

**IN UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF TENNESSEE**

CHERYL PHIPPS and SHAWN)	
GIBBONS,)	CLASS ACTION
)	
<i>Plaintiffs,</i>)	CIVIL ACTION
)	
v.)	CASE NO. 3:12-cv-1009
)	
WAL-MART STORES, INC.,)	JUDGE LAWSON
)	
<i>Defendant.</i>)	MAGISTRATE JUDGE FRENSLEY
)	

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Factual Background	3
A. The Tennessee Region Operated with a Uniform Job, Store, and Management Structure in Which Men Held the Vast Majority of Management Positions	3
B. Wal-Mart Used Uniform Compensation Policies and Practices that Consistently Paid Hourly Women Less than Men.....	7
1. Guidelines Were Issued Annually Governing All of Region 43	7
2. Starting Pay Was Set in a Manner that Adversely Affected Women	9
3. Other Pay Practices in Effect through 2004 Maintained These Disparities	11
4. The Change in Job Classifications in 2004 Had an Adverse Impact on Women Employees	14
5. Wal-Mart Did its Own Analyses of Its Hourly Pay Practices, Identified Practices Giving Rise to Inequity, But Failed to Change Prior to 2004	17
6. Statistical Evidence Demonstrates Common Pattern of Pay Disparities	19
C. Wal-Mart Used Uniform Compensation Policies and Practices that Consistently Paid Women Managers Less than Men	21
1. Wal-Mart Issued Guidelines Annually Governing All of Region 43, Placing Regional Management in Charge of Managers' Pay	21
2. Management Trainee Pay Systematically Set Adverse to Women.....	22
3. Assistant Manager Pay Systematically Set Adverse to Women.....	23
4. Statistical Evidence Demonstrates Statistically Significant Disparities in Compensation of Women in Management	25
D. Regional Management Used Common Policies to Make Promotion Decisions Which Disadvantaged Women.....	25
1. Women Faced Unlawful Barriers to Promotion from Hourly Position to MIT/Assistant Manager	25
2. The Management Posting System Was Rife With Exceptions.....	28
3. These Promotion Practices Had an Adverse Impact on Women	30
E. Wal-Mart Managers Shared Stereotypes About Women Employees.....	31

TABLE OF CONTENTS

	<u>Page</u>
F. Wal-Mart Knew its Practices Adversely Affected Women and Regional Managers Did Nothing to Change Until Three Years After the <i>Dukes</i> Case Was Filed, But Belated Efforts Only Underscore Common Control Over Uniform Practices	34
III. Argument	38
A. The Proposed Class Is Sufficiently Numerous	38
B. Plaintiffs Have Identified Common Questions of Law and Fact.....	38
1. Plaintiffs Have Identified Common Questions for Their Hourly Pay Claims	44
2. Plaintiffs Have Identified Common Questions for Their Management Pay Claims	48
3. Plaintiffs Have Identified Common Questions for Their Promotion Claims	49
C. Plaintiffs' Claims Are Typical of the Class	51
D. Plaintiffs Are Adequate Class Representatives.....	51
E. The Case Can Properly Be Certified Under Rule 23(b)(3), and Plaintiffs Have Proposed a Manageable Trial Plan	52
1. Common Questions Predominate	52
2. A Class Action Is the Superior Approach.....	53
3. This Dispute is Manageable.....	55
F. Alternatively, the Court May Certify a Rule 23(c)(4) Liability Class.....	60
IV. Conclusion	60

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>In re Am. Med Sys., Inc.</i> , 75 F.3d 1069 (6th Cir. 1996)	53
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 632 (1997)	52
<i>Amgen Inc. v. Conn. Ret. Plans & Tr. Funds</i> , 568 U.S. 455 (2013).....	38, 55
<i>Bazemore v. Friday</i> , 478 U.S. 385 (1986).....	43
<i>Beattie v. CenturyTel, Inc.</i> , 511 F.3d 554 (6th Cir. 2007)	51, 52, 53
<i>Brown v. City of Detroit</i> , No. 10-CV-12162, 2014 WL 7074259 (E.D. Mich. Dec. 12, 2014)	60
<i>Brown v. Nucor Corp.</i> , 785 F.3d 895 (4th Cir. 2015)	43, 48, 49, 51
<i>Brown v. Trs. of Boston Univ.</i> , 891 F.2d 337 (1st Cir. 1989).....	54
<i>Calibuso v. Bank of Am., Corp.</i> , 893 F. Supp. 2d 374 (E.D.N.Y. 2012)	41, 45
<i>Chen-Oster v. Goldman, Sachs & Co.</i> , 877 F. Supp. 2d 113 (S.D.N.Y. 2012).....	41, 46
<i>Chen-Oster v. Goldman, Sachs & Co.</i> , No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875 (S.D.N.Y. Jan. 19, 2012).....	46, 49
<i>Chicago Teachers Union, Local No. 1 v. Bd. of Educ.</i> , 797 F.3d 426 (7th Cir. 2015)	42, 49
<i>Chin v. Port Auth. of N.Y. & N.J.</i> , 685 F.3d 135 (2d Cir. 2011).....	54
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013).....	58, 60
<i>In re Countrywide Financial Mortgage Lending Practices Litigation</i> , 708 F.3d 704 (6th Cir. 2013)	41

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Davidson v. Henkel Corp.</i> , 302 F.R.D. 427 (E.D. Mich. 2014)	51
<i>Dukes v. Wal-Mart, Inc.</i> , 222 F.R.D. 189 (N.D. Cal. 2004).....	<i>passim</i>
<i>EEOC v. Performance Food Grp., Inc.</i> , 16 F. Supp. 3d 576 (D. Md. 2014).....	57
<i>Ellis v. Costco Wholesale Corp.</i> , 285 F.R.D. 492 (N.D. Cal. 2012).....	<i>passim</i>
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011)	<i>passim</i>
<i>Exxon Shipping Co. v. Baker</i> , 554 U.S. 471 (2008).....	58
<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977).....	19
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977)	43, 44, 48, 55
<i>Iorio v. Allianz Life Ins. Co. of N. Am.</i> , No. 05 CV 633 JLS (CAB), 2009 WL 3415703 (S.D. Cal. Oct. 21, 2009).....	58
<i>Johnson v. Nextel Commc’ns Inc.</i> , 780 F.3d 128 (2d Cir. 2015).....	58
<i>Kolstad v. Am. Dental Ass’n</i> , 527 U.S. 526 (1999).....	56
<i>McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 672 F.3d 482 (7th Cir. 2012)	40, 41, 46, 48
<i>McReynolds v. Sodexo Marriot Servs., Inc.</i> , 349 F. Supp. 2d 1 (D.D.C. 2004).....	47
<i>Moore v. Napolitano</i> , 926 F. Supp. 2d 8 (D.D.C. 2013).....	41, 57
<i>Olden v. LaFarge Corp.</i> , 383 F.3d 495 (6th Cir. 2004)	57, 59

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Reeb v. Ohio Dep’t of Rehab. & Corr.</i> , 435 F.3d 639 (6th Cir. 2006)	58
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133 (2000).....	31
<i>Rollins v. Traylor Bros.</i> , No. C14-1414 JCC, 2016 WL 258523 (W.D. Wash. Jan. 21, 2016).....	43, 48
<i>Rosiles-Perez v. Superior Forestry Serv., Inc.</i> , 250 F.R.D. 332 (M.D. Tenn. 2008)	52
<i>Salvagne v. Fairfield Ford, Inc.</i> , 264 F.R.D. 321 (S.D. Ohio 2009).....	53
<i>Scott v. Family Dollar Stores, Inc.</i> , 733 F.3d 105 (4th Cir. 2013)	42, 45, 46, 49
<i>Scott v. Family Dollar Stores, Inc.</i> , No. 308-CV-00540-MOC-DSC, 2016 WL 9665158 (W.D.N.C. June 24, 2016).....	42, 43, 46, 48
<i>Segar v. Smith</i> , 738 F.2d 1249 (D.C. Cir. 1984).....	19
<i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U.S. 555 (1931).....	58
<i>Sutton v. Hopkins Cty., Ky.</i> , No. 4:03CV-003-M, 2007 WL 119892 (W.D. Ky. Jan. 11, 2007).....	53
<i>Tyson Foods, Inc. v. Bouaphakeo</i> , 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016).....	52, 57
<i>United States v. City of New York</i> , 276 F.R.D. 22 (E.D.N.Y. 2011).....	57
<i>United States v. City of New York</i> , 681 F. Supp. 2d 274 (E.D.N.Y. 2010)	59
<i>United States v. City of New York</i> , 847 F. Supp. 2d 395 (E.D.N.Y. 2012)	58, 59
<i>In re Vivendi Universal, S.A. Sec. Litig.</i> , 284 F.R.D. 144 (S.D.N.Y. 2012)	59

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011).....	<i>passim</i>
<i>Watson v. Fort Worth Bank & Tr.</i> , 798 F.2d 791 (5th Cir. 1986)	45
<i>Watson v. Fort Worth Bank & Trust</i> , 487 U.S. 977 (1988).....	40, 45
<i>In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.</i> , 722 F.3d 838	60
<i>Young v. Nationwide Mut. Ins. Co.</i> , 693 F.3d 532 (6th Cir. 2012)	38, 53
 STATUTES & RULES	
42 U.S.C. § 1981(a)(b)(1).....	56
42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii)	55
Fed. R. Civ. P. 23	<i>passim</i>
 OTHER AUTHORITIES	
7AA C. Wright, A. Miller, & M. Kane, <i>Federal Practice and Procedure</i> § 1778 (3d ed. 2005)	53
Claudia Goldin & Joshua Mitchell, <i>The New Life Cycle of Women’s Employment</i>	11
Joseph L. Gastwirth et al., <i>Some Important Statistical Issues Courts Should Consider in Their Assessment of Statistical Analyses Submitted in Class Certification Motions: Implications for Dukes v. Wal-Mart</i> , 10 <i>Law, Probability & Risk</i> 225, 228, 234-35 (2011)	47
Ramona L. Paetzold and Steven L. Willborn, <i>The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases</i> 169-171 (West, 2012-2013 ed.)	47

I. INTRODUCTION

For over ten years, Wal-Mart systematically paid its female employees less than their male counterparts and promoted female employees less frequently than their male counterparts in its stores in Region 43, located mainly in Tennessee. Plaintiffs allege these disparities were caused by policies and practices that have operated uniformly and consistently throughout Wal-Mart's retail operations within Region 43, and allege discrimination under both the intentional pattern or practice and the disparate impact theories of liability under Title VII. Accordingly, Plaintiffs seek certification of a class of female employees challenging sex discrimination in compensation and promotions against women who were employed by Wal-Mart within Region 43 during the proposed class period.¹ Plaintiffs seek certification of the following class:

All women below the level of Store Manager and excluding Pharmacists and Co-Managers, employed at any retail store in Wal-Mart Region 43 at any time from December 26, 1998 to February 23, 2009, who were subject to: (a) the compensation system for hourly retail sales positions; (b) the compensation system for Management Trainees and Assistant Managers; or (c) the promotion system into Management Trainee/Assistant Manager positions.

Wal-Mart used compensation policies and practices that consistently paid female hourly employees less than men. Between 1998 and 2004, hourly pay was decided at the store level, but this store-level discretion was guided by various region-wide policies, including specified criteria for setting starting pay, along with regular feedback and communication between store, district and regional management. Disparities in starting pay were maintained through Wal-Mart's policy of increasing pay as a percentage of prior pay, ensuring that those who started at lower

¹ The opening date of the class is December 26, 1998, based on the statute of limitations dating from the earliest EEOC charge filed; the closing date, February 23, 2009, is based on the date when Region 43 was dissolved, and stores were re-assigned to several different regions.

pay continued to have lower pay. These practices resulted in statistically significant disparities in pay between women and similarly-situated men that were consistent across the stores in the Region.

