similar positions in Sterling’s own performance appraisal process, women have consistently been paid less.³³⁶ The Second Circuit has held that subsequent employment practices, even if facially neutral, can be the “means” through which earlier disparities in starting pay are “carried forward” throughout employees’ careers.³³⁷ The situation presented here is like the circumstances in *McReynolds*, where the Seventh Circuit recognized the account distribution policy increased the amount of discrimination caused by the teaming policy; here Sterling’s merit increase policy perpetuates and even magnifies the discrimination caused at the time of hire in setting starting pay rates.³³⁸ The *Costco* court recognized this same dynamic.³³⁹

Thus, Sterling’s starting pay and merit increase policies require the use of common and consistent criteria but leave to DMs the decisions of how to value prior job experience. In a manner analogous to the policies in both *Costco* and *McReynolds*, Sterling’s compensation policies allow DMs to exercise their discretion in setting starting pay rates pursuant to a discrete Company policy.³⁴⁰ By construing the same criterion, prior job experience, the DMs exercise their discretion in a common manner. That the DMs exercised their discretion in setting starting

³³⁶ Lanier Report at ¶23, Tbl. 3, Ex. 41.

³³⁷ See *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 29-32 (2d Cir. 1975) (explaining that employer’s system of giving yearly “guideline increases” coupled with the employer’s failure to use “out-of-guidelines” increases to equalize pay of female professors perpetuated disparities that likely were the result of discrimination “in setting initial salaries or, at some point, in increasing them discriminatorily”).

³³⁸ *McReynolds*, 672 F.3d at 490 (“This spiral effect attributable to company-wide policy and arguably disadvantageous to black brokers presents another question common to the class. . .”).

³³⁹ See *Costco*, 285 F.R.D. at 532 (“the derivative effects of a companywide policy could themselves present issues common to the class.”).

³⁴⁰ See *id.*; *McReynolds*, 672 F.3d at 489; *supra* Sec III.B.2. at 63 - 64 (discussing commonality standard after *Dukes*).

pay rates in an environment polluted by conduct demeaning to women only reinforces the conclusion that the DMs exercised their discretion in a common manner.³⁴¹

The evidence is also compelling that the discrete policies Claimants challenge have had a disparate effect on women. The statistical analyses conducted by Dr. Lanier show that women performing the same jobs at the same locations have been consistently underpaid.³⁴² The analyses reveal a strong pattern of pay disparities adverse to women in each year between 2003 and 2012 and adverse to female full-time Sales Associates in 71 percent of the Districts, female Department Managers in 75.7 percent of the Districts, and female Assistant Managers and Store Managers in 63 percent of the Districts using rigorous regression analyses that compare employees in the same job and same stores with similar tenure and performance.³⁴³

Because these are specific policies used companywide over the course of the period covered by this case and because resolution of their impact can be accomplished on a basis common to the class, Claimants have satisfied the commonality requirement for their disparate impact compensation claims.

(2) Promotion

Claimants have identified and challenge discrete policies that govern the promotion process companywide at Sterling and that have had a disparate impact on female Retail Sales Employees. Claimants challenge Sterling's Succession Planning or Succession Management program, which directs DMs and VPROs to identify, groom, and ultimately select candidates for promotion into and within management throughout Sterling's retail stores. While Sterling provides a common set of criteria for identifying, grooming and selecting candidates for

³⁴¹ *Costco*, 285 F.R.D. at 532-33.

³⁴² *See supra* Sec. II.D. at 27 (describing Dr. Lanier's analysis).

³⁴³ *See supra* Sec. III.B.2. at 67, n.274 (discussing Gastwirth and Finkelstein articles) and Lanier Report ¶¶57-62 and Tbl. 15, Ex. 41.

promotion, it fails to define many of the criteria, such as communication, teamwork, and integrity, and to prescribe their relative importance to each other.³⁴⁴ The Succession Planning Program provides a process in which managers are directed to groom and pre-select candidates for promotion before the vacancies arise. Rather than post job vacancies and create a formal application process, however, in 2007 Sterling instituted the CAR which Sterling claimed would provide a forum in which candidates could register their interest in promotion and in which managers could identify and select candidates for promotion.³⁴⁵ Rather than using the CAR as a neutral and independent source of candidates for promotion, Sterling managers have continued to preselect candidates for promotion through Succession Planning.³⁴⁶ The CAR was used largely as a formality, a technical pre-requisite that had to be satisfied before a promotion could be finalized, rather than constituting the pool from which candidates from promotion were drawn.³⁴⁷

Much like *Costco*, the Succession Planning Program is a common policy through which bias has been exercised by managers exercising discretion in its implementation. In *Costco*, the court found several practices supported a finding of commonality: a promote-from-within policy; the involvement of high-level managers and executives in developing and maintaining lists of promotable candidates; the application of consistent, but unvalidated and unweighted, criteria across the company for determining promotability; and statistical evidence showing

³⁴⁴ See *supra* Sec. II.C.2 at 22 (describing Succession Planning Policy); Lundquist Report at 42-43 (describing insufficient guidance given for evaluating factors identified for Succession Planning), Ex. 46.

³⁴⁵ See *supra* Sec. II.C.3. at 25.

³⁴⁶ See *supra* Sec. II.C.3. at 25-26 (describing how Sterling has failed to use CAR as a neutral source of candidates for promotion).

³⁴⁷ Lanier Report at ¶¶52-53, Tbl. 13 (showing that more than 40% of promotions were made from registrations made to CAR within one month; median length of time in CAR before promotion is approximately two months), Ex. 41

disparities.³⁴⁸ Those elements appear here as well. Sterling's Succession Planning policy is the vehicle for Sterling's promote-from-within culture, requiring DMs and VPROs to identify, groom, and pre-select candidates for promotion. Sterling provides the managers a common set of criteria for identifying, grooming and pre-selecting candidates for promotion but failing to weight and assign some of those criteria.³⁴⁹

Thus, Sterling's companywide Succession Planning policy establishes common criteria to govern promotions but leaves to the managers the interpretation of those subjective factors, such as teamwork, communication and integrity, and the choice of weights to accord each of the many factors. As in both *Costco* and *McReynolds*, Sterling's policy of Succession Planning directs that DMs, VPROs, and DVPs exercise discretion in the interpretation and implementation of a discrete policy.³⁵⁰

Moreover, the Succession Planning Program ensures the managers will exercise their discretion in a common manner—like the disparate impact challenge to Sterling's pay policies, the discretion Sterling requires DMs, VPROs and DVPs to use in making promotion decisions is exercised in an environment polluted by conduct demeaning to women, reinforcing the conclusion that these managers have exercised their discretion in a common manner.³⁵¹

³⁴⁸ *Costco*, 285 F.R.D. at 531.

³⁴⁹ See *supra* Sec. II.C. at 20 - 21 (describing inadequate guidance offered for identifying candidates for grooming); Lundquist Report at 42-43 (describing insufficient guidance given for weighing factors to evaluate candidates for grooming), Ex. 46; see also *supra* Sec. II.C.2 at 22 (describing regular review by VPROs); *Floyd v. City of New York*, 283 F.R.D. 153, 163-64, 172, n.127 (S.D.N.Y. 2012) (citing *McReynolds* and explaining that the fact that city's stop-and-frisk program was discussed regularly at top-level management meetings and reported down to lower-level staff through Chief of Police's office supported commonality).

³⁵⁰ See *Costco*, 285 F.R.D at 532; *McReynolds*, 672 F.3d at 489; *supra* Sec. III.B.2 at 66 (discussing commonality standard after *Dukes*).

³⁵¹ Indeed, many of the managers entrusted to make promotion decisions have personally engaged in the behavior demeaning to women that has polluted the Sterling workplace. See *supra* Sec II.E. at 32 - 33. *Costco*, 285 F.R.D. at 532-33; see *supra* Sec II.E. at 33 - 39 (describing evidence of mistreatment of

Moreover, the evidence shows that the Succession Planning policy has consistently had a disparate effect on women. The statistical analyses conducted by Dr. Lanier show that women are less likely to receive promotions into and within management jobs at the retail stores and that those who receive promotions take longer to do so.³⁵² Dr. Outtz’s analysis shows that the number of women decline at the higher managerial and executive ranks of the company.³⁵³

Claimants have satisfied the requirements of commonality for their disparate impact promotion claims—whether Sterling’s Succession Planning policy has resulted in a disparate impact on female Retail Sales Employees is an issue common to the class that is subject to class-wide proof.