In 2004, Wal-Mart changed its hourly pay structure, employing a uniform policy that no longer relied upon store-level decisionmaking. Wal-Mart assigned all hourly jobs to new job classes, differentiated by department, with male-dominated departments at higher levels than female-dominated department, resulting in a highly statistically significant adverse impact upon women for the rest of the class period. Hourly pay disparities in this timeframe were also caused by Wal-Mart's region-wide "credit" system for starting pay, which awarded higher pay to those with prior experience, but only if that experience was within the years immediately prior to hiring. This disparately impacted women, who are more likely to have interruptions in their work history to have children.

As with hourly pay, Wal-Mart used policies and practices that consistently paid female Management Trainees and Assistant Managers less than their male counterparts. Starting in 2002, Management Trainees' pay rate was set based on their pay as hourly employees, thus perpetuating the prior pay disparities. Assistant Managers, in turn, had their starting pay set based on their Management Trainee pay, maintaining the pay disparities. In addition, regional managers approved any exceptions made to the pay rates, including setting pay for external hires, creating another opportunity for bias in setting pay. Performance increases and merit increases were also reviewed and approved by regional management. The region-wide policies setting pay for Management Trainees and Assistant Managers, along with decisions made at the regional level, led to statistically significant disparities in pay.

Wal-Mart's regional policies also adversely affected female employees seeking

promotions into Management Trainee and Assistant Manager positions. These policies included a refusal to post positions and a requirement that applicants be willing to relocate, both implemented until 2003 and both known to perpetuate bias against female candidates. And even when positions were posted starting in 2003, Wal-Mart required applicants to agree to certain travel conditions discouraging female candidates, and the posting system was frequently used in such a way that preferred candidates could be pre-selected before positions were posted. And, as with management pay, promotions into Management Trainee and Assistant Manager positions involved approval by regional management, thus permitting bias at the regional level. These practices had a statistically significant adverse impact on women.

Along with the strong statistical evidence showing that Wal-Mart's pay and promotions policies adversely affected women and that Wal-Mart operated under a general policy of discrimination, anecdotal evidence shows that Wal-Mart managers shared certain stereotypes about how much women should be paid and what kind of work they should perform. Wal-Mart corporate officers were also well aware of the adverse effect of their policies on female employees, at least since the beginning of the class period. This combined evidence shows that Wal-Mart had common policies and practices that operated uniformly and with an adverse effect on members of the proposed class, and can be challenged on a class-wide basis.

II. FACTUAL BACKGROUND

A. The Tennessee Region Operated with a Uniform Job, Store, and Management Structure in Which Men Held the Vast Majority of Management Positions

During the class period, Wal-Mart retail operations were divided geographically into six Wal-Mart divisions, each consisting of approximately six regions.² At issue here are the

² Deposition of Kevin Harper ("Harper I"), Rule 30(b)(6) witness on Wal-Mart Organizational

employment practices of a single region: Region 43, largely based in Tennessee. Thus, this case concerns the employment practices in approximately 100 stores,³ just 3% of the 3,400 stores that Wal-Mart operated in the U.S.

Each store in Region 43 had the same job categories, job descriptions and management hierarchy.⁴ At the bottom of the ladder, the primary entry-level hourly positions were Cashier, Sales Associate, and Stocker.⁵ And, importantly, Wal-Mart grouped all the hourly jobs into job classes, and treated all jobs within a job class identically for purposes of hourly pay rates. From the opening date of the class period through June 2004, Wal-Mart had five job classes, although all jobs were assigned to the first three classes, except for a small number of specialty department positions.⁶ Wal-Mart then expanded to seven job classes.⁷

Structure, at 215:3-4, 215:18-216:1, Ex. 1.

³ As some stores were added to the Region, and some reassigned elsewhere, there are more than 100 stores over the ten-year class period.

⁴ Harper I Dep. 32:14-40:12, 58:18-59:9, Ex. 1; Deposition of Trent Burner, Rule 30(b)(6) witness on validation, at 144:16-145:12, 148:24-149:13, Ex. 2; Deposition of James Winkler, Regional Personnel Manager, at 172:7-15, Ex. 3; Deposition of Gisel Ruiz, People Director, at 130:22-131:3, Ex. 4; Job Descriptions, Ex. 5.

⁵ Harper I Dep. 42:15-43:10, Ex. 1; Wal-Mart Stores Matrix of Essential Job Functions, Ex. 6.

⁶ Deposition of Lisa Riley, Rule 30(b)(6) witness on compensation and promotions, at 18:12-21:11, Ex. 8; Field Associate Compensation Guidelines, Revised Aug. 1998, at 13, Ex. 9; Field Associate Compensation Guidelines, Effective May 1, 1999, at 13, Ex. 10; Field Non-Exempt Associate Pay Guidelines FYE 2002, at 16-17, Ex. 11; Field Non-Exempt Associate Pay Guidelines, Effective Feb. 1, 2002 to Jan. 31, 2003, at 20, Ex. 12; Field Non-Exempt Associate Pay Guidelines, Effective Feb. 1, 2003 to Jan. 31, 2004, at 20, Ex. 13.

Wal-Mart has, at various times, referred to these job groupings as “job classifications,” “job classes,” “pay classes,” and “position pay grades.” We refer to them as “job classes” throughout. As Wal-Mart explained the job class is a “group of jobs . . . determined by job responsibilities. . . . All jobs in the same class[] will have the same starting rate of pay.” Ex. 9 at 5; see also Ex. 10 at 5 (“Each position is assigned to a particular [class] based on its job responsibilities. Jobs in the same [class] have the same Starting Pay.”); Ex. 11 at 5; Ex. 12 at 5; Ex. 13 at 5.

⁷ Field Hourly Associate Pay Plan FYE 2005, Effective June 12, 2004, at 15-17, Ex. 16; Field Non-Exempt Associate Pay Plan, Effective June 12, 2004, Revised March 14, 2005, at 22-28,

The first step above an entry-level job was an hourly supervisor position, including Department Manager and Support Manager.⁸ The next step up was Management Trainee (“MIT”), a four-to-five-month program that prepared employees to be Assistant Managers, a salaried position.⁹ Each store had several Assistant Managers. The next level was Co-Manager, a position used only in larger stores, and then Store Manager.¹⁰

Approximately seven to ten stores were assigned to each district, which was run by a District Manager.¹¹ There were approximately fourteen District Managers who reported to the Regional Vice President.¹² Region 43 was supervised by a Regional Vice President (RVP).¹³ The RVP had overall responsibility for the region, including compliance with Wal-Mart’s

Ex. 17; Riley Dep. 62:14-63:24, 63:25-64:12; 145:11-146:17, Ex. 8.

⁸ Deposition of Kimberly Weaver, Rule 30(b)(6) witness on Wal-Mart hourly promotions, at 37:19-20, 45:3-9, Ex. 22; Deposition of Arthur Keeley, Rule 30(b)(6) witness on job assignments and transfers, at 83:13-85:14, Ex. 23; Harper I Dep. 108:16-109:10, Ex. 1; Deposition of John Butler, Regional Vice President, at 128:1-5, Ex. 24; *see also* Wal-Mart Corporate Policy: Support Managers 2002, Ex. 25.

⁹ Deposition of Kevin Harper (“Harper II”), Vice President People Group for Operations, at 195:7-15, Ex. 26; Memo re: New Management Training Program, dated Jan. 31, 2001, Ex. 27; Deposition of Brad Schaffner, Rule 30(b)(6) witness, at 79:17-80:10, Ex. 28; Deposition of Debra Kintzele, Rule 30(b)(6) witness on salaried promotions, at 44:6-11, 56:20-57:1, Ex. 29; Harper I Dep. 35:24-36:11, Ex. 1. The MIT Program was the gateway to an Assistant Manager position. Kintzele Dep. 44:6-11, Ex. 29.

¹⁰ Harper I Dep. 150:25-152:17, 35:24-36:11, 159:18-25, Ex. 1.

¹¹ Deposition of Christopher Vaden, former District Manager, at 18:15-22, Ex. 30; Deposition of Russell Steiner, District Manager, at 22:8-12, Ex. 14. Although the name changed to “Market Manager” in 2006, we use the same name throughout for simplicity. Riley Dep. 108:9-12, Ex. 8; Deposition of Charles Rinehart, former Regional Vice President Region 43, at 72:25-73:3, Ex. 31. District Managers were responsible for ensuring stores in their districts complied with Wal-Mart’s standards. Vaden Dep. 17:18-18:7, Ex. 30; Steiner Dep. 21:14-23, Ex. 14.

¹² Ex. 122 at 21-23 (listing districts included in Region 43).

¹³ Rinehart Dep at 20:7-11, Ex. 31.

personnel policies.¹⁴ Moreover, the RVP is a key figure in one of the decisions at issue—pay increases for Assistant Managers—and had influence over promotions into MIT positions. *Infra* at 24. Region 43 also had one Regional Personnel Manager (RPM), who was responsible for the “people side of the region.”¹⁵ The RPM is a key figure in two of the decisions at issue—promotion into the MIT program and starting pay for MIT and Assistant Managers.¹⁶

In Region 43, women comprised 64% of all hourly workers, and 80% of hourly Department Managers, but only 27.1% of MITs, 36.5% of Assistant Managers, 20.7% of Co-Managers, and 15.1% of Store Managers.¹⁷ At the district level, 94% of the time within the class period, districts in Region 43 were supervised by male District Managers.¹⁸ All RVPs during the class period were men.¹⁹

Women were not only concentrated at the bottom of the store hierarchy, but in certain departments within the stores. The stores each contained many departments, some of which were highly gender segregated.²⁰ For example, women made up over 90% of workers in the

¹⁴ Rinehart Dep. 19:5-20:6, Ex. 31; Deposition of Sonya Hostetler, former Regional Personnel Manager Region 43, at 44:17-46:9, Ex. 32.

¹⁵ Deposition of Sandy Ellison, District Manager, at 74:21-75:5, Ex. 33. There were five RPMs during the class period, John Simmons (until June 2000); Brian Hardin (June 2000-March 2003); Sonya Hostetler (March 2003-January 2005); Reginald Coffin (January 2005); Georgia Litterell (January 2005 to February 2009). Region 43 RVPs and RPMs Chart, Ex. 34.

¹⁶ Harper I Dep. 189:11-16, 191:8-16, Ex. 1; RPM Responsibilities, Ex. 35; Regional Personnel Manager Training Guide 2000 excerpts, Ex. 36; Field Compensation Programs 1997-1998, at 5, Ex. 37.

¹⁷ Bendick Decl. at C-15, C-16.

¹⁸ Region 43 Managers Chart, Ex. 38.

¹⁹ From 1999 to 2009, RVPs for Region 43 were: Harry Miller (to 2000); John Lykins (2000-2002); Charles Rinehart (2002-06); Glen Gabardi (2006-09). Ex. 34.

²⁰ Bendick Decl. at ¶ 35, C-8; Deposition of Cheryl Phipps, at 161:1-7, Ex. 39; Deposition of Shawn Gibbons, at 55:16-56:5, Ex. 40; Tate Decl. ¶ 3; Parker Decl. ¶ 3; Webb Decl. ¶ 2; Roberts

Infant/Toddlers, Health and Beauty Aids, Hosiery, and Men's Wear Departments. Bendick Decl. at C-8. In contrast, the Pets, Sporting Goods, and Horticulture (Lawn & Garden) Departments were between 26% and 33% female. *Id.* This gender segregation is significant because Wal-Mart chose to pay workers in some male-dominated departments at higher rates for the same job. *See infra* at 14-17.

B. Wal-Mart Used Uniform Compensation Policies and Practices that Consistently Paid Hourly Women Less than Men

1. Guidelines Were Issued Annually Governing All of Region 43

Wal-Mart regularly issued written guidelines governing hourly compensation which applied to all hourly employees in Region 43.²¹ No other guidelines applied to any district or store within Region 43.²² Store Managers were explicitly directed to set pay for hourly employees following the guidelines.²³ The guidelines were designed to ensure that Wal-Mart's compensation policies were consistently administered, and designated the RPM to ensure consistent application.²⁴

In order to maintain that consistency, exceptions to the compensation guidelines, as well as some actions within the guidelines (such as setting starting pay more than 6% above the minimum, *see infra* at 9, were reviewed by the District Manager, who had to decide whether or

Decl. ¶ 4; Stallard Decl. ¶ 4.

²¹ *See* Exs. 9-13, 16-17; Field Non-Exempt Associate Pay Plan FYE 2007, revised Aug. 5, 2006, Ex. 18; Field Non-Exempt Associate Pay Plan FYE 2009, Effective March 29, 2008, Ex.20; Field Non-Exempt Associate Pay Plan FYE 2008, Effective Feb. 3, 2007, Ex. 21; Riley Dep. 12:19-24, Ex. 8. This included hourly employees who worked in Specialty departments. Riley Dep. 24:18-23, Ex. 8.

²² Riley Dep. 12:13-24; 14:20-15:4, Ex. 8.

²³ Riley Dep. 22:24-23:13, Ex. 8; Ex. 9 at 3-4; Ex. 10 at 4; Ex. 11 at 4; Ex. 12 at 4; Ex. 13 at 4.

²⁴ *Id.*; Riley Dep. 15:5-10, 18:1-11, Ex. 8; Steiner Dep. 56:18-57:15, Ex. 14.

not to approve the Store Manager's pay decision.²⁵ Exception reports were created and sent to District Managers at least through 2003.²⁶ District Managers would discuss the exceptions with Store Managers, or ask their district assistants to do so, so they could decide whether or not to approve the pay action.²⁷ If there were a large number of exceptions from one store, the District Manager would talk in greater depth with the Store Manager.²⁸ The District Managers did not operate as a rubber stamp for the Store Manager decisions, but reviewed the exception reports and made decisions based on the information provided.²⁹ Thus, the Store Managers received regular feedback from the District Managers about their decisionmaking.

In addition to the formal feedback through the exception process, there was a constant exchange between the Regional, District and Store managers. Both the RVP and the District Managers testified that they spent 80% of their time touring stores and talking with the managers in those stores. District Managers visited each store about once every two weeks, while the RVP visited each store twice per year.³⁰ In addition, the District Managers had regular conference calls with all of the Store Managers in their districts, either weekly or monthly, sent emails, and

²⁵ Ex. 9 at 3-4, 6; Ex. 10 at 4, 6; Ex. 11 at 4-5; Ex. 12 at 4; Ex. 13 at 4; Riley Dep. 16:8-17:6, Ex. 8. The precise process changed, but exceptions to hourly pay guidelines continued to be reviewed through the end of the class period. Riley Dep. 107:9-22, Ex. 8; Steiner Dep. 138:13-140:4, Ex. 14; Ex. 21 at 28.

²⁶ Riley Dep. 43:9-18, Ex. 8; Steiner Dep. 74:7-16; 77:21-25, Ex. 14; Exception Report from 9/7/2002 to 9/20/2002, Ex. 42; Exception Report from 9/6/2003 to 9/19/2003, Ex. 43; Exception Report from 11/30/2002 to 12/13/2002, Ex. 44; Exception Report from 6/28/2003 to 7/11/2003, Ex. 45.

²⁷ Steiner Dep. 62:12-63:16; 64:18-65:1, 66:4-13, Ex. 14; Vaden Dep. 53:10-25, Ex. 30.

²⁸ Steiner Dep. 64:18-65:1, Ex. 14.

²⁹ Steiner Dep. 66:4-13, Ex. 14.

³⁰ Rinehart Dep. 23:12-24, 28:6-9, Ex. 31; Steiner Dep. 23:3-5, 23:6-13, Ex. 14; Vaden Dep. 19:24-20:1, 20:2-14, Ex. 30.

had periodic in person meetings, approximately monthly.³¹ Similarly, the RVP held conference calls with all his District Managers on a weekly basis, with in-person meetings and emails as well.³² These regular calls touched on many aspects of store operations, including people issues.³³

In sum, there were not only written guidelines issued which governed the Store Manager's decisionmaking, there was also a constant stream of communications with district and regional management that provided feedback to Store Managers about their hourly compensation decisions and guidance about how Wal-Mart regional management expected them to carry out their responsibilities. Thus, Store Managers followed a common method in making compensation decisions.

2. Starting Pay Was Set in a Manner that Adversely Affected Women

Pursuant to Wal-Mart's guidelines, from 1998 to June 2004 Store Managers set starting pay for each hourly employee; the Store Manager could pay an individual up to \$2 over the minimum amount Wal-Mart set for the job.³⁴ In 1998-2001, starting pay that was more than 6% above the minimum required approval from the District Manager.³⁵ District Managers no longer

³¹ Steiner Dep. 30:10-20, 34:6-12, 226:4-14; Ex. 14; Vaden Dep. 21:23-22:6, 23:7-16, 54:1-4, Ex. 30.

³² Rinehart Dep. 26:2-14, 27:13-24, Ex. 31; *see, e.g.*, Priorities Email from C. Rinehart, dated July 22, 2005, Ex. 46; Evaluations Email from Charles Rinehart, dated Feb. 23, 2004, Ex. 47; Diversity Requirements Email from C. Rinehart, dated Apr. 15, 2005, Ex. 48; Diversity Good Faith Efforts Goals Attainment Status Email, dated June 27, 2005, Ex. 49. The RVP, in turn, participated in a weekly call with the other regional managers and home office management in Bentonville. Rinehart Dep. 23:16-24:10, Ex. 31.

³³ Rinehart Dep. 24:11-25:9, 26:15-27:8, Ex. 31; Steiner Dep. 31:3-32:9, 35:8-36:5, Ex. 14; Vaden Dep. 22:7-13, Ex. 30.

³⁴ Ex. 9 at 6; Ex. 10 at 6; Ex. 11 at 5; Ex. 12 at 5; Ex. 13 at 5; Vaden Dep. 47:20-23, Ex. 30.

³⁵ Ex. 9 at 6; Ex. 10 at 6; Ex. 11 at 5; Riley Dep. 22:24-24:3, Ex. 8.

reviewed starting pay within \$2 of the minimum after February 2002, although review was still required for starting rates that were more than \$2 over the minimum.³⁶

Managers were only permitted to set starting pay above the minimum if the associate had “additional skills, abilities or education that would enhance their ability to perform the job.”³⁷ Thus, Wal-Mart prescribed common factors Store Managers were required to use in awarding starting pay rates above the rates prescribed by the company guidelines. These criteria, along with the factors noted above—feedback from District Managers reviewing exceptions and regular communication among management in Region 43—all combined to ensure that Wal-Mart provided a common mode for the exercise of discretion among Store Managers in setting starting pay rates for Sales Associates. The statistical evidence reflects that this policy on starting pay—and the common mode of exercising discretion within this policy—resulted in men consistently being paid more at hire than similarly-situated women. Bendick Decl. at ¶¶ 52-56, C-12. Wal-Mart knew that the system it created to set starting pay was likely to cause inequity, at least by 2001.³⁸ But Wal-Mart did not change this practice until June 2005.³⁹

In 2005, Wal-Mart adopted a system of credits based upon past work experience, formulated in a way which also had an adverse effect on women, thus causing systematic disparities in starting pay. Wal-Mart’s policy dictated that the only way to be paid anything

³⁶ Ex. 12; Riley Dep. 41:4-11, Ex. 8. From June 2004 to June 2005, there was no cap at all on the start rate set by the Store Manager. Riley Dep. 64:23-66:10, Ex. 8.

³⁷ Ex. 9 at 6; Ex. 10 at 6; Ex. 11 at 5; Ex. 12 at 5; Ex. 13 at 5; Steiner Dep. 71:22-72:10, Ex. 14; Riley Dep. 25:23-26:8, Ex. 8.

³⁸ Compensation Issues 2001, at 4, Ex. 50 (noting pay inequities between comparable associates and a focus on start rates); Field Hourly Pay Administration Proposal Revised, dated June 25, 2003, at 1883, Ex. 51 (stating that the discretion of Store Managers in setting start rate “allows for inequity in pay”).

³⁹ Ex. 17; Riley Dep. 67:6-69:21, Ex. 8.

above the minimum start rate for the position was through earning a “credit.” Pursuant to the policy—which applied to all hourly associates across the region and did not depend upon any Store Managers decisions – a credit was assigned for “each full year of retail experience or experience in a comparable position *during the past five years.*”⁴⁰ Women are more likely than men to have interruptions in their work history due to having children. Claudia Goldin & Joshua Mitchell, *The New Life Cycle of Women’s Employment*, 31 *Journal of Economic Perspectives*, No. 1 (Winter 2017), 161, 163. Thus, a man and a woman who each have five years of total retail experience will receive different credits if the man’s experience is five consecutive years prior to employment at Wal-Mart, and the woman’s experience is five years total within the past six years, but with a 12-month gap in between. Not surprisingly, there continued to be statistically significant disparities in starting pay with this system. Bendick Decl. ¶ 56, C-12.

3. Other Pay Practices in Effect through 2004 Maintained These Disparities

Not only did hourly women start at Wal-Mart with lower pay, but Wal-Mart’s pay guidelines also created three ways to ensure they stayed at lower rates. Hourly workers could receive pay increases through performance increases, promotional increases and merit increases.⁴¹ These were awarded as percentage increases through 2004, which meant that employees with lower existing pay rates (largely women) would receive a smaller dollar increase than those with a higher base rate (predominantly men), thus maintaining or even increasing the difference between them despite identical performance. *Id.* So disparities in starting pay had a

⁴⁰ Ex. 17 at 6 (emphasis added). In subsequent years the credits were revised to consider “any lawful work,” but continued to require that work have been in the past six years. Ex. 18 at 6; Ex. 20 at 8; Ex. 21 at 11 (returned to giving credit only for retail experience, but continued to count only experience within the past five years).

⁴¹ Ex. 9 at 7, 9-10; Ex. 10 at 8, 11, 12; Ex. 11 at 7, 9, 10; Ex. 12 at 8, 11, 13; Ex. 13 at 8, 11, 13.

long-term impact, maintaining pay differences between women and comparable men. This is a phenomenon known as “start low, stay low.” Wal-Mart’s own internal analyses identified these practices as ones which contributed to pay inequity. *See infra* at 34-37.

Performance Increases: Store Managers have the final say over the performance rating of each employee.⁴² While Plaintiffs do not challenge the ratings themselves,⁴³ Store Managers also determined the amount of the accompanying pay increase.⁴⁴ While Wal-Mart had guidelines which prescribed a specific percentage increase associated with each evaluation level, Wal-Mart permitted Store Managers to depart from that percentage.⁴⁵ This discretion to depart from the prescribed pay increase associated with each performance level continued until June 2004, when each rating was associated with an automatic dollar increase that could not be changed.⁴⁶

Promotional Increases: Similarly, promotional pay increases, awarded when an employee moved from a lower-level hourly position to a higher-level hourly position, were also

⁴² Riley Dep. 51:8-51:16; 52:23-53:3, Ex. 8; Vaden Dep. 76:19-77:10, Ex. 30; Evaluations PRG 801 Evaluation Process, dated June 11, 2004, Ex. 52; Evaluations PRG 801 Evaluation Process, dated March 31, 2007, Ex. 54; Evaluations PRG 802 Personnel Associate’s Role, dated Jan. 15, 2004, Ex. 53. Pursuant to Wal-Mart policy, these performance evaluations occur approximately 90 days after their date of hire, and each year thereafter on, or shortly before, the anniversary of their hire date. Ex. 9 at 10; Ex. 10 at 12; Ex. 11 at 10; Ex. 12 at 13; Ex. 13 at 13; Steiner Dep. 76:14-77:1, Ex. 14; Ex. 52; Ex. 54. For those employees who receive an evaluation of “meets expectations” or better, a pay increase is awarded. Ex. 9 at 10; Ex. 10 at 12; Ex. 11 at 10; Ex. 12 at 13; Ex. 13 at 13.