(b) Pattern or Practice Claims of Disparate Treatment in Compensation and Promotion

Claimants also advance claims alleging that Sterling engaged in a pattern or practice of intentional discrimination in the compensation and promotion decisions at issue in this case. As the Supreme Court explained in *Teamsters*, a decision the *Wal-Mart* Court reaffirmed,³⁵⁴ pattern or practice claims may establish liability upon showing that discrimination was the “regular

women by company executives and senior managers); *infra* Sec II.G.2 at 58 - 59 (describing findings of Dr. Outtz regarding how conduct by executives and managers can influence behavior inside a company).

³⁵² See *supra* Sec. II.D. at 30 - 31 (discussing Dr. Lanier’s report). As the challenged promotion decisions are made at the regional level by VPROs, upon recommendations by the DMs and final approval by the DVPs, Dr. Lanier studied promotions at the regional level and, because promotions are made pursuant to a policy common across each region, he also studied patterns across regions. Lanier Report at ¶48, Ex. 41.

³⁵³ See Outtz Report at 23, Ex. 103. Of the nearly 230 people who have held the DM position since 2002, fewer than half are female. *Id.*, Ex. 103. Since 2002, 24 people have held the position of VPRO, only six of whom have been female. See Glossary of Sterling Executives, Ex. 13.

³⁵⁴ *Wal-Mart*, 131 S. Ct. at 2554-56. As the Supreme Court held in *Hazelwood* and as the Second Circuit recently affirmed, statistical disparities alone can be sufficient to create an inference of liability, and therefore, can certainly be “significant proof” of a “general policy of discrimination” sufficient to show commonality. See *United States v. City of N.Y.*, Nos. 11-5113-CV L, 12-491-CV XPA, 2013 WL 1955782, at *7-8 (2d Cir. May 14, 2013) (explaining continuing viability of a *Teamsters*-model, pattern or practice disparate treatment case).

rather than the unusual practice.”³⁵⁵ Statistically-significant disparities between the observed and expected results in the challenged personnel practices are sufficient to establish liability, although individual accounts of discrimination “[bring] the cold numbers convincingly to life.”³⁵⁶ While not the same as proving liability, *Wal-Mart* interpreted the commonality standard for pattern or practice claims as requiring “significant proof that an employer operated under a general policy of discrimination.”³⁵⁷ As the evidence Claimants have offered, including robust statistically significant disparities and hundreds of accounts of bias, stereotyping and sexually demeaning behavior by Company managers and executives, should be sufficient to establish liability under *Teamsters*, it should be more than sufficient to satisfy commonality.

The same evidence of statistical disparities adverse to women, described above, which is offered in support of the disparate impact claims also demonstrates the “general policy of discrimination” required by the commonality standard here. In addition, Claimants provide a plethora of evidence of conduct demeaning to women exhibited by executives at Sterling which, while not necessary to sustain liability under *Teamsters*, suggests the kind of top-down direction that *Wal-Mart* offered as an example how commonality could be satisfied.³⁵⁸ This is precisely the type of evidence that the *Costco* court found to support commonality for the pattern or practice claims in that case. The court highlighted both the involvement of high-level level employees in the decisions at issue and evidence of gender stereotyping at senior levels of the company.³⁵⁹ There the plaintiffs offered evidence and expert testimony that “Costco’s culture

³⁵⁵ See *supra* Sec. III.B.2. at 80 - 81 (discussing *Costco* court’s cite to standard for proof of disparate treatment liability in *Teamsters*); *Costco*, 285 F.R.D. at 518 (citing *Teamsters*, 431 U.S. at 336).

³⁵⁶ *Teamsters*, 431 U.S. at 339.

³⁵⁷ *Wal-Mart*, 131 S. Ct. at 2551-53.

³⁵⁸ *Wal-Mart*, 131 S. Ct. at 2554-55.

³⁵⁹ *Costco*, 285 F.R.D. at 512-13, 520.

fosters and reinforces stereotyped thinking, which allows gender bias to infuse from the top down.”³⁶⁰

Claimants have provided similar evidence here.³⁶¹ First, the evidence here shows repeated instances when executives at all levels, from the CEO to DMs, have shown they regard women at Sterling as little more than sexual opportunities to exploit. While this evidence is described fully in earlier sections of the brief,³⁶² a few examples here should suffice to show the demeaning treatment of women employees. For example, Joe Beck, who has been and still is a Divisional Vice President, and Mark Light, currently the CEO of Sterling, were entertained rather than offended when a manager at a company meeting described a good female store manager as one who “walked like a sailor” because of the amount of sex in which she had

³⁶⁰ *Id.* at 520.

³⁶¹ Nor is this evidence susceptible to the criticism leveled against the same type of evidence offered in the *Wal-Mart* case—that bias in one store cannot be attributed as bias elsewhere. First, Claimants have established that decisionmaking regarding pay and promotion happens above the store level. Second, a substantial amount of the evidence of bias Claimants have developed demonstrates that bias, stereotyping and sexually demeaning conduct occurs among those managers and executives responsible for setting pay and making promotion, and there are many examples of bias and stereotyping in the highest ranks of the company. See Outtz Report *passim*, Ex. 103; Sec II.E. at 32 (describing evidence of mistreatment of women); *Costco*, 285 F.R.D. at 520 (crediting plaintiffs’ expert’s testimony that CEO and other top executives employ stereotyped thinking regarding women’s roles in society) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235–36 (1989)). Finally, unlike in *Wal-Mart*, Claimants’ statistical evidence of the widespread nature of the disparities in compensation and promotion is provided at levels of the Company consistent with the levels at which the decisions were made. See Lanier Report at ¶¶57-62, Ex. 41; *Wal-Mart*, 131 S. Ct. at 2555; *Costco*, 285 F.R.D. at 508. The Second Circuit has rejected employers’ attempts to discount the relevance of discriminatory comments made by employees other than the ultimate decisionmaker responsible for the adverse action, finding these comments to be probative. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 93 (2d Cir. 2001) (“[discriminatory] statements about changing the corporate culture made by top executives surely have probative value as to possibly discriminatory acts on the part of the lower level supervisors.”); *Tomassi v. Insignia Fin. Group*, 478 F.3d 111, 115 (2d Cir. 2007) (“the more a remark evinces a discriminatory state of mind, and the closer the remark’s relation to the allegedly discriminatory behavior, the more probative that remark will be”); *Sadki v. SUNY Coll. at Brockport*, 310 F. Supp. 2d 506, 513 (W.D.N.Y. 2004) (“[t]here is considerable authority, however, from this circuit and others, that the element of causation – i.e., that the adverse employment action was caused by discrimination – can be satisfied by showing that a person with discriminatory animus toward the plaintiff influenced the “actual” decision maker, even if the latter did not consciously discriminate against the plaintiff.”).

³⁶² See *supra* Sec. II.E. at 33 - 39.

engaged and had swollen lips because of her frequency of having oral sex.³⁶³ Mr. Light was also observed by multiple witnesses at Company meetings being entertained by female managers, in various states of undress, in a swimming pool and joining them in the pool himself. Moreover, Light, Mooney and Liebler, the latter two of whom are currently VPROs, have had sex with women employees and conditioned women's success at Sterling upon acceding to such demands, an expectation attributed to other male executives as well.³⁶⁴ Another VPRO, David Everton, justified lower compensation to women than men on grounds that women "just get pregnant and have families. . . ."³⁶⁵ And Sterling DM John Grande justified a female being passed over for promotion in favor of a less-experienced male because he "had a family to support."³⁶⁶ Other examples of similar conduct abound.³⁶⁷

In addition, the record contains expert testimony explaining how this demeaning conduct to women by senior executives is capable of introducing bias into the compensation and promotion decisions at issue in this case. First, the policies Claimants challenge require the DMs and VPROs and even DVPs to exercise discretion in their implementation. DMs are expected to exercise discretion in identifying and valuing prior job experience in setting starting pay rates. Likewise, DMs and VPROs are required to exercise discretion in implementing Sterling's Succession Planning policy. As Dr. Lundquist explains in her report, the discretionary features of the challenged policies permit the influence of bias to infect the ultimate pay and promotion decisions.³⁶⁸ Moreover, the HR program at Sterling, as Dr. Lundquist explains, utterly failed to

³⁶³ Huffman Decl. ¶11, Ex. 7, Tab A 128.

³⁶⁴ See, e.g., Contaldi Decl. ¶¶8, 16, 19, 22, 24, 25, Ex. 7, Tab A 55; *supra* Sec. II.E. at 33 - 35.