⁴³ Indeed, statistical analysis of performance evaluations shows that women on average received slightly higher ratings than men. Bendick Decl. at ¶ 25, C-4.

⁴⁴ Riley Dep. 55:16-24, Ex. 8; Ex. 51 at 1884; Field Pay Administration Recommendations, dated July 15, 2003, at 341, Ex. 55.

⁴⁵ Ex. 9 at 10; Ex. 10 at 12; Ex. 11 at 10; Ex. 12 at 13; Ex. 13 at 13; Ex. 51 at 1884 (easy to override suggestion); Ex. 55 at 341.

⁴⁶ Ex. 16 at 13; Ex. 17 at 19; Ex. 18 at 17; Ex. 20 at 24; Ex. 21 at 29.

computed on a percentage basis, through June 2004.⁴⁷ The Store Manager had some discretion, but if he wanted to give an increase of more than 6%, District Manager approval was needed.⁴⁸ These approvals were obtained through the exception report, as with starting pay set more than 6% above minimum.⁴⁹ Starting in June 2004, any promotional or demotional pay changes were handled automatically based on the change in level.⁵⁰

Merit Increases: Unlike performance evaluation increases, for which every employee is systematically considered each year, *see supra* at 12, the merit increase was an additional pay increase the Store Manager was authorized to award to an associate who “exhibits exceptional performance above job responsibilities,” pursuant to Wal-Mart’s compensation guidelines.⁵¹ As with performance and promotional increases, it was set as a percentage of the prior rate. *Id.* Wal-Mart expanded on this guidance in 2004 when it added some requirements, such as not being subject to disciplinary coaching, not having a below expectations performance rating, and not having received a merit increase within the past 12 months.⁵²

As with starting pay, the guidelines and regular communications with regional management provided a common framework for Store Managers to make merit awards. Like

⁴⁷ Ex. 9 at 7; Ex. 10 at 8; Ex. 11 at 7; Ex. 12 at 8; Ex. 13 at 8.

⁴⁸ Riley Dep. 41:21-42:11, Ex. 8.

⁴⁹ Steiner Dep. 74:7-16, Ex. 14.

⁵⁰ Ex. 16 at 7; Ex. 17 at 9; Ex. 18 at 9; Ex. 20 at 10; Ex. 21 at 13; Riley Dep. 72:21-73:9, Ex. 8.

⁵¹ Riley Dep. 43:24-44:15, Ex. 8; Ex. 9 at 9; Ex. 10 at 11; Ex. 11 at 9; Ex. 12 at 11; Ex. 13 at 11; Ex. 16 at 12; Ex. 17 at 17.

⁵² Ex. 16 at 12; Ex. 17 at 17. Wal-Mart also revised the language describing the essential requirement for a merit increase to: the employee “exhibited exceptional performance and exceptional results in the execution of their job responsibilities.” *Id.* While the wording was slightly different than prior to 2004, it was intended to reward the same sorts of conduct. Riley Dep. 86:2-87:15, Ex. 8.

starting pay, any deviation from the guidelines appeared on an exception report for discussion with the District Manager, who decided whether or not to approve the award. Exs. 42-45. Moreover, starting in June 2004, Wal-Mart required District Managers to review and approve *every* merit increase, at the same time requiring that all merit increases be awarded in the same dollar amount.⁵³ The provision of a common set of criteria ensured that Wal-Mart provided a common mode for managers exercising discretion in awarding merit increases.

Wal-Mart's compensation department acknowledged that merit increases were likely to give rise to inequity, and identified the specific practices that could give rise to this inequity: the Store Manager's discretion over who received a merit increase and the amount of the increase, and the fact that the system allowed managers to over-ride rules and give merit increases outside of the guidelines.⁵⁴ While Wal-Mart considered eliminating merit increases in 2003 because of these concerns, it did not do so then.⁵⁵ Finally, years after first considering eliminating merit increases, Wal-Mart did so in August 2006.⁵⁶ This change was made to increase consistency in the awards made.⁵⁷

4. The Change in Job Classifications in 2004 Had an Adverse Impact on Women Employees

In June 2004, Wal-Mart changed the job classification structure for hourly employees. As described above, from 1998 through June 2004, Wal-Mart assigned jobs to five classes, the

⁵³ Ex. 16 at 12; Ex. 17 at 17; Steiner Dep. 80:1-11; 118:1-21, Ex. 14; Riley Dep. 78:18-80:15, Ex. 8.

⁵⁴ Ex. 51 at 1885; Ex. 55 at 341; see also Steiner Dep. 127:22-128:10; 128:17-129:10, Ex. 14.

⁵⁵ Ex. 51 at 1885.

⁵⁶ Field Hourly Pay Program Changes for FYE 2007, at 24, Ex. 19; Riley Dep. 99:12-21, Ex. 8.

⁵⁷ Steiner Dep. 120:15-121:20, Ex. 14; Ex. 19.

top two of which were only used for a few specialty jobs; jobs were assigned to the same class regardless of department.⁵⁸ In 2004, Wal-Mart introduced a new structure, consisting of seven classes for hourly retail employees, in which many jobs which had previously been in one class were assigned to separate classes depending on department.⁵⁹ As under the prior system, each successive job class had a higher minimum starting rate. *Id.* This was a uniform change, dictated by Wal-Mart Home Office, and applied to every individual in Region 43 based purely on their job assignment.⁶⁰

The separation of jobs into new job classes based on department was a significant change. Compare Ex. 10 at 13 to Ex. 16 at 15-17. As the proportion of women in the departments varied greatly,⁶¹ Wal-Mart's reliance on department to set job class ensured that disparities in pay rates by department would correlate with gender. Many jobs in departments in which women were over-represented were assigned to lower job classes, while those same job titles in departments over-represented by men were assigned to higher job classes. *Infra* at 17.

Prior to this change, jobs were not separated into different classes based on department; a Sales Associate was a Sales Associate, whether selling housewares or sporting goods.⁶² Wal-

⁵⁸ Riley Dep. 18:12-21:11, Ex. 8; Ex. 9 at 13; Ex. 10 at 13; Ex. 11 at 16-17; Ex. 12 at 20; Ex. 13 at 20. There were two departments where Sales Associates were assigned to a higher level in 2002, and a third added in 2003. Riley Dep. 35:3-37:7, Ex. 8; Ex. 12 at 20; Ex. 13 at 20. The three departments were Electronics, Sporting Goods, and Hardware. *Id.* These are three departments where men are disproportionately likely to be working.

⁵⁹ Ex. 16 at 15-17; Riley Dep. 62:14-63:24, Ex. 8.

⁶⁰ Riley Dep. 37:25-38:14; 64:4-8, Ex. 8.

⁶¹ Bendick Decl. at C-8.

⁶² Ex. 9 at 13; Ex. 10 at 13; Ex. 11 at 16-17; Ex. 12 at 20; Ex. 13 at 20; Riley Dep. 34:17-35:25, 36:18-37:7 (with few exceptions noted for 2002-03), Ex. 8; Steiner Dep. 90:4-91:4, Ex. 14; Deposition of Craig Arnold, Rule 30(b)(6) witness on compensation, at 242:18-243:18, Ex. 15 (stating definitively that department was not a factor which should affect compensation).

Mart assigned the electronics, sporting goods, and hardware departments (departments in which men are over-represented, Bendick Decl. at C-8) to a higher job class in 2002-03, without any study, analysis, or documentation.⁶³ While Wal-Mart worked with consultants at the Hay Group in making the more extensive 2004 changes,⁶⁴ they were no more justified than the earlier changes. An experienced Wal-Mart District Manager testified that he could not justify some of the changes in job class assignments.⁶⁵ He confirmed that all Sales Associates have the same responsibilities in nearly all respects, and any additional responsibilities unique to a specific department may be learned through Wal-Mart's Computer Based Learning system.⁶⁶

Indeed, the Hay Group, whose work Wal-Mart relied upon, found that there was a "high degree of consistency in the primary role of Sales Associate job across departments."⁶⁷ Despite this finding, Wal-Mart worked to find ways to differentiate Sales Associate and Department Manager positions so they could be assigned to different job classes, and thus pay rates.⁶⁸ This determination to assign different job classes to the same job based on the department the employee worked in, notwithstanding the company's consultant finding that there was a "high degree of consistency" in the job between departments, coincided with, and might be explained by, Wal-Mart's litigation position in *Dukes v. Wal-Mart Stores, Inc.*, in which its expert witness argued at that time that the analysis of hourly employee pay should control for department,

⁶³ Riley Dep. 130:1-25, Ex. 8.

⁶⁴ Riley Dep. 120:4-121:8; 141:7-17, Ex. 8; Hay Group Contract, Ex. 56.

⁶⁵ Steiner Dep. 93:18-95:10, 95:16-97:9, Ex. 14.

⁶⁶ Steiner Dep. 89:22-91:4, 99:6-100:9, Ex. 14.

⁶⁷ Steering Committee Update, dated Oct. 24, 2003 (Hay Group), at 4, Ex. 57.

⁶⁸ Ex. 57 at 12.

reducing the statistical disparity in pay between men and women.⁶⁹

Moreover, as noted above, *supra* at 10-11, in 2005 Wal-Mart started giving “credits” for prior work experience. Because each credit was worth more to employees in higher pay levels, the application of this credit policy exacerbated the pay disparities.⁷⁰ Then, in 2006, Wal-Mart added a cap on the pay permitted for each job class, further impacting the pay of women relegated to the lower job classes, which had lower pay caps.⁷¹

The adverse impact of the 2004 pay restructuring can be seen simply by comparing the departments where Sales Associates (previously all within job class 1) were assigned to a higher job class (Ex. 16 at 15-17) with the table of gender segregation by department (Bendick Decl. C-8). However, Dr. Bendick has taken three of the larger job titles which appear in multiple departments and shown exactly how a group of workers that had previously all been assigned to the same job class was divided up in a manner adverse to women. Bendick Decl. ¶¶36-38, C-10. The adverse impact is highly statistically significant. *Id.*

5. Wal-Mart Did its Own Analyses of Its Hourly Pay Practices, Identified Practices Giving Rise to Inequity, But Failed to Change Prior to 2004

Wal-Mart had long been aware of problems with its hourly compensation system. In

⁶⁹ Notably, this portion of Wal-Mart’s expert’s analysis was excluded. *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 195-98 (N.D. Cal. 2004). Wal-Mart’s expert relied upon so-called “survey” results to support her use of department as a factor in her analysis, which were found not to be consistent with professional standards, as the “surveys” were declarations which had been withheld during discovery. Wal-Mart now claims to have relied upon “surveys” to support the change to job classes. Riley Dep. 120:4-121:8, 206:1-14, Ex. 8. And, as in 2003, Wal-Mart has withheld the actual surveys from Plaintiffs.

⁷⁰ *See, e.g.*, Ex. 17 at 6 (newly hired employees would receive a “credit” for each year of prior retail experience, but that credit was worth \$.25 per hour for employees in job classes 1 or 2, but \$.30 for job classes 3-4, and \$.40 for job classes 5-7).

⁷¹ Ex. 18 at 5; Ex. 19 at 7-10.

2000, it identified several issues not addressed until 2004 or later:

- Ineffective pay administration in the field (*e.g.*, pay inequities between associates with comparable service and performance levels);
- Possible inappropriateness of merit/performance pay approach;
- Often start rate is based on what the applicant was earning and not on what job he or she will be performing.⁷²

Wal-Mart discussed its problems in even greater depth in June 2003, presenting the case for considering changes to its hourly pay practices by noting that the then-current system for setting start rates “allows for inequity in pay,” that Store Manager ability to over-ride the amount of performance increases “lead[s] to pay inequities,” and that merit increases were problematic because “Managers have discretion on amount of merit increase which may led to inequity of pay,” and “Manager has discretion on Associates who receive merit increases which may lead to inconsistency of administration.”⁷³ The only inconsistency was between the way women and similarly-situated men were treated; as set forth below, *infra* at 19-21, these practices resulted in the inequity Wal-Mart predicted, and women were consistently paid less than their male counterparts. Despite these concerns with the use of merit increases, Wal-Mart continued the practice through 2006.

In 2004-06, Wal-Mart made a series of changes to its pay practices, described *supra* at 14-17, intended to increase consistency in employee pay.⁷⁴ However, these changes—all of which Wal-Mart could have made by 1998⁷⁵—merely substituted the pay disparities caused by

⁷² Ex. 50 at 4.

⁷³ Ex. 51 at 1883-85; see also Ex. 55 at 341.

⁷⁴ Steiner Dep 110:16-115:13, Ex. 14; Hostetler Dep. 275:1-277:5, Ex. 32; Riley Dep. 94:20-95:10, Ex. 8; Ex. 51; Field Hourly Pay Administration Guidelines, dated March 19, 2004, Ex. 58 (repeatedly refers to changes as making pay decisions “systematically” and “standardized”); Divisional Meetings, Pay Administration 2004, Ex. 7 (same).

⁷⁵ Hostetler Dep. 275:16-277:5, Ex. 32.

the pre-2004 practices Wal-Mart identified and sought to change with new policies (job class assignment and starting pay credits) which caused continued, though slightly smaller, pay disparities. In sum, Wal-Mart never adopted a policy to eliminate the pay disparities.

6. Statistical Evidence Demonstrates Common Pattern of Pay Disparities

Plaintiffs challenge a series of practices which created hourly pay disparities through 2004: how starting pay was set, the use of percentage-based increases which exacerbated disparities, and the use of merit awards. While these practices were changed between 2004 and 2006, Wal-Mart introduced its new job class assignments in mid-2004, which itself created disparities that continued throughout the use of the new job class system. Thus, throughout the entire class period, Wal-Mart maintained one or more hourly pay practices giving rise to the disparities in pay discussed below.

Plaintiffs' statistical analysis of Wal-Mart's compensation confirms that there were indeed inequities in Wal-Mart's hourly compensation system, just as its own internal documents conceded. Dr. Bendick found statistically significant disparities in hourly pay rates for every single year in the class period. Bendick Decl., ¶¶ 20-41. Even considering the challenged use of department as a factor, the level of significance ranged from 4.9 to 13.7 standard deviations in all but 2004, when the disparity still exceeded 2 standard deviations.⁷⁶ His analyses controlled for available information about the employees (their years of experience with Wal-Mart, potential pre-Wal-Mart experience, and performance rating) and about the jobs worked (including whether

⁷⁶ Bendick Decl. at C-2. Roughly two or more standard deviations (a .05 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 Sch. Dist. v. United States*, 433 U.S. 299, 309-11 & nn.14, 17 (1977); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984). When department and level are excluded from consideration, as Plaintiffs contend is appropriate, the level of statistical significance ranges from over 6 to over 16 standard deviations, depending on the year studied. Bendick Decl. at C-3.

the position was in a grocery or non-grocery department, job title, division, and individual store). *Id.* at ¶¶ 20-21. Dr. Bendick completed analyses both with and without the challenged variables of job class and department. *Id.* at ¶¶ 35-41. Either way, the results are highly statistically significant across Region 43.

The disparities are not limited to a few stores. Dr. Bendick did a further analysis separately by store. For each store he analyzed hourly pay during each year of the class period. As described above, Plaintiffs' claims with respect to hourly pay turn on store-level decisions only through 2003, while there were region-wide practices implemented in mid-2004 and 2005 which adversely affected the entire class without any store-level input. Thus, with respect to store-level results, Dr. Bendick examined the pattern for 1998-2003. The results were striking: 97.2% of the store-years showed results adverse to women, and 92.3% of the store-years were adverse to women even when the challenged variable of department is included; 370 out of 497 store-years—74.4%—were both statistically significant and adverse to women, and that was true for 57.3% of those results even when department is added. Bendick Decl., ¶¶ 43, 45-48, C-9, C-11. These results show a region-wide pattern “beyond a shadow of a doubt.” Bendick Decl., ¶ 46. As Dr. Bendick explains, in the absence of a pattern of treating women differently, one would find statistically significant results adverse to women in only 2.5% of the stores—not 57% or 74%. Bendick Decl., ¶ 48. Looking at the stores within Region 43 across this same 1998-2003 time period, 81.7% of stores paid women less than comparable men in every single year. Bendick Decl., ¶ 49.

As noted above, Plaintiffs challenge different practices after 2003: the change in assignment of jobs to different job classes in 2004 and the use of “credits” to set starting pay beginning in 2005. *Supra* at 10-11, 14-17. As neither practice was influenced by store-level

decisions, the relevant analyses are done at the regional level. Dr. Bendick found highly statistically significant disparities in each year between 2004 and 2008, both as to total hourly compensation and as to starting pay. Bendick Decl. ¶¶ 27-28 51-56, C-2, C-3, C-12. Moreover, these disparities actually grew in magnitude from year to year. *Id.* Thus, Wal-Mart’s change in practices in 2004-05 may have changed the mechanism through which it caused the pay disparity, but not the existence of the pay disparity.⁷⁷

Throughout the entire class period, Wal-Mart’s practices operated to pay female hourly employees less than similar men, and these differences were meaningful to these low-wage workers. Depending on the year, and which analysis is used, women working full time lost a few hundred to a thousand dollars per year—a considerable sum for individuals who are only earning an average of \$14,000 per year. Bendick Decl. C-2, C-3, C-7.

C. Wal-Mart Used Uniform Compensation Policies and Practices that Consistently Paid Women Managers Less than Men

1. Wal-Mart Issued Guidelines Annually Governing All of Region 43, Placing Regional Management in Charge of Managers’ Pay

As with hourly compensation, Wal-Mart issued written guidelines governing management compensation. These written guidelines applied consistently throughout Region 43

⁷⁷ The magnitude of the disparity decreased in 2004, before steadily climbing back up. That is because when Wal-Mart changed the job class assignments, it made pay adjustments to ensure each employee matched his or her newly-assigned job class, at cost of \$109 million per year. Proposal for Field Hourly Classification and Compensation Structure, effective May 29, 2004, at 177405-407, 177454, Ex. 59. More significantly, Wal-Mart made what it called a “neutralization adjustment,” designed to eliminate the statistically significant differences for male and female employees, though only if within the same, newly-assigned job class, by giving larger pay increases to women. Ex. 59 at 177406-409, 177450-454; Hourly Wage Adjustment Analysis Instructions, Ex. 60; Riley Dep. 146:18-147:13, Ex. 8. The cost of the neutralization adjustment was over \$293 million nationwide, for one year. *Id.*

and did not vary by district or store.⁷⁸ In most circumstances, these guidelines prescribed a formula for setting starting pay rates which, because it was largely based on prior pay rates, perpetuated disparities in pay adverse to women. However, exceptions could be sought, and external hires were not subject to the same formula, and in these instances a single decisionmaker—the RPM—decided pay.⁷⁹

2. Management Trainee Pay Systematically Set Adverse to Women

The primary way for hourly employees to become managers was through selection for and completion of the Management Trainee (MIT) program. *Supra* at 5. Participants in the MIT program initially were assigned a single start rate of \$27,500 per year, although exceptions could be requested.⁸⁰ But, starting in 2002, hourly employees promoted to MIT had their pay set based on their pay as an hourly employee.⁸¹ For external hires, however, there was substantially more leeway until 2008, just before the class period ended.⁸² In general, external hires had their pay set based on how their experience compared to individuals already working as Assistant

⁷⁸ Riley Dep. 157:8-24, Ex. 8.

⁷⁹ Hostetler Dep. 18:10-21, 28:15-21, Ex. 32; Ex. 37 at 5; Riley Dep. 155:23-156:25, Ex. 8.

⁸⁰ Riley Dep. 152:10-19, 153:22-154:8, Ex. 8; Ex.37 at 7; Field Management Compensation Programs, dated Aug. 1, 1999, at 4, Ex. 61; Field Management Compensation Programs, dated Nov. 2000, at 4, Ex. 62; Field Exempt Associate Pay Guidelines, Effective Feb. 1, 2002, at 4, Ex. 63.

⁸¹ Field Management Pay Guidelines, Effective Feb. 1, 2002 to Jan. 31, 2003, at 5-6, Ex. 64; Field Management Pay Guidelines, Effective Feb. 1, 2003 to Jan. 31, 2004, at 5-6, Ex. 65; Field Management Pay Guidelines, Effective Feb. 1, 2004 to Jan. 31, 2005, at 5-6, Ex. 66; Field Manager In Training (MIT) Pay Guidelines, Effective Feb. 19, 2005, at 2, Ex. 67; Field Manager In Training Pay Plans, Effective Feb. 4, 2006, at 4, Ex. 70; Ex. 21 at 32 (under “LOIF” the new name for MIT, see Wal-Mart University Leaders Out in Front Overview, printed June 12, 2008, Ex. 74). While the precise formula was tweaked over time, it was consistently based on the hourly pay rate immediately prior to promotion.

⁸² Riley Dep. 158:16-159:8, Ex. 8; Ex. 62 at 4; Ex. 63 at 4; Ex. 64 at 5-6; Ex. 65 at 5-6; Ex. 66, at 5-6; Ex. 67 at 2; Ex. 70 at 4.

Managers. *Id.*

The RPM was responsible for setting pay for MITs.⁸³ While the pay rates for MIT participants who had been hourly Wal-Mart employees was largely governed by formula, the RPM generally was responsible for approving any exceptions and for setting starting pay rates for external hires for whom no formula controlled.⁸⁴

These policies contributed to the observed pay disparities in three ways. First, for those promoted from hourly positions, women on average had lower hourly pay rates and, therefore, their pay rates in the MIT program were lower than similarly-situated men. Thus, the “start low, stay low” phenomenon was not just a feature of hourly pay, but one that continued to influence MIT and Assistant Manager pay rates. Second, the higher pay offered to external candidates as compared to internally-promoted MITs provided another opportunity to pay men more than women in the MIT program. Third, any discretion permitted in setting managerial pay rates, both for internal and external candidates, was exercised by a single decisionmaker, the RPM. Any bias by the RPM would thus affect the class as a whole. Because the MIT program was for just a few months, there were no pay changes during the MIT program itself, but only upon successful completion and promotion to Assistant Manager.

3. Assistant Manager Pay Systematically Set Adverse to Women

When trainees successfully completed the MIT program and became Assistant Managers, their pay was set by formula, initially \$2,000 above MIT pay, which itself was based on each participant’s prior pay rate.⁸⁵ While the formula for setting pay rates for new managers changed

⁸³ Ex. 37 at 5; Riley Dep. 155:23-156:25, Ex. 8; Ex. 36 at 447; Ex. 35.

⁸⁴ Riley Dep. 159:23-161:7; 161:23-164:1; 165:22-166:21, Ex. 8.