³⁶⁵ Sumen Decl. ¶9, Ex. 7, Tab A 225; see *supra* Sec. II.E.2 at 41 - 42 (describing evidence of stereotyping).

³⁶⁶ V. White Decl. ¶11, Ex. 7, Tab A 242.

³⁶⁷ See *supra* Sec. II.E.2. at 41 - 42.

³⁶⁸ Lundquist Report at 29-30, 41-44, Ex. 46.

discharge its obligation to ensure the challenged compensation and promotion policies operated in an equitable and fair manner. Notwithstanding Sterling's regular review and analysis of compensation decisions to ensure they complied with applicable budgets, it never examined whether those compensation decisions adversely affected women, nor adjusted compensation levels to correct for disparities Sterling would have found had it chosen to look for them. Similarly, Sterling never examined whether its Succession Planning policy operated to the disadvantage of women, which its own workforce data would have revealed had it chosen to review those decisions.³⁶⁹ Sterling's lack of curiosity is especially hard to fathom after the EEOC issued its Letter of Determination in January 2008, finding consistent patterns adverse to women in pay and promotion decisions.³⁷⁰ Even Sterling's CEO Mark Light testified that, having learned of the specific accounts of mistreatment of women at Sterling set forth in the hundreds of sworn statements produced in this action, he would not make any changes to Sterling's policies and procedures.³⁷¹

Second, Dr. Outtz has shown that the kinds of biased conduct and remarks exhibited by Sterling's executives is fully capable of influencing the managers making the challenged compensation and promotion decisions.³⁷² Indeed, a substantial number of the executives who have directly engaged in this demeaning treatment of women are themselves involved in the challenged pay and promotion decisions.³⁷³ Similarly, Sterling recognizes the capacity of managers, by their behavior, to set workplace norms, as its "Lead by Example" training materials

³⁶⁹ Lundquist Report at 41-42, Ex. 46.

³⁷⁰ See EEOC Letter of Determination, Ex. 1; *United States v. City of New York*, 11-5113-CV L, 2013 WL 1955782, * 14 (2d Cir. May 14, 2013) (intent can be inferred from a company's continued use of employment practices that it knows had a disparate impact on a group).

³⁷¹ Light Dep. at 176:18-177:10, Ex.87; see *supra* Sec II.F.3 at 51 - 52 (discussing failures in HR program and Light's testimony).

³⁷² Outtz Report at 29-30, 37, 39, Ex. 103.

³⁷³ *Id.* at 14-17, Tbl.1, Ex.103.

reveal.³⁷⁴ Even Mr. Light conceded that his behavior influences other managers at Sterling.³⁷⁵ Dr. Outtz confirmed that Mr. Light's admissions at his deposition of sexual involvement with lower level employees was "clearly improper" and that "leaders are watched and emulated because they have the power to determine whether and to what extent subordinates will be rewarded for their behavior."³⁷⁶ Dr Outtz found it notable that Mr. Light "embraced the position of role model, testifying that he 'tries to reinforce the company's culture by leading by example.'" Dr. Outtz also confirmed that it was to be expected that this behavior would be emulated by other Executives and Senior Managers and as well as lower lever Managers due to the "trickle down" theory related to this activity..³⁷⁷

Taken together with the statistical evidence Claimants have developed showing disparities in compensation across the Company, this evidence of conduct demeaning to women at the highest levels of the Company should be sufficient to establish liability under *Teamsters*, much less to demonstrate that Sterling has a general policy of discrimination needed to show Claimants' pattern or practice claims satisfy the commonality standard.

3. Typicality: Claimants Satisfy the Requirements of Rule 23(a)(3) and AAA Supplementary Rule 4(a)(3)

Rule 23(a)(3) is satisfied "when each class member's claim arises from the same course

³⁷⁴ See PowerPoint by DVP Fernholz, SJI 192635 at 192639 ("District Managers and Managers That Lead by Example"), Ex. 91.

³⁷⁵ Light Dep. at 73:7-16, 79:2-80:5, Ex. 87.

³⁷⁶ "It follows then that the leaders at Sterling most likely to be modeled are those who have power and prestige...The leader at Sterling who best fits this paradigm is...Mark Light." Outtz Report at 10-11, Ex. 103.

³⁷⁷ Outtz Report at 10, 11, 13, 14-18, Ex. 103. This is the kind of expert testimony, evidence and analysis that was credited in *Costco* and in *Price Waterhouse v. Hopkins*. See *Costco*, 285 F.R.D. at 520 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (U.S. 1989)). Moreover, the Second Circuit has recognized that courts should not credit alleged "gender-neutral factors" for employment practices that are based on stereotypes and unsupported by the record. See *Sobel*, 839 F.2d at 33 (rejecting district court's analysis that defendant's practice of paying "sole wage earners" more was a gender neutral factor); see also *supra* Sec. II E. 33 - 34.

of events, and each class member makes similar legal arguments to prove the defendant's liability."³⁷⁸ "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims."³⁷⁹ Typicality "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class."³⁸⁰ Here, the Named Claimants' claims arise from the same course of conduct as the claims of the class – Sterling's companywide discriminatory pay and promotion policies.³⁸¹

a. The Pay Claims of the Claimants Are Typical of the Class Claims

Nine of the Named Claimants assert timely claims that they were paid less than similarly situated male employees.³⁸² Four of the Named Claimants assert that their starting pay at

³⁷⁸ *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal citations omitted); *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2012 U.S. Dist. LEXIS 56748, at *367-71 (S.D.N.Y. Apr. 23, 2012) (Typicality established where "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability") (citations omitted).

³⁷⁹ *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); see also *Jacob v. Duane Reade, Inc.*, No. 11 Civ. 0160 (JPO) 2013 U.S. Dist. LEXIS 38675, at *16-32 (S.D.N.Y. Mar. 20, 2013) (same); *Floyd v. City of New York*, 283 F.R.D. 153, 175-177 (S.D.N.Y. 2012); *Pagan v. Abbott Labs., Inc.*, NO. 10-CV-4676(ADS)(WDW), 2012 U.S. Dist. LEXIS 159273, * 10-17 (E.D.N.Y. Oct. 20, 2012).

³⁸⁰ *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999) (internal citations omitted); see *Guan Ming Lin v. Benihana N.Y. Corp.*, No. 10 Civ. 1335 (RA)(JCF), 2012 U.S. Dist. LEXIS 186526, at * 25-27 (S.D.N.Y. Oct. 23, 2012), adopted in relevant part and class certification granted, No. 10 Civ. 1335 (RA)(JCF), 2013 U.S. Dist. LEXIS 27792 (S.D.N.Y., Feb. 27, 2013) (same).

³⁸¹ See Summaries of Named Claimants' claims, attached hereto as Exs. 107-118.

³⁸² Pagan-Huff Summary at 1; Jock Summary at 1; McConnell Summary at 1-2; Meierdiercks Summary at 1; Reed Summary at 1; Rhodes Summary at 1; Shahmirzadi Summary at 1; Smith-Murphy Summary at 1-2; Wolf Summary at 1-2, Exs. 108, 110-116, 118.

Sterling was set less than the pay of similarly-male employees.³⁸³ For example, on August 5, 2005, Sterling hired Named Claimant Gloria Huff (formerly Pagan) as a full-time Sales Associate in a mall store at a rate of \$9.00 per hour.³⁸⁴ After Sterling hired a male Sales Associate in the same store in November 2005, Huff found out that he was paid two dollars more per hour even though she had a similar background as the male and she was performing the same job duties.³⁸⁵ Each of the Named Claimants testified that Sterling's policy of prohibiting employees from discussing their base pay was effective during her career in hiding the pay discrimination that is rampant at Sterling.³⁸⁶ For example, Named Claimant Marie Wolf was paid significantly less than several male Sales Associates even though she outperformed them and was recognized as a President's Club Member³⁸⁷ and a Million Dollar Sales Writer.³⁸⁸ Wolf's Store Manager kept her from finding out she was paid less than male Sales Associates by incorrectly telling her she was the highest paid Sales Associate in her store.³⁸⁹ Other Named Claimants continued to be paid less than similarly-situated males even after receiving promotions.³⁹⁰ For example, in 2003, after Named Claimant Lisa McConnell was promoted to Assistant Manager in a Mall store, her Store Manager informed her that male Assistant Managers in her district typically were paid between \$2.00 to \$4.00 more per hour than she was being

³⁸³ House Summary at 1; Meierdiercks Summary at 1; Pagan-Huff Summary at 1; Rhodes Summary at 1, Exs. 107, 111, 112, 114.