⁸⁵ Ex. 37 at 8; Ex. 61 at 4; Ex. 62 at 4; Ex. 63 at 5; Ex. 64 at 6; Ex. 65 at 6; Ex. 66 at 6; Ex. 67

in 2005, the key factor was still the rate paid in the MIT program, which was directly tied to the hourly pay rate for internal promotees.⁸⁶ The pay for Assistant Managers who were external hires into the MIT program was also linked to their rate of pay while in the MIT program, but as described above, their MIT pay provided for higher compensation than for internal promotees.⁸⁷ Any exceptions to the formulaic rules required approval of the RPM.⁸⁸ This formulaic use of prior pay rates to set starting Assistant Manager pay meant prior pay disparities adverse to women would be perpetuated. And the use of exceptions, all ruled on by a single individual RPM, provided the opportunity to create additional disparities adverse to women as well.

Assistant Managers received performance evaluations each year, all on the same date. These were prepared by the Store Manager and District Manager. The District Manager entered the rating and recommended increase into the computer system, which was then reviewed and approved by the RVP.⁸⁹ Like the hourly employees, the increases in pay rates for Assistant Managers were computed as a percentage of their base pay rate, thereby perpetuating any pre-

at -24249; Ex. 70 at 144080; Ex. 73 at 8.

⁸⁶ Ex. 67 at 024249.

⁸⁷ Ex. 37 at 8; Ex. 61 at 4; Ex. 62 at 4; Ex. 63 at 5; Ex. 64 at 6; Ex. 65 at 6; Ex. 66 at 6; Ex. 67 at -24249; Ex. 70 at 144080. In 2006 there was a single rate for all internal promotees becoming Assistant Managers in metro stores, one rate for non-metro stores. Ex. 70 at 4, 144080. The Field Management Pay Plans, Effective Feb. 4, 2006, at 3, Ex. 69. In 2008, there was a new formula which returned to being based on prior pay. Ex. 21 at 32.

⁸⁸ Riley Dep. 167:7-167:19; 167:20-169:18, Ex. 8.

⁸⁹ Field Compensation Protocol FYE 2002 Overview Assistant Manager Annual Increase Program, Ex. 75; Evaluation Information District Manager Packer FYE 2004 Email, dated Nov. 10, 2003, Ex. 76; Performance Appraisal Timeline FYE 2005, dated Oct. 28, 2004, Ex. 77; Annual Performance Evaluation Process for Management Associates with Direct Reports, dated Dec. 19, 2006, Ex. 78; Annual Performance Evaluation Process for Management Associates with Direct Reports, dated Dec. 1, 2007, Ex. 79; Riley Dep. 189:19-192:4, Ex. 8; Hostetler Dep. 223:2-224:18; 226:20-227:19; 229:13-19, Ex. 32; Ex. 72 at 12.

existing disparities in pay. *Id.* Further, performance ratings, which were all approved by the RVP, could incorporate bias and unfairly rate women Assistant Managers lower than their peers.

In addition to performance increases, Assistant Managers could receive merit increases from 2002 to 2006, which had to be approved by the District Manager and RPM.⁹⁰ These merit increases were computed as a percentage of the base pay rate, perpetuating prior disparities in pay. And they provided an opportunity for these single decisionmakers to exercise bias in choosing whom to favor with these discretionary pay increases.

4. Statistical Evidence Demonstrates Statistically Significant Disparities in Compensation of Women in Management

Dr. Bendick analyzed the base salary of MITs and Assistant Managers, considering their store assignment, specific job title, performance evaluation and years of experience. Bendick Decl., ¶¶ 68-70, C-14. He found highly statistically significant disparities every year of the class period. *Id.* These differences amounted to approximately \$2200-\$3400 per year. *Id.* As with hourly pay, the statistical significance of these disparities far exceeded the standard required to permit the inference of discrimination. *Id.* (6.4 to 10.8 standard deviations, depending on year).

D. Regional Management Used Common Policies to Make Promotion Decisions Which Disadvantaged Women

1. Women Faced Unlawful Barriers to Promotion from Hourly Position to MIT/Assistant Manager

Wal-Mart refused to post MIT positions prior to 2003, so that all Assistant Manager positions were filled through a tap-on-the-shoulder system, which is known to perpetuate bias.⁹¹

⁹⁰ Ex. 64 at 11; Ex. 65 at 13; Ex. 66 at 12; Field Management Pay Guidelines, Effective Feb. 19, 2005, at 5, Ex. 68; Riley Dep. 199:1-202:18, Ex. 8; Ex. 69 (no longer including merit increases); Vaden Dep. 122:11-122:20, Ex. 30.

⁹¹ Deposition of Kendall Schwindt, Divisional Vice President, at 172:4-173:11, Ex. 80; Harper II Dep. , at 160:3-9, 161:3-16, 180:23-181:10, Ex. 26; Kintzele Dep. 41:17-42:8, 42:16-21,

Indeed, in June 2002, when Wal-Mart first began working on a notice to hourly associates about “how to get promoted into the management training program,” Wal-Mart’s Senior Vice President for People acknowledged, “we do not have a poster, brochure, nothing that I am aware of.”⁹² In addition, Wal-Mart’s established criteria for the MIT program prior to 2003 included willingness to relocate.⁹³ Willingness to relocate was a factor known to deter women from pursuing such positions and which executives acknowledged was not necessary.⁹⁴

Wal-Mart first experimented with posting in January 2003, introducing the Management Trainee Career Selection (MTCS) system.⁹⁵ This system was used through 2006, and positions were posted for one week, a few times per year.⁹⁶ When this posting system was introduced for the first time, it required candidates to agree to certain job conditions, including (1) assignment

129:15-18, Ex. 29; Management Career Selection RPM Training, Aug. 3, 2000, Ex. 82 (at 377999, acknowledges one reason for posting is “legality” as well as ensuring all associates have the opportunity to be considered, because otherwise people can be “pigeonholed”).

⁹² Urgent Project for Notice for MIT Program Email from Jarrells Porter, dated June 27, 2002, Ex. 83.

⁹³ Management Selection Process Criteria, dated Nov. 20, 2000, Ex. 84; Promotional Guidelines Update, March 19, 2001, Ex. 85; Promotion/ Demotion Guidelines 2002, Ex. 86; Associate MTCS Admin Application, Ex. 87. Wal-Mart had created a position for a “Resident Assistant Manager” (RAM) who was not expected to relocate. However, this program was dormant when Wal-Mart sought to revive it in 2002, and it was rarely used: when eliminated in 2003, there were only 90 RAM out of 20,000 Assistant Managers. Resident Assistant Manager Guidelines 2002, Ex. 88; Resident Assistant Manager Program Changes Memo, dated Feb. 9, 2004, Ex. 89.

⁹⁴ Walton and Huey, *Made in America*, (1993 Bantam), at 217-18, Ex. 90; *Women in Leadership*, dated May 13, 1996, Ex. 91; *Diversity Ideas*, Ex. 92.

⁹⁵ Deposition of James Clark, Director of Training and Development, at 278:1-5, Ex. 93; Deposition of Judy Evans, District Manager, at 78:17-24, Ex. 94; Deposition of John Scantlin, District Manager, at 24:5-25:13, Ex. 95; Schwindt Dep. 134:19-135:12, 174:2-19, Ex. 80; Store Verification of Assistant Manager Trainee position, Ex. 96; Management Trainee Hiring Guide, February 2003, Ex. 97.

⁹⁶ *See, e.g.* Ex. 97; Management Trainee Hiring Guide 2006, Ex. 98; Ex. 96; Management Trainee Job Posting, dated Aug. 11, 2004, Ex. 99.

to a store up to a one-hour drive from home; (2) travel for up to six weeks; and (3) replacing the requirement that all candidates be willing to relocate with a statement that the greater geographic area an individual would move to, the more likely they would be promoted.⁹⁷ All three factors would be more likely to discourage women than men, in a manner similar to the prior relocation requirement. Notably, testimony established that travel assignments were filled on a voluntary basis, so stating that six weeks of travel would be required was not a fair representation of the actual job requirements.⁹⁸

Starting in 2007, Wal-Mart began using the Career Preference system for all management promotions, including MIT.⁹⁹ This system permitted employees to register in advance for the positions and geographic areas in which they were interested.¹⁰⁰ Every vacancy was expected to be posted with a “requisition” which automatically applied the minimum qualifications Wal-Mart required for the position to the group of those who had expressed interest in the position, within that geographic area, and presented the hiring manager with a set of candidates. *Id.* at 028169.

Both before and after Wal-Mart posted MIT positions, the selection process involved screening by District Managers and approval of selections by the RPM.¹⁰¹ In 2003, in addition to

⁹⁷ Ex. 87; Rinehart Dep. 54:6-11, 54:22-55:2, 55:16-22, Ex. 31.

⁹⁸ Rinehart Dep. 55:4-22, Ex. 31. In addition to the minimum requirements, Wal-Mart also had a common set of additional factors that were considered in selecting MIT candidates, which Plaintiffs do not allege were inappropriate, but which contributed to the common mode of exercising discretion. Ex. 97 at 560; Vaden Dep. 93:4-94:11, Ex. 30; Regional Personnel Manager Training Guide 2000 excerpts, at 371493, Ex. 100; Hostetler Dep. 139:12-141:7, Ex. 32.

⁹⁹ Career Preference for Management Selection Playbook 2007, at 028172, Ex. 101; Riley Dep. 214:5-10, as corrected by errata, Ex. 8.

¹⁰⁰ Ex. 101 at 028172.

¹⁰¹ Ex. 35; Ex. 36 at 1447; Ex. 37 at 81287; Riley Dep. 216:4-217:6, 218:2-218:13, 225:4-

posting, Wal-Mart adopted standardized interview questions, which it used through 2009.¹⁰²

Despite the tweaks to the MIT promotion process, two things remained consistent barriers to women: (a) a refusal to post or a system to circumvent the purpose of posting to choose a preferred candidate identified prior to posting (“pre-selection,” *see infra* at 28-30); and (b) requiring candidates to be willing to relocate, or to accept comparable conditions on travel and commuting distance. In addition to challenging the disparate impact of these discrete practices, Plaintiffs challenge the exercise of discretion in selecting candidates for the MIT program. The District Managers who screened candidates and the RPM who had final approval on the selection decisions could, and did, apply a common mode of exercising discretion, including shared biases adverse to women in making the selections.

2. The Management Posting System Was Rife With Exceptions

The promotion process from hourly into management was replete with exceptions.¹⁰³ Exceptions could be made for (i) failure to meet one of the minimum criteria; (ii) the requirement for posting a position; (iii) considering an individual who had not formally applied; and (iv) closing a posting because the desired candidate was not included among the applicant pool. *Id.* It was particularly common for managers to post a position, see who the candidates were, and

226:2, 240:11-240:16, Ex. 8; Vaden Dep. 95:4-95:22, 98:2-98:22, Ex. 30; Steiner Dep. 183:13-184:1, Ex. 14; Rinehart Dep. 22:8-22:23, 59:4-59:9 (questions about MIT selection process should go to RPM), 65:1-65:6, 66:17-67:1, 70:14-70:17, 91:1-92:25, 167:16-167:22, 134:6-137:23 (RVP had influence over MIT selection), Ex. 31.

¹⁰² Ex. 97; Ex. 98; Career Preference Management Interview Dashboard, at 218, 220 (directing interviewers to ask only the questions included in the interview packet, among other details), Ex. 102.

¹⁰³ Rinehart Dep. 34:12-35:6, Ex. 31; Riley Dep. 226:19-227:24, Ex. 8 (MTCS exceptions); RPM Quarterly Report Card, dated May 19, 2003, Ex. 106 (she received “F” grade because she had too many exceptions in the MCS system); Hostelter Dep. 82:12-25, Ex. 32; Ex. 101 at 181-188; Career Preference Management Exception Process 2007, Ex. 109.

then close the posting without selecting anyone because the manager's pre-chosen candidate was not included in the pool.¹⁰⁴ The process of opening a posting and then closing it was so common that Wal-Mart finally created a mechanism to permit the manager to review who was in the applicant pool before formally opening the posting, in order to reduce the number of "exceptions" created by that practice.¹⁰⁵ In other words, because managers made an exception so often, Wal-Mart simply made that part of the standard practice.