³⁸⁴ Pagan-Huff Summary at 1, Ex. 112.

³⁸⁵ *Id.*, Ex. 112.

³⁸⁶ House Summary at 1; Pagan-Huff Summary at 1; Jock Summary at 1; Maddox Summary at 1; McConnell Summary at 1; Meierdiercks Summary at 1, Ex. 111; Reed Summary at 1; Rhodes Summary at 1; Shahmirzadi Summary at 1; Smith-Murphy Summary at 1-2; Souto-Coons Summary at 1; Wolf Summary at 1, Exs. 107-118

³⁸⁷ Membership in the President's Club recognizes Sterling's top salespersons companywide. *See* Team Member Handbook, SJI 3347-78 at SJI 3362, attached as Ex. 119.

³⁸⁸ Wolf Summary at 1-2, Ex. 118.

³⁸⁹ *Id.*, Ex. 118.

³⁹⁰ McConnell Summary at 2, Ex. 110; Reed Summary at 1-2, Ex. 113.

paid.³⁹¹ McConnell's District Manager acknowledged the disparity, but told McConnell that Sterling would only increase McConnell's pay at \$1.00 per hour each year.³⁹²

b. The Promotion Claims of the Claimants Are Typical of the Class Claims

Seven Named Claimants have timely claims for being denied promotions into higher level positions.³⁹³ They describe Sterling's Succession Management program as being a "tap on the shoulder" system where male employees are groomed for promotional opportunities that are denied to equally or more qualified female candidates.³⁹⁴ For example, Wolf describes an occasion when her DM attempted to showcase a new male Sales Associate he was grooming for management when a VP was visiting Wolf's store.³⁹⁵ The VP began quizzing the male Sales Associate about selling watches. After the male Sales Associate floundered, Wolf nailed the answer to the VP's question.³⁹⁶ However, the DM turned his back on Wolf and told the VP that the male Sales Associate was "going places."³⁹⁷ The male being groomed, who was hired about one year after Wolf, was selected for promotion to General Manager within two years but Wolf, eleven years into her career at Sterling, is still waiting.³⁹⁸ Named Claimant Dawn Souto-Coons trained male managers being groomed for promotion who eventually were promoted over her

³⁹¹ McConnell Summary at 1, Ex. 110.

³⁹² *Id.* at 2, Ex. 110.

³⁹³ House Summary at 1-3; Maddox Summary at 1; McConnell Summary at 2; Reed Summary at 1-2; Shahmirzadi Summary at 1-2; Souto-Coons Summary at 2; Wolf Summary at 2, Exs. 107, 109, 110, 113, 115, 117, 118.

³⁹⁴ House Summary at 1-3; Maddox Summary at 1; McConnell Summary at 2; Reed Summary at 1-2; Shahmirzadi Summary at 1-2; Souto-Coons Summary at 2; Wolf Summary at 2, Exs. 107, 109, 110, 113, 115, 117, 118.

³⁹⁵ Wolf Summary at 2, Ex. 118.

³⁹⁶ *Id.*, Ex. 118.

³⁹⁷ *Id.*, Ex. 118.

³⁹⁸ *Id.*, Ex. 118.

despite her significant retail management and jewelry experience.³⁹⁹

c. Sterling's Defenses Do Not Draw the Focus of the Litigation from Common Legal or Factual Issues

Sterling's defenses to the Named Claimants' claims are generic and common to the putative class and do not present any potential of drawing the focus of the litigation away from common legal or factual issues.⁴⁰⁰ Notably, in employment discrimination and civil rights cases, defendants cannot defeat typicality by asserting fact-specific defenses proving discrimination did not cause an adverse employment action.⁴⁰¹

In each of its responses to the Named Claimants' Step 1 RESOLVE Claims, Sterling asserted that its equal employment, sexual harassment, diversity, and standards of conduct and business ethics policies provided a defense to the asserted claims.⁴⁰² These are generic defenses, which are common to the class and which do not present any risk of drawing the focus of the litigation away from those common issues. Moreover, as Claimants have explained, in reality,

³⁹⁹ Souto-Coons Summary at 2, Ex.117.

⁴⁰⁰ The unique defenses doctrine is limited to cases in which a full defense is available against an individual plaintiff's action and "those unique defenses threaten to become focus of the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000) (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 267-68 (S.D.N.Y. 2007) ("claiming that something other than discrimination explains the named plaintiffs' experience" cannot defeat typicality because "[t]he question presented by each plaintiff's claim is undoubtedly typical of the class, whether or not defendants are eventually able to prove that the answer to that question is unique to each plaintiff."); *Koppel v. 4987 Corp.*, 191 F.R.D. 360, 365 (S.D.N.Y. 2000).

⁴⁰¹ See, e.g., *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 97 (S.D.N.Y. 2010) (explaining that defendants in Title VII cases cannot defeat typicality by claiming that unique factors other than discrimination explain the experiences of named plaintiffs); *Costco*, 285 F.R.D. at 534-35 (noting that unique defenses did not defeat typicality because they were either specific examples of defenses typical to the entire class or "merely alternative explanations for alleged discrimination" and not likely to become a "major focus" of the litigation, especially when compared to the common and typical classwide issues.).

⁴⁰² See Spagnola letters to House (Nov. 6, 2006) at 1; Huff (Apr. 8, 2008) at 1-2; Jock (May 31, 2006) at 1; Maddox (Apr. 8, 2008) at 1; McConnell (Apr. 8, 2008); Meierdiercks (July 13, 2006) at 1; Reed (May 30, 2006) at 1; Rhodes (June 9, 2006) at 1; Shamirzadi (Apr. 10, 2008) at 1; Smith-Murphy (Sept. 1, 2006) at 1; Souto-Coons (May 30, 2006) at 1; Wolf (May 30, 2006) at 1, attached as Exs. 120-131.

Sterling's written policies prohibiting discrimination and sexual harassment in the workforce are illusory given its complete failure to enforce those policies. The experiences of the Named Claimants underscore this analysis and demonstrate both the generic nature of Sterling's defense and the common nature of Claimants' evidence in response. For example, Named Claimant House's Assistant Manager and Store Manager made sexually demeaning verbal comments and exhibited inappropriate behavior.⁴⁰³ When she complained to her DM about this behavior, he told House to get back to work, that she was overreacting.⁴⁰⁴ A Sterling Regional HR Specialist told House not to further disturb the DM and placed the blame on House.⁴⁰⁵ The expert testimony of Dr. Lundquist and Dr. Outtz regarding Sterling's HR Department's abdication of its responsibilities and the impact of demeaning conduct at the highest levels of the company will benefit the Named Claimants as well as all other members of the putative class.

Sterling also asserted that the male comparators' prior sales experience or supervisory responsibilities justified the pay differentials of the Named Claimants.⁴⁰⁶ These Claimants, like other members of the putative class, will benefit from statistical and industrial psychology expert testimony showing that Sterling's use of this prior job experience has adversely affected them, was not job related, and was not justified by business necessity. Likewise, Sterling defended the promotion denials generally by asserting that the males being promoted had more relevant prior

⁴⁰³ The Assistant Manager pantomimed sexual activities with women in front of female Sales Associates and told House that he would like to "bend her over the table" and "suck on her boobs." House Summary at 2, Ex. 107. The Store Manager frequently stood by the store's front door with male Sales Associates and made comments about the breasts and buttocks of women passing by and what they would like to do to the women sexually, all within earshot of female Sales Associates. *Id.*, Ex. 107.

⁴⁰⁴ *Id.*, Ex. 107.

⁴⁰⁵ *Id.* at 1-2, Ex. 107.

⁴⁰⁶ *See e.g.*, Spagnola April 8, 2008 letter to Huff, at 2; Spagnola July 13, 2006 letter to Meierdiercks, at 2-3; Spagnola May 30, 2006 letter to Reed, at 2; Spagnola June 9, 2006 letter to Rhodes, at 2; Spagnola September 1, 2006 letter to Smith-Murphy, at 3; Spagnola May 30, 2006 to Souto-Coons, at 3, Exs. 121, 125-127, 129, and 130.

job experience or better performance histories.⁴⁰⁷ Such generic defenses to the claims of the proposed Class Representatives' claims are common to the putative class and do not present any potential of drawing the focus of the litigation away from common legal or factual issues.⁴⁰⁸

4. Adequacy of Representation: Claimants Satisfy the Requirements of AAA Supplementary Rule 23(a)(4)

Rule 23(a)(4) requires that the named representatives “will fairly and adequately protect the interests of the class.” The Rule is satisfied where, as here, the proposed class representatives (1) have an interest in “vigorously pursuing the claims of the class,” and (2) do not have interests “antagonistic to the interests of other class members.”⁴⁰⁹

Here, the Named Claimants have demonstrated that their interests are identical to the interests of the class, as Named Claimants seek to prove that Sterling engaged in a practice of gender discrimination in compensation and promotion that similarly affected members of the putative class. Reflecting an intention to pursue the interests of the class vigorously, the Named Claimants have been involved in the case since its filing, have maintained regular contact with the proposed Class Counsel, have cooperated in the discovery process undertaken to date—including preparing responses to written discovery and submitting to deposition—and have assisted in the factual development of the class claims. They have also communicated the status of the case to other potential class members upon their request. As a result, each Named Claimant has sufficient knowledge of the action and her responsibilities as a Class

⁴⁰⁷ See Spagnola April 8, 2008 letter to Huff, at 2; Spagnola April 8, 2008 letter to McConnell, at 2; Spagnola May 26, 2006 letter to Reed, at 3; Spagnola April 10, 2008 letter to Shahmirzadi, at 2; Spagnola May 30, 2006 letter to Souto-Coons, at 2, Exs. 121, 124, 126, 128, and 130.

⁴⁰⁸ Class certification is only inappropriate “where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.” *Gary Plastic*, 903 F.2d at 180.

⁴⁰⁹ *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); *Baffa*, 222 F.3d at 60.

Representative and has demonstrated that she will protect and pursue the interests of the class diligently and vigorously.

Moreover, Named Claimants do not have interests antagonistic to members of the putative class. In order to defeat class certification, any conflict within the class must be “fundamental.”⁴¹⁰ That some class members hold different positions within a company does not create a class conflict.⁴¹¹ Named Claimants satisfy this standard. Here, the putative class consists of female Retail Sales Employees, all of whom have been similarly harmed by Sterling’s compensation and promotion systems. That female Store Managers are encompassed within the putative class does not create a conflict with other members of the putative class. As the compensation and promotion decisions at issue in this action were made by senior managers and executives at the level of DM and above, the challenged bias is attributable to managers who are not members of the putative class.⁴¹²

⁴¹⁰ *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other grounds by In re IPO*, 471 F.3d 24 (2d Cir. 2006), *superseded by statute on other grounds as stated in Attenborough v. Const. and Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006) (holding that a conflict is not fundamental if it is “speculative” or “hypothetical” and that there was not a fundamental conflict in class of large retailers, smaller merchants, and retail associations where the interests were aligned and all were challenging the same conduct).

⁴¹¹ *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 958-59 (9th Cir. 2003) (explaining that there was no “substantive issue” for a conflict of interest where several members of the class were supervised by other employee class members because the mere fact that the employees could have “potentially conflicting interests” was not sufficient to deny class certification); *Latino Officers Ass’n City of N.Y. v. City of New York*, 209 F.R.D. 79, 90 (S.D.N.Y. 2002) (finding no fundamental conflict in a class of police officers that had class representatives who were in supervisory and non-supervisory positions); *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, No. 98-CV-99C, 2008 WL 343011, at *5 (W.D.N.Y. Feb. 6, 2008) (holding that it was not necessary for each class member or representative to hold “identical” positions to be adequate class representatives). The adequacy requirement merely requires a showing that the class representatives were employees who suffered the same alleged discrimination as suffered by other class members. *See Velez*, 244 F.R.D. at 269 (quoting *Hnot v. Willis Grp. Holdings Ltd*, 228 F.R.D. 476, 485 (S.D.N.Y. 2005) (“Even if one female officer supervised another, it is still possible, as plaintiffs allege, that they all suffered from gender discrimination by the key decisionmakers.”); *Hnot*, 228 F.R.D. at 486 (“If supervisory employees and supervisees all are subject to discrimination, all have an equal interest in remedying the discrimination, and the named plaintiffs can still be expected to litigate the case with ardor. A potential for conflict need not defeat class certification.”).

⁴¹² *See supra* Sec II.B-C at 10, 20.

Finally, Named Claimants have retained counsel with the resources and expertise to prosecute this action vigorously on behalf of the putative class.⁴¹³ Claimants have retained three private law firms, each of which possesses substantial experience in litigating class action employment discrimination cases. *Id.* The lead attorneys collectively have decades of experience litigating these matters. *Id.*

C. Claimants Satisfy the Requirements of Rule 23(b)(3) AAA Supplementary Rule 4(b)

Claimants have satisfied the requirements of Rule 23(b)(3) and AAA Supplementary Rule 4(b), as common questions predominate over individual ones and the class procedure is superior to any other types of procedures for “fairly and efficiently adjudicating” this dispute.⁴¹⁴ As models adopted in other cases show, this proposed class is manageable, which is the most critical factor in determining whether Rule 23(b)(3) and Rule 4(b) have been satisfied.⁴¹⁵

1. Common Questions Predominate

Rule 23(b)(3)’s predominance requirement is meant to “tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”⁴¹⁶ “Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each ‘elemen[t] of [her] claim [is] susceptible to classwide proof’ [just] that common questions ‘*predominate* over any

⁴¹³ See Declaration of Joseph M. Sellers (May 31, 2013), attached as Ex. 132.

⁴¹⁴ Rule 23(b)(3); AAA Supp. R. 4(b)(“fair and efficient adjudication”); see *infra* Sec. III.C.1-2 at 94 - 99.

⁴¹⁵ See *infra* Sec. III.C.3 at 99 - 103. The other three factors listed in Rule 23(b)(3) that are “pertinent to a court’s ‘close look’ at the predominance and superiority criteria” also support a finding that Claimants have met the Rule 23(b)(3) standards. *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997). There is no other “litigation concerning the controversy . . . commenced by or against members of the class” Accordingly, the only pending proceeding by which the putative class members may have their civil rights addressed is if this proceeding is adjudicated on a class basis. As further described in Section III.C.2, (a) the “interest[s]” of the putative class members support the class certification of this action since it is only by such certification that the class members may effectively obtain relief, and (b) it is “desirabl[e]” to “concentrate[e]” the litigation of the claims in this arbitral forum since that is the only efficient method by which to adjudicate those claims.

⁴¹⁶ *Amchem*, 521 U.S. at 623.

questions affecting only individual [class] members.”⁴¹⁷ Many factors support a finding that common questions govern each aspect of this action and predominate over any individual questions, including: (1) the fact that Sterling implements companywide compensation and promotions practices; (2) all class members will rely upon common statistical evidence in challenging Sterling’s compensation and promotion practices; (3) senior executives and managers of the Company have engaged in misconduct and stereotyping devaluing women at Sterling; (4) Sterling’s HR Department permits rather than protects against sex discrimination; (5) defenses to these challenges which Sterling may raise apply to the claims of all class members; (6) remedial questions, including the implementation of injunctive relief, Sterling’s liability for liquidated damages and a three-year statute of limitations for willful violation of the EPA, and punitive damages under Title VII, affect the remedies that may be available to all class members.

Claimants have offered substantial evidence that Sterling operates under common companywide compensation and promotion systems and have identified specific employment practices that have resulted in women receiving substantially lower pay and significantly fewer promotions. Claimants have also offered evidence of executives at the highest levels of the Company and those involved in pay and promotion decisions engaging in intentional misconduct and stereotyping demeaning to women. This evidence sends the clear message that women are less valued members of the workforce and applies to the entire class. Claimants have also offered evidence common to the class that Sterling’s HR Department has permitted sex discrimination to persist at the Company by failing to discharge its responsibilities to ensure that compensation and promotions are fairly determined and by discouraging employees from

⁴¹⁷ *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2012) (citing Rule 23(b)(3))(emphasis in original).

challenging discrimination through its deeply flawed internal complaint process. Whether these policies and practices violate Title VII and the EPA present common questions that affect the claims of all members of the putative class.⁴¹⁸

In presenting those claims pursuant to either disparate impact or pattern or practice disparate treatment theories of liability under Title VII or the EPA, Claimants will rely on statistical proof to establish that Sterling's compensation and promotion practices violate these fair employment laws. All members of the putative class will rely upon this same statistical evidence.⁴¹⁹

Furthermore, defenses that Sterling may raise, such as whether prior job experience justifies the disparities in compensation identified by Claimants, apply to all class members. In response to the showing that its compensation and promotion practices have a disparate impact, Sterling may attempt to prove that those practices are "job related and consistent with business necessity"; and, in response to a showing that women receive less pay than men for substantially equal work in violation of the EPA, Sterling may attempt to show that the pay difference was due to a "factor other than sex." Whether Sterling prevails on these defenses is a common question that applies to the claims of all the class members.