Wal-Mart was well aware that managers were using exceptions to game the system. The Office of Diversity addressed this issue in a training presentation.¹⁰⁶ It acknowledged that some managers were "just not accepting that the process has changed to hire and promote." *Id.* at 199710. As Wal-Mart acknowledged, "It is inappropriate to just review the list, not see the name you are looking for and close [the posting], or to not evaluate the applicants before closing." *Id.* at 199714. However, Wal-Mart estimated that "as high as 30% of all job offers for internals involve an exception." *Id.* at 199715.

One example of such abuse of the exception process was documented in an email exchange with the RPM for Region 43. An individual named Brian Conover emailed to state his acceptance of a Co-Manager position offered to him, with the approval of Charles Rinehart (RVP) on November 12, 2004.¹⁰⁷ Only after Mr. Conover had accepted the position did the RPM post the position. *Id.* However, Mr. Conover could not submit his application through the system, so an exception was created to add him to the group of candidates nominally being

¹⁰⁴ Diversity Goals Program Market HR Managers 2006, at 199714, Ex. 110 (almost 185,000 such exceptions in a few months; managers were "looking for specific applicants").

¹⁰⁵ Ex. 101 at 178.

¹⁰⁶ Ex. 110.

¹⁰⁷ Email from B. Conover to S. Hostetler, dated Dec. 14, 2004, Ex. 111; Hostetler Dep. 76:5-86:20, Ex. 32.

considered. *Id.* Mr. Conover and the RPM then discussed starting dates. It was only on November 17—five days after he accepted the position—that Mr. Conover was interviewed. *Id.* Thus, despite the appearance of a posting system in which all candidates had a fair opportunity to be considered, the tap-on-the-shoulder system continued to operate behind the façade.

3. These Promotion Practices Had an Adverse Impact on Women

The statistical evidence demonstrates the results of these systemic barriers, as women were promoted from hourly to MIT/Assistant Manager positions at a rate far lower than expected given their qualifications. Women’s rates of promotion were 25-35% of the rate of similarly qualified men, depending on the model used. Bendick Decl., ¶¶ 82-84, C-18. That means men were three to four times more likely to be promoted than comparable women—a result that was highly statistically significant. *Id.* Not surprisingly, Dr. Bendick documented that the representation of women in every level of management was far lower than would be expected given the large number of available, qualified women. Bendick Decl., ¶¶ 71-81, C-17. The differences are consistent over time. *Id.*

Nor can these disparities in promotion of women into management be explained by women being less qualified than their male peers, or being less interested in promotions. In addition to Dr. Bendick’s analysis, which took into account qualifications, Wal-Mart managers repeatedly testified that they observed no difference in qualifications by gender, or in interest in advancing into management.¹⁰⁸

¹⁰⁸ Rinehart Dep. 169:22-170:21, 171:1-17, Ex. 31; Deposition of John White, Store Manager, at 67:14-69:18, 70:3-71:2, Ex. 112; Hostetler Dep. 193:19-194:11, Ex. 32; Steiner Dep. 234:2-20, Ex. 14.

E. Wal-Mart Managers Shared Stereotypes About Women Employees

It is quite unusual in modern employment litigation to have evidence of overtly expressed bias against members of a protected group. Such direct evidence is, of course, not legally required to prove claims of discrimination, much less class certification.¹⁰⁹ Here, however, expressions of biased views about women’s abilities and interests among Region 43 managers were commonplace.

A 1998 survey of Wal-Mart managers revealed that there was a “good ol’ boy philosophy” at Wal-Mart, that many managers were “close minded” about diversity in the workplace, and that some District Managers “don’t seem personally comfortable with women in leadership roles.”¹¹⁰ The findings of the 1998 survey echoed an earlier 1992 report by a group of female Wal-Mart management employees, who identified a number of concerns for women employees, including the following: “Stereotypes limit the opportunities offered to women,” “[c]areer decisions are made for associates based on gender,” “[a]ggressive women intimidate men,” “men are interviewed as the replacements, women are viewed as support,” and “[m]en’s informal network overlooks women.”¹¹¹

These attitudes were amply displayed in Region 43. Female employees were consistently told that they did not deserve the same treatment because of their gender. For example, putative class member Kimberly Wicks-Beason was told by her Store Manager in a Memphis-area store

¹⁰⁹ Cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146 (2000) (direct evidence of discrimination, such as derogatory comments, is not necessary for proof of intentional discrimination); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (district court need not resolve whether women were in fact discriminated against to determine class certification).

¹¹⁰ Diversity Management Inc. Memo re: Diversity Training, at 734095, Ex. 113.

¹¹¹ Memo re: Women in Leadership, Ex. 114.

that “a woman has a choice: to have a career or kids. You can’t have both.” Wicks-Beason Decl. ¶ 3. Likewise, in 1999, putative class member Alissa Westmoreland asked her department manager in a Memphis Wal-Mart why a male co-worker with less experience was paid more than her, and was told that it was because he had a family to support, whereas Ms. Westmoreland had a husband to support her. Westmoreland Decl. ¶ 4-5. Putative class members Wendy Sims in Cookeville, TN, and Peggy Griffin in Jackson, TN were told the same thing when they inquired as to discrepancies in their pay. Sims Decl. ¶ 4; Griffin Decl. ¶ 5. Putative class member Patricia Hughes Miller was told the same thing by her Store Manager in Athens, TN, despite the fact that she was a single mother raising two children. Miller Decl. ¶ 3. *See also* Matlock Decl. ¶ 3 (Store Manager in a different Jackson, TN store frequently told female employees they should stay home and cook for their husbands); Johnson Decl. ¶ 4 (around 2007, she overheard managers in Tupelo, MS Wal-Mart saying that “women can’t do a man’s job”); Ryan Decl. ¶ 3 (around 2004, she was told by Store Manager in Franklin, TN that “women should be seen and not heard”); Strode Decl. ¶ 3 (overheard Co-Manager telling group of male employees that women cannot perform their duties as well as men).

Women were denied or steered away from positions and employment opportunities because of stereotypes as to what sorts of work women should perform, and what departments they should work in. For example, when named Plaintiff Cheryl Phipps started in the “tire, lube and express” department in 2006, the man in charge of training refused to train her, telling her that “no woman” was going to be trained in that department in his store. Phipps Dep. 161:1-7, Ex. 39. Likewise, named Plaintiff Shawn Gibbons was told by her Store Manager that she should not work in the garden center because it was hard work, and he didn’t know if she’d be able to do it. Gibbons Dep. 55:16-56:5, Ex. 40. *See also* Tate Decl. ¶ 3 (told by Co-Manager in

Kimball, TN that request to be assigned to furniture department was denied because it “was for men”); Parker Decl. ¶ 3 (told by Co-Manager in Memphis that she was being paid less for work in hardware department because hardware was “a man’s job”; told around 2006-07 that she was not qualified for Assistant Manager position because she was female); Webb Decl. ¶ 2 (around 2007, women were not permitted in her Athens, TN store to use forklift or get license to operate forklift); Roberts Decl. ¶ 4 (between 2007 and 2009 she was told by Assistant Managers in Athens, TN that men could handle the pressures of selling mobile phones better than women could); Stallard Decl. ¶ 4 (heard multiple disparaging comments from Store Manager in Bartlett, TN in mid-2000s, including being told that “if you had muscles, you could do the job”); Yancey Decl. ¶ 3 (in Nashville, TN in around 1999, the District Manager told female loss prevention employees they were not allowed to handcuff men who did not want to be handcuffed, though men were allowed to do so).

Wal-Mart’s internal complaints also demonstrate that men were given preferential treatment over women, and that regional managers knew of this issue. Perhaps the most striking example is a 2004 email from a store personnel manager—an hourly employee assigned to process pay changes.¹¹² This hourly employee sent an email to alert the RPM that the Store Manager was consistently keeping female employees’ wages below that of men throughout the store. *Id.* The personnel manager asked that someone review the pay records and personnel files to “see for yourself what is going on.” *Id.* The RPM sent a District Manager to investigate the complaint, and he reported that he found “a few minor issues,” and told the complainant that he would take steps to stop this type of behavior from happening again. *Id.* at 188331. The store personnel manager responded with a second email expressing concern that the review only

¹¹² Open Door discussion emails, Ex. 115.

focused on a few employees, which did not show “the whole picture.” *Id.* at 188333. The District Manager had also told the complainant that a new pay program was being implemented, and “made it clear that nothing can be done at this point because it has been ‘too long.’” The hourly personnel manager, who had been concerned with these pay disparities for four years, expressed concern about the failure to address the problems that had been recognized, saying she “hope[d] that as a company this is not how we handle problems, by overlooking them.” *Id.*

F. Wal-Mart Knew its Practices Adversely Affected Women and Regional Managers Did Nothing to Change Until Three Years After the *Dukes* Case Was Filed, But Belated Efforts Only Underscore Common Control Over Uniform Practices

Wal-Mart’s corporate offices regularly reviewed reports on the representation of women in retail management (*i.e.*, Assistant, Co- and Store Managers as a group).¹¹³ Progress was slow: the proportion of retail managers who were women was approximately 29% in 1998, 30% in 1999, 31% in 2000 and 32% in 2001. *Id.* Significantly, however, Wal-Mart’s numbers never approached the representation of women in management at other retailers. Internal reports showed that in 1997, women already represented 38.6% of retail managers nationwide, but only 31.25% of Wal-Mart store management in 2000. Ex. 117. *See also* Ex. 119 (June 2000 report concluded “Wal-Mart’s women in management per cent (32.4%) is significantly behind several of the other retailers reporting (43.2% to 65.3%).”). This was particularly striking because Wal-Mart was drawing these managers largely from an hourly workforce which was 62.6% women, “among the highest” of the companies reporting.¹¹⁴ It was no overstatement, therefore, when Coleman Peterson, Senior Vice President of People, stated in 1999 that “[w]e’re behind the rest

¹¹³ *See, e.g.*, Fourth Quarter Diversity Representation: Total Management, at 027-028, Ex. 116; Diversity Presentation July 15, 1999, Email and attachment, at 389, Ex. 117; Cole’s Board Presentation, Oct. 2, 2001, at 164, Ex. 118.

¹¹⁴ Retail Benchmarks on Diversity June 2000, at 315, Ex. 119.

of the world.”¹¹⁵

If Wal-Mart overall was behind the rest of the world, Region 43 was behind the rest of Wal-Mart. For example, from FYE¹¹⁶ 2002 to mid-2002, Wal-Mart retail management overall moved from 32.32 to 33.02% female.¹¹⁷ However, from FYE 2003 to mid-2003 in Region 43, the proportion of managers who were women only moved from 29.6% to 31.18%.¹¹⁸ Thus, even one year later, Region 43 was lagging behind the company-wide average. And, of course, it was even further behind “the rest of the world.”

Wal-Mart’s own reports also show that women managers on average were paid less than men holding the same positions.¹¹⁹ In 2000, Wal-Mart conducted a Minority/Gender Pay Analysis of retail store management positions, in which it concluded that “average salaries for female and minority males are below the overall average pay for most jobs,” and “[a]verage pay increases for minority males and females are generally below overall average income ratio across most jobs.”¹²⁰ Specifically, Region 43 showed that the average non-minority female assistant manager salary, \$36,200, was \$1500 lower than the average non-minority male assistant manager salary of \$37,700. *Id.*

Despite the well-known disparities, Regional managers took no discernable steps to monitor or protect against gender pay disparities in Region 43. Rinehart Dep. 168:17-169:4, Ex.