Moreover, remedial questions are common to all class members. For example, whether Sterling is liable for punitive damages under Title VII or liquidated damages under the EPA, or whether the statute of limitations for the EPA claims is extended to three years because of willful

⁴¹⁸ See *Costco*, 285 F.R.D. at 538 (finding that common issues predominate and that the class is sufficiently cohesive where there is significant proof of common practices and identification of specific practices causing disparities.).

⁴¹⁹ See *Moore v. Napolitano*, 2013 WL 659111, at *19 (finding predominance met where "all members of the class will rely upon the same statistical evidence.").

violations, turns solely upon the motivation and conduct of Sterling.⁴²⁰ In addition, the injunctive relief sought by Claimants presents common questions regarding the appropriate approach for ending the discriminatory practices and remedying the effects of those practices. Claimants seek injunctive relief to address discriminatory practices, including (1) criteria for evaluating prior job experience and other factors for setting starting pay for Sales Associates that are job related; (2) job-related criteria for identifying and selecting candidates for promotion; (3) eliminating Sterling's policy or practice prohibiting employees from discussing their compensation; and (4) fundamentally revamping the HR program to ensure that the process for handling complaints is consistent with the EEOC's policy guidance regarding anti-harassment policies and complaints.⁴²¹ Claimants also seek backpay and liquidated damages under the EPA.⁴²²

Even with respect to monetary relief that may be due to class members pursuant to their Title VII disparate treatment claims, there are critical common questions that apply to all class members. Each class member would rely upon the pattern or practice method of establishing liability in order to provide a rebuttable presumption that she is entitled to individualized relief pursuant to the *Teamsters* method of proof that was specifically approved in *Wal-Mart*.⁴²³ Moreover, given that there may well be more eligible class members than promotional

⁴²⁰ See *infra* Sec. III.C.3 at 102; *supra* Sec. II.E-Fat 32 – 33, 40 - 48 (describing evidence common to the class of misconduct and stereotyping by senior executives at Sterling and deeply flawed HR Department).

⁴²¹ See Lundquist Report at 19-20 (citing EEOC standards for anti-harassment and complaint procedures), Ex. 46.

⁴²² Claimants do not seek individual injunctive remedies, including preferential promotions or retroactive remedy. Nor do Claimants seek compensatory damages. Furthermore, because there is notice and a right to opt out should a class be certified, should members of the putative class wish to pursue these other remedies, that option would be open to them. See *Wal-Mart* 131 S. Ct. at 2558-59; AAA Supp. R. 4(b).

⁴²³ See *infra* Sec. III.C.3 at 99.

opportunities lost due to Sterling’s pattern or practice of discrimination it is likely that the allocation of backpay for promotion claims may be made by a common formula approach.⁴²⁴

These common questions concerning the determination of liability under Title VII and the EPA, as well as the appropriate remedies for any such violations, may readily be managed by the Arbitrator in a manner that addresses these questions in a fashion applicable to the class as a whole.⁴²⁵ The manageability of a class proceeding to resolve Claimants’ allegations of classwide violations underscores that common questions predominate.

2. A Class Proceeding Is Superior

A class proceeding in this dispute is consistent with the “policy at the very core of the class action mechanism” in that it provides a “mechanism . . . to overcome the problem” that individuals will not have the “incentive” or means “to bring a solo action prosecuting” their rights.⁴²⁶ Where individuals allege harm caused by systemic practices of discrimination that require statistical evidence, expert analyses and careful descriptions of a pattern or practice of discrimination, a class procedure is the only effective mechanism available to address such harm. The reality is that the modest economic value of individual claims makes it very unlikely that Claimants can afford to prosecute their claims individually.⁴²⁷ A class proceeding, therefore, is superior to any possible alternative approach.

Moreover, the pattern or practice method of proof, initially designed by the Supreme

⁴²⁴ See *United States v. City of New York*, 847 F. Supp. 2d 395, 425-26 (E.D.N.Y. 2012); *United States v. City of New York*, 877 F. Supp. 2d 57, 63 (E.D.N.Y. 2012); *infra* Sec. III.C.3 at 102.

⁴²⁵ See *infra* Sec. III.C. at 99 - 100.

⁴²⁶ *Amchem*, 521 U.S. at 617, quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997). The design and purpose of the RESOLVE Program mean that this case may represent the only opportunity that members of the putative class will have to present their claims. See *supra* Sec. II.F.3 at 50 - 55 (describing how RESOLVE is intended to shield Sterling from liability, not to provide a viable mechanism for redressing workplace wrongs); Lundquist Report at 20 (describing shortcomings of RESOLVE), Ex. 46.

⁴²⁷ See Lanier Report at Tbl. 7 (showing that females on average have lost between \$488 and \$1,308 per year due to Sterling’s pay discrimination), Ex. 41,

Court in *Teamsters* to address the type of systemic violations of the fair employment laws alleged here, is not available to the “nonclass private plaintiff.”⁴²⁸ Without certification of a class, the *Teamsters* method of proof, which is the most effective method of proof of these claims, would be unavailable to Claimants. Broad systemic remedies intended to address underlying causes of discrimination, of the type Claimants seek, are also not available in non-class cases.⁴²⁹ Furthermore, adjudicating claims individually would lead to a considerable loss of economies, as Claimants offer evidence about the demeaning conduct of senior executives, Sterling’s HR Department, and Sterling’s companywide compensation and promotion policies and practices that are common to all members of the putative class.

In addition, a class action procedure is superior to individual proceedings because without a class proceeding and the attendant classwide notice many, if not most, of the putative class members would never know that Sterling violated their rights to equal pay and equal opportunity.⁴³⁰ Sterling’s practice of forbidding employees to share pay information has concealed pay inequities and limited the number of putative class members who have sufficient information to understand that they may have claims of compensation discrimination under Title VII and the EPA. In addition, Sterling’s failure to post job vacancies has made it difficult for female employees to be aware of promotions that were available. More generally, most putative class members would not have access to or understand the complicated analyses, which include

⁴²⁸ *Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135, 147, 150 (2d Cir. 2011) (“Outside the class context, however, private plaintiffs may not invoke the *Teamsters* method of proof as an independent and distinct method of establishing liability.”) (emphasis added).

⁴²⁹ See, e.g., *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337, 361 (1st Cir. 1989); *Houston v. Manheim-New York*, No. 09. Civ. 4544 (SCR)(GAY), 2010 WL 6121688, at *6 (S.D.N.Y. July 7, 2010).

⁴³⁰ See *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 229 (2d Cir. 2006). The Second Circuit reversed, in part, the lower court’s denial of class certification, finding a class action to be the superior procedure since, without a class procedure, many class members would not know that Nassau County’s practice of conducting strip searches of persons arrested for misdemeanors may have violated their Constitutional rights. *Id.* at 229.

statistical evidence and the review of whether selection practices are “consistent with business necessity,” that provide the foundation for the violations of their rights to equal employment opportunity.

Finally, a classwide adjudication is more manageable and efficient than alternative individual proceedings since it will permit the adjudication of multiple issues in a single proceeding and avoid inconsistent and perhaps conflicting judgments that might arise from multiple individual proceedings.⁴³¹ As demonstrated by the manageability plan described in Section III.C.3 below, the application of a class proceeding is the “metho[d] best suited to the adjudication of [this] controversy fairly and efficiently.”⁴³²

3. This Dispute is Manageable

This dispute is manageable pursuant to approaches followed by courts both before and after *Wal-Mart*. In *Wal-Mart*, the Supreme Court expressly re-affirmed a two-stage approach for trying pattern or practice cases initially established in *Teamsters*.⁴³³ After the establishment of liability, Claimants seek individual monetary relief in the next “phase” and the “burden of proof will shift to the company” where “it will have the right to raise any affirmative defenses it may have, and ‘to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.’”⁴³⁴ As further described below, in a stage I trial proceeding the Arbitrator may

⁴³¹ *Costco*, 285 F.R.D. at 540; *City of New York*, 276 F.R.D. at 49.

⁴³² *See Amgen*, 133 S. Ct. at 1191 (internal quotations omitted).

⁴³³ *Teamsters*, 431 U.S. at 361; *Wal-Mart*, 131 S.Ct. at 2561 (affirming the *Teamsters* approach).

⁴³⁴ *Wal-Mart*, 131 S. Ct. at 2561, quoting *Teamsters*, 431 U.S. at 362; *see also United States v. City of New York*, No. 11-5113-CV L, 2013 WL 1955782, at *10 (2d Cir. May 14, 2013). In *City of New York*, the Second Circuit considered a limited number of issues decided by Judge Garaufis: (a) decided that summary judgment was improperly granted on the disparate treatment claim and remanded the issue of whether the City had unlawfully and intentionally discriminated against a class of minority applicants for determination by a judge other than Judge Garaufis but left other parts of the action, including the continued management of the litigation, before Judge Garaufis; (b) the federal and state law claims were properly dismissed against Mayor Bloomberg as were state law claims against Commissioner Scoppeta but the federal law claims against Scoppeta should be reinstated; and (c) the provisions of the injunction

hear and decide liability issues as well as related remedy issues that are unrelated to any determination of the claims of individual class members. Following this stage I trial, the Arbitrator may establish a procedure for a stage II trial for determining relief related, in part, to claims and defenses pertinent to individual class members.

Following *Wal-Mart*, a number of courts have adopted such a two-stage trial plan.⁴³⁵ Adhering to the principle applied by Judge Lynch that “Title VII civil rights cases may be divided into liability and remedial phases,”⁴³⁶ Judge McMahon, who was assigned to the *Velez v. Novartis* sex discrimination class action after Judge Lynch was appointed to the Second Circuit, conducted a stage I jury trial that addressed class liability issues as well as the issue of punitive damages.⁴³⁷ Courts have also applied a bifurcated trial approach in class proceedings similar to discrimination actions. In an action raising a violation of the securities law, Judge Holwell bifurcated the trial to assess in a stage I trial class liability issues concerning justifiable reliance on a “fraud on the market” theory and the “truth on the market defense.”⁴³⁸ As described further below, after the determination of liability, Judge Scheindlin adopted procedures for the second stage of the trial that may provide guidance for this procedure. *Id.* Further, JAMS Arbitrator

based upon the unchallenged ruling of a disparate impact finding were affirmed but certain provisions based upon the ruling of a disparate treatment violation were vacated. *City of New York*, 2013 WL 1955782, at *1, 17, 21-22.

As Claimants do not rely upon these opinions by Judge Garaufis, their reversal by the Second Circuit’s does not affect the validity of rulings by Judge Garaufis on which Claimants rely. To the contrary, in a number of ways, the Second Circuit supports Claimants’ positions: (a) it is appropriate to bifurcate the liability and remedy phases of the trial, *id.* at *10; (b) “statistical disparities supporting” an impact claim may also serve “to establish a *prima facie* case . . . of a pervasive pattern of discriminatory treatment,” *id.* at *11; (c) the disparate treatment class claim was remanded for trial.

⁴³⁵ *Costco*, 285 F.R.D. 492, 539 (N.D. Cal. 2012) (plaintiffs’ proposed plan for addressing individualized claims and defenses in “a second phase of trial if liability is established” is appropriate); *Moore v. Napolitano*, 2013 WL 659111, at *18-19, n.16; *City of New York*, 276 F.R.D. at 34.

⁴³⁶ *Velez*, 244 F.R.D. at 271.

⁴³⁷ *Velez v. Novartis*, Civ No. 04 Civ. 09194(CM), 2010 WL 4877852, at *3 (S.D.N.Y. Nov. 30, 2010) (Order approving settlement describes the scope of trial).

⁴³⁸ *In re Vivendi Universal, S.A. Sec. Litig.*, 248 F.R.D. 144, 153 (E.D.N.Y. 2012).

Michael Loeb certified a class of over 5,000 truckers who claim that their employer failed to pay all of the wages owed and bifurcated the arbitral proceeding into liability and remedy phases.⁴³⁹

In the stage I trial in this action, the Arbitrator would consider class-based liability and related issues. The class-based liability issues are set forth below for the EPA claims, Title VII disparate impact claims and Title VII disparate treatment claims:

- Stage I Liability Issues for EPA Claims
 - Whether Sterling pays women less than men for substantially equal work in jobs within stores?
 - If Sterling pays women less for substantially equal work, whether Sterling has established one of the EPA’s affirmative defenses and, if so, whether the reason asserted in the affirmative defense was a pretext for discrimination?
 - If Sterling has violated the EPA, whether the unlawful conduct was a willful violation leading to the application of a three-year rather than a two-year statute of limitations?
 - If Sterling has violated the EPA, whether Sterling has a “good faith” defense to an award of liquidated damages?
- Stage I Liability Issues for Title VII Disparate Impact Claims
 - Whether Sterling’s compensation and/or promotion practices have a disparate impact?
 - If Sterling’s compensation practices have a disparate impact, whether Sterling can establish that one of the affirmative defenses established by the Bennett Amendment justifies the disparity in pay and, if so, whether the reason asserted in the affirmative defense was a pretext for discrimination?
 - If Sterling’s promotional practices have a disparate impact, whether Sterling’s practices were job related and justified by business necessity and, if so, whether there was a less discriminatory alternative?
- Stage I Liability Issues for Title VII Disparate Treatment Claims

⁴³⁹ *Pryor v. Overseas Admin. Servs.*, JAMS Ref. No. 1100052926 (Apr. 28, 2011), attached as Ex. 133. After the Supreme Court issued *Wal-Mart*, Arbitrator Loeb denied the motion to decertify the class and reaffirmed the trial plan. *Pryor*, JAMS Ref. No. 1100052926 (Aug. 24, 2012), attached as Ex. 134.

- Whether Sterling has engaged in a pattern or practice of intentional discrimination in setting compensation for or in promoting in-store employees?
- If Sterling has engaged in a pattern or practice of intentional discrimination in setting compensation or in promoting employees, whether Sterling’s conduct meets the Title VII standard for an award of punitive damages?

All of these liability questions, including those concerning the scope of the remedy—the “good faith” and “willful” determinations under the EPA and liability for punitive damages under Title VII—affect the class generally. The relevant question at stage I is the class’s eligibility for punitive damages, not the amount or the distribution thereof. Title VII⁴⁴⁰ “provides for punitive awards based solely on an employer’s state of mind”⁴⁴¹ As a result, whether punitive damages should be awarded is a determination that should be made at the same time as liability, as both will be determined based in large part on a common body of evidence, at the Stage I trial.⁴⁴² When the amount of punitive damages should be decided need not be determined now and is best left to the discretion of the Arbitrator.⁴⁴³

⁴⁴⁰ “A complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981(a)(b)(1).

⁴⁴¹ *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999) (emphasis added).

⁴⁴² *Costco*, 285 F.R.D. at 542 (“the availability of punitive damages should be adjudicated in Stage One [while] determination . . . and individual distribution of punitive damages should be reserved for Stage Two.”); *EEOC v. Outback Steak House of Fl.*, 576 F. Supp. 2d 1202, 1205-06 (D. Colo. 2008); *EEOC v. Pitre, Inc.*, No. 1:11-cv-00875-RB/KM, 2012 WL 6161945, at *12 (D.N.M. Nov. 30, 2012).

⁴⁴³ Unlike the dispute in the EEOC’s action against Sterling, where there arose a question of at what stage punitive damages determinations should be made, here there is no jury. *See EEOC v. Sterling Jewelers Inc.*, 788 F. Supp. 2d 83, 91-92 (W.D.N.Y. 2011). Therefore, challenges regarding when and where to decide the amount and distribution of punitive damages do not arise here. Because the Arbitrator is the trier of fact and will have heard the evidence of intentional discrimination that is also relevant to determining the amount of punitive damages, the Arbitrator can therefore decide the correct stage and process for determining punitive damages. By contrast, where Title VII pattern or practice class cases are tried to a jury, a court may determine that the jury must decide the amount of punitive damages as well as the defendant’s liability for punitive damages in stage I, as that jury will hear all of the evidence pertinent to the claims of intentional discrimination. *See, e.g., Velez*, 2010 WL 4877852, at *3.

At the conclusion of the stage I trial, the Arbitrator should address the following: if Sterling has engaged in unlawful discriminatory conduct, what is the scope of appropriate injunctive relief? Claimants seek an injunctive remedy “designed to erase the discriminatory effect of the challenged practice[s] and to assure compliance” with the fair employment laws in the future.⁴⁴⁴ This injunctive relief would be designed to end the unlawful practices, establish class-wide relief to end the effect of those practices and assure the implementation of fair and non-discriminatory practices and should be entered as soon as possible after the Arbitrator has identified the unlawful practices, at the conclusion of the stage I trial, as there will be no question presented with respect to injunctive relief specific to an individual.⁴⁴⁵

The Arbitrator need not define the procedure for the stage II trial at this time.⁴⁴⁶ It makes eminent sense to wait until the conclusion of the stage I trial before formulating the procedure for determining damages owed to individual class members in stage II, at which point the Arbitrator and the parties will know the precise contours of the unlawful practices that caused individual class members to suffer economic loss. However, examining procedures used by courts that would facilitate any stage II trial in this dispute underscores the manageability of this case as a class action.⁴⁴⁷ These procedures include the use of class-wide calculations of damages, an efficient claims process, and use of a claims administrator and special masters.

4. Class-Wide Calculations of Damages

⁴⁴⁴ *Berkman v. City of New York*, 705 F.2d 584, 595 (2d Cir. 1983).

⁴⁴⁵ *See supra* Sec. III.C.I at 97, n.371.

⁴⁴⁶ *See In re Vivendi*, 284 F.R.D. at 155 (Judge Scheindlin stated that the procedures for determining individual settlements and amount of damages were “left open” until after the stage I trial.); *Pryor*, JAMS Ref. No. 1100052926 at *33 (Apr. 28, 2011) (Arbitrator Loeb stated that if “claimants are successful in establishing the existence of [unlawful] policy at the liability stage, then the parties and I will determine how best to proceed to the damages phase of the trial.”), Ex. 133.

⁴⁴⁷ In addition, a stage II trial may become unnecessary if, after the scope of the unlawful practices has been defined, the parties enter into a settlement resolving the individual issues. *See Velez*, 2010 WL 4877852 (Order approving settlement).

There are common, class-wide issues related to the determination of back pay owed to individuals. In *United States v. City of New York*, Judge Garaufis established an efficient class-based approach for dealing with a situation that would no doubt occur in this action if the Arbitrator were to determine that Sterling's promotion practice were unlawful:

[W]here the number of qualified class members exceeds the number of openings lost to the class through discrimination and identification of individuals entitled to relief would drag the court into a quagmire of hypothetical judgments and result in mere guesswork . . . a case may require class-wide, rather than individualized, assessments of monetary relief.⁴⁴⁸

Utilizing expert testimony, Judge Garaufis determined the total number of job opportunities lost by minorities due to unlawful discrimination and the amount of lost earnings that resulted.⁴⁴⁹ If a similar process were applied in this action, Sterling could challenge the right of any claimant to receive a portion of the aggregate backpay by meeting its burden that the claimant was denied the employment opportunity for a lawful reason. If Sterling were successful in reducing the number of claimants entitled to a backpay remedy below the number of lost opportunities that resulted from its unlawful promotional practices, then Sterling would pay less than the estimated amount of gross backpay loss. If, after Sterling had an opportunity to apply the affirmative defenses, there were more eligible claimants than there were lost job opportunities, then those claimants would share in the backpay award on a *pro rata* basis.⁴⁵⁰

If the Arbitrator finds that Sterling's compensation policies violated the EPA, the calculation of lost earnings due to those practices may be determined by an analysis by an expert

⁴⁴⁸ 847 F. Supp. 2d 395, 408-09 (E.D.N.Y. 2012) (internal quotations and citation omitted); see also *Costco*, 285 F.R.D. at 538-39, n.38.

⁴⁴⁹ *City of New York*, 847 F. Supp. 2d at 425-26. (No genuine issue in dispute concerning the "amount of gross, aggregated wage backpay due to eligible claimants").

⁴⁵⁰ See *United States v. City of New York*, 877 F. Supp. 2d 57, 63 (E.D.N.Y. 2012) ("This proportionate distribution is necessary because the number of eligible Claimants will most likely exceed the hiring shortfalls the City's violations of Title VII produced.").

of the wages paid to female workers and their male comparators.⁴⁵¹ Similarly, if the Arbitrator finds that Sterling’s compensation policies violated Title VII, the calculation of unequal pay for each female employee may be calculated by a comparison of the wage records. At that point, Sterling would have an opportunity, if applicable, to meet its burden that a particular class member was paid less for lawful reasons.⁴⁵²

5. Efficient Notice and Claims Process.

Both *City of New York* and *Vivendi* offer examples of effectively managed notice and claims processes. Judge Garaufis established a notice and claims procedure in order to “implement a workable process by which the thousands of potential victims can be identified and compensated.”⁴⁵³ After class members filed claims showing eligibility for monetary relief pursuant to the presumption created by the stage I liability finding,⁴⁵⁴ Sterling would have the opportunity to identify which, if any, claims it would oppose and to present the basis for that

⁴⁵¹ See *Belfi*, 191 F.3d at 136 (“The Equal Pay Act creates a type of strict liability . . .”).

⁴⁵² In making a determination of monetary harm to individuals that results from a class-based wrong, the Supreme Court has stated that the “[c]alculation need not be exact.” *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Importantly, the Supreme Court expressly referenced the principles established in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) as appropriate guides for the calculation of damages. *Comcast Corp.*, 133 S. Ct. at 1433. “Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such cases, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result will only be approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise . . . [T]he risk of the uncertainty should be thrown upon the wrongdoer instead of the injured party.” *Story Parchment Co.*, 282 U.S. at 563.

⁴⁵³ *United States v. City of New York*, 681 F. Supp. 2d 274, 284-85 (E.D.N.Y. 2010).

⁴⁵⁴ “Under the burden-shifting framework set out by the Supreme Court in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and explained in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ‘proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief . . .’” *United States v. City of New York*, No. 07-CV-2067 (NGG)(RLM), 2011 WL 2259640, at *18 (E.D.N.Y. June 6, 2011) (quoting *Teamsters*).

opposition.⁴⁵⁵

Judge Scheindlin adopted a similar notice and claims procedure in order to permit Vivendi to challenge whether the presumption of reliance by an investor on the fraud was in fact applicable.⁴⁵⁶ Based upon the information supplied, *Vivendi* could send interrogatories to a specific category of “sophisticated” investors who might be susceptible to a successful challenge.⁴⁵⁷

6. Use of Special Masters and Claims Administrator

As was done in *City of New York* and *In re Vivendi*, the Arbitrator may appoint a Special Master or a claims administrator or both in order to assure that an effective remedy is efficiently determined and implemented. In *City of New York*, Judge Garaufis appointed four special masters in order to determine the eligibility of class members to individual relief as well as to evaluate the affirmative defenses that the City of New York might raise.⁴⁵⁸

Similarly in *Vivendi*, Judge Scheindlin adopted a two-step approach for implementing the claims process. First, she appointed a claims administrator, Garden City Group, to handle the “ministerial tasks” of distributing claim forms, assessing whether the class members asserted claims within the period covered by the class claims and applying the “Court-approved damages calculation.”⁴⁵⁹ Second, the court appointed a Special Master to “determine which . . . responses raise a triable issue of material fact sufficient to potentially rebut the presumption of reliance,” to evaluate validity of claims, and challenges by defendants to the amount of damages calculated by

⁴⁵⁵ *City of New York*, 681 F. Supp.2d at 285-87.

⁴⁵⁶ *In re Vivendi*, 284 F.R.D. at 155.

⁴⁵⁷ *Id.* at 155.

⁴⁵⁸ *City of New York*, 847 F. Supp. 2d at 434.

⁴⁵⁹ *In re Vivendi*, 284 F.R.D. at 156.

the Garden City Group.⁴⁶⁰

In advance of the determinations with respect to liability in stage I, it is premature to determine the specific method for resolving remedial issues in stage II. However, the Arbitrator has numerous processes available to facilitate an efficient and effective stage II resolution. The successful implementation of these processes to successfully manage other class actions underscores the manageability of certifying this case as a class action and supports a finding that Claimants have satisfied the requirements of Rule 23(b)(3).

IV. CONCLUSION

For the reasons stated above, Claimants respectfully request that the Arbitrator grant Claimants' Motion for Class Certification.

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Respectfully submitted,

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⁴⁶⁰ *In re Vivendi*, 284 F.R.D. at 155-56.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2013, I served Claimants' Motion for Class Certification and Memorandum in Support of Motion for Class Certification upon the following via electronic mail:

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