¹¹⁵ Bentonville '99 People Strategic Planning Session, at 415, Ex. 120.

¹¹⁶ “FYE” refers to “fiscal year ending” and Wal-Mart’s fiscal year ends on January 31. Thus FYE 2002 runs from February 1, 2001 to January 31, 2002. Riley Dep. 66:23-67:4, Ex. 8.

¹¹⁷ Diversity Report Card Through 5/31/2002, Ex. 121.

¹¹⁸ Retention Diversity Report Card FYE04 June 2003, Ex. 122.

¹¹⁹ Wal-Mart Stores/Supercenter Minority/Gender Pay Analysis FYE 2000, Ex. 123.

¹²⁰ Wal-Mart Stores/Supercenter Minority/Gender Pay Analysis FYE 2000, Ex. 123.

31 (he could not remember checking to see if there were pay disparities based on gender); Hostetler Dep. 27:9-17, 169:21-170:11, 178:22-179:2 (she did nothing to check to see that pay was being administered in conformity with policies), 179:8-15 (no action taken to protect against managers in Region 43 considering sex in setting pay rates), Ex. 32.

Nor could Regional managers identify any steps taken to ensure that, when required, MIT positions were posted.¹²¹ Prior to 2004, there was no discussion about whether Region 43 was meeting Wal-Mart's goals for including women in management, nor did anyone express concern that Region 43 was failing to meet the company's own modest goals.¹²² Even when RPM Hostetler received specific complaints of sex discrimination, she could not recall taking steps to ensure that the conduct described in the complaint was not recurring in other stores in the Region.¹²³

Finally, in 2004, three years after the *Dukes* case was filed, Wal-Mart began a new diversity effort. It created a diversity office and required diversity training. Ex. 104 at 2. Moreover, it established numerical goals for selection of MIT, Co-Managers and Store Managers on which the RVP and District Managers would be formally rated as part of their performance evaluations.¹²⁴ Separately, these managers were rated on their "Good Faith Efforts" with respect to diversity. Ex. 107 at 5. In 2007, a portion of managers' incentive compensation was tied to achieving these goals.¹²⁵ Because these goals were made such a significant part of each

¹²¹ Hostetler Dep. 169:5-20, Ex. 32.

¹²² Hostetler Dep. 184:6-12, 186:6-15, Ex. 32.

¹²³ Hostetler Dep, 246:9-12, 258:5-260:1, Ex. 32.

¹²⁴ Diversity Goals FYE05 February 2004 Draft, at 2-3, 9, Ex. 107; Rinehart Dep. 158:20-159:11, Ex. 31.

¹²⁵ Placement Diversity Goals Email from Russell Steiner, dated May 22, 2007, Ex. 124.

manager's performance rating, these goals became a topic of great concern among managers, who were sent regular updates and urged to ensure goals were met.¹²⁶ The goals were set based on the number of women who made it through Wal-Mart's posting system, which had tended to discourage women, *supra* at 26-28. Thus, because the pool of candidates did not reflect the actual population of employees who would have sought these positions were it not for the policies discouraging female candidates, by and large the goals were met. And, notably, the diversity goals only addressed the proportion of women in management positions, and failed to address pay inequity for either hourly or management employees.¹²⁷ As Wal-Mart officer Celia Swanson testified, "one of the things about our organization is what gets measured, gets done."¹²⁸ Not surprisingly, therefore, the shortage of women in management was reduced in response to the close monitoring of promotions. Using an alternate approach, the neutralization payment in 2004, disparities in compensation at the hourly level were briefly reduced in magnitude, but immediately began to increase again after that one-time payment, under the influence of two new region-wide policies (pay level restructuring and the credit system, *see supra* at 10-11, 14-17). The disparities in management pay remained unabated. Thus, Wal-Mart was able to exercise control over policies and practices in order to achieve greater equity when it chose to do so.

¹²⁶ See, e.g., DM Meeting Highlights 2004 Email, dated June 11, 2004, at 831, Ex. 125; Ex. 48; Ex. 49; Ex. 46 at ¶5; Ex. 124.

¹²⁷ Ex. 107; Rinehart Dep. 160:7-161:10, Ex. 31.

¹²⁸ Deposition of Celia Swanson, at 247:14-18, Ex. 81. The same phrase was adopted by Charlyn Jarrells Porter, Chief Diversity Officer, in a July 2006 email explaining that Wal-Mart had begun tying managers' bonuses to achievement of their diversity goals. Diversity Inc. Responses Email from Jarrells Porter, dated July 12, 2006, at 546, Ex. 126.

III. ARGUMENT

As Federal Rule of Civil Procedure 23 requires, Plaintiffs demonstrate that certification is appropriate here, as they satisfy the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy, as well as the Rule 23(b)(3) requirements of predominance and superiority. Fed. R. Civ. P. 23.

In determining whether class certification is appropriate, the Court's class analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). However, Rule 23 "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Hence, the Court's task at the Rule 23 stage is "not to adjudicate the case; rather, it is to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Id.* At 460 (internal quotation marks omitted).

For the reasons set forth below, Plaintiffs provide significant proof to satisfy the requirements for certification of their proposed class under Rule 23.

A. The Proposed Class Is Sufficiently Numerous

Rule 23(a)(1) "requires as a prerequisite to class action that the class [be] so numerous that joinder of all members is impracticable." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 541 (6th Cir. 2012) (internal citation and quotation marks omitted). This requirement is satisfied here, with a class consisting of thousands of women. Bendick Decl. at C-16.

B. Plaintiffs Have Identified Common Questions of Law and Fact

To satisfy the requirement of commonality, Plaintiffs' claims must "depend upon a common contention ... that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one

of the claims in one stroke.” *Dukes*, 564 U.S. at 350.

Here, Plaintiffs have presented common questions capable of class-wide resolution, including whether, within Region 43: (1) Wal-Mart’s policy directing Store Managers to consider specific criteria in setting starting pay, combined with regular communication with district and regional management, led to a common mode of exercising discretion that was adverse to female hourly employees; (2) Wal-Mart’s policies creating merit increases and awarding performance, merit and promotional increases as a percentage of prior pay had an adverse impact on female hourly employees; (3) Wal-Mart’s managers operated under a general policy of discrimination to deny female hourly employees compensation equal to men; (4) Wal-Mart’s 2004 change in pay classification structure had an adverse impact on female hourly employees; (5) Wal-Mart’s practices of setting MIT and Assistant Manager pay based on prior pay adversely affected female employees in these positions; (6) the policy allowing exceptions to the pay formula, primarily used to permit external hires into MIT positions to be paid more than internal promotees, had an adverse impact on female employees in these positions; (7) regional decisionmakers engaged in a pattern or practice of intentionally discriminating against female MIT and Assistant Managers in setting their pay; (8) Wal-Mart’s refusal to post MIT positions and the conditions candidates were required to agree to in order to be considered for promotion had an adverse impact on women; (9) Wal-Mart’s policies regarding specific criteria for promotion created a common mode of exercising discretion that adversely affected women; (10) regional decisionmakers engaged in a pattern or practice of intentionally discriminating against female candidates for promotion into MIT and Assistant Manager positions; and (11) if adverse impact is shown, any of these policies are justified by business necessity.

For disparate impact claims, plaintiffs must typically identify a specific employment

practice or practices that adversely affect the putative class. *Dukes*, 564 U.S. at 357-58. In pattern or practice disparate treatment cases, plaintiffs must provide “significant proof that [an] employer operated under a general policy of discrimination.” *Id.* at 353.

Courts interpreting the *Dukes* decision have illuminated the legal principles that determine whether the commonality requirement has been met.

1. Policies incorporating discretionary decisionmaking may demonstrate commonality in disparate impact cases. The *Dukes* Court reaffirmed its earlier holding in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that a system of delegated discretion may give rise to liability under Title VII “in appropriate cases.” *Dukes*, 564 U.S. at 355 (quoting *Watson*, 487 U.S. at 990-91). In order for such claims to demonstrate commonality where discretion had been delegated to multiple decisionmakers, the Court required demonstrating a “common mode of exercising discretion” and identifying a “specific employment practice.” *Id.* at 356-57.

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.), *cert. denied*, 568 U.S. 887 (2012), the Seventh Circuit reversed a denial of class certification. As Judge Posner explained for a unanimous panel, the existence of a company-wide personnel policy distinguished the case from the “delegation of discretion” in *Dukes*, which failed to qualify as a discrete, company personnel policy. *Id.* at 488. The Seventh Circuit found dispositive that the discretion permitted by the challenged policies was exercised “within a framework established by the company.” *Id.* 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. *Id.* at 488-89. The Seventh Circuit concluded that challenges to these policies presented questions about their adverse effect that could generate answers common to the class. *Id.* at 490-91.¹²⁹ *See also Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 118 (S.D.N.Y. 2012) (“360-degree review” process, a forced-quartile ranking of employees, and a “tap on the shoulder” system for selecting employees for promotion, in combination with managerial discretion, could comprise a “common mode of exercising discretion”) (citing *Dukes*, 131 S. Ct. at 2554-55).

Similarly, in *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), *appeal dismissed*, 657 F.3d 970 (9th Cir. 2013), the court certified challenges to policies permitting discretion. Like *McReynolds*, the *Ellis* court found that exercising discretion pursuant to discrete company policies satisfied the commonality requirement of Rule 23. *Id.* at 518-19. A constellation of policies formed the framework for discretion: a promotion-from-within preference, a practice against posting management job vacancies, and the absence of a formal application process for promotions to certain management positions. *Id.* at 510, 511. *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 [H]ere plaintiffs allege that the implementation of companywide procedures [including the compensation system] results in a disparate impact on women.”); *Moore v. Napolitano*, 926 F. Supp. 2d 8, 29-31 (D.D.C. 2013).

¹²⁹ In *In re Countrywide Financial Mortgage Lending Practices Litigation*, 708 F.3d 704 (6th Cir. 2013), the Sixth Circuit held that the plaintiffs had failed to satisfy the requirements for commonality laid down in *Dukes*. However, as the Sixth Circuit noted, its decision is not at odds with *McReynolds*. *Id.* at 708. Here, Plaintiffs have provided a common mode of exercising discretion and have specifically identified challenged practices, distinguishing their claims from those in *Countrywide*.

2. ***Disparate impact challenges to non-discretionary policies continue to easily satisfy commonality.*** *Dukes*, 564 U.S. at 353; *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110, 116-17 (4th Cir. 2013); *Scott v. Family Dollar Stores, Inc.*, No. 308-CV-00540-MOC-DSC, 2016 WL 9665158, at *6 (W.D.N.C. June 24, 2016).

3. ***The existence of a single decisionmaker helps demonstrate commonality in both disparate impact and disparate treatment claims.*** The *Dukes* Court noted that one way plaintiffs can identify a common mode of exercising discretion is to show that the discretion was exercised through “some common direction.” 564 U.S. at 341. The Court also provided the example of “the assertion of discriminatory bias on the part of the same supervisor” as a type of claim that is dependent upon a common contention capable of class-wide resolution. *Id.* at 350.

Subsequent courts have found that where decisions are made by a single person or small group, a common mode of exercising discretion or operation of a general policy of discrimination are more readily apparent. *See, e.g., Ellis*, 285 F.R.D. at 511-14 (“[t]op management’s involvement in the promotion process [was] ... consistent, and pervasive, classwide,” and although mid-level managers were “the primary sources of candidate recommendations, ... the decisions [had to] be approved all the way up the chain of command.”); *Scott*, 733 F.3d at 114 (“[D]iscretionary authority exercised by high-level corporate decisionmakers, which is applicable to a broad segment of the corporation’s employees, is more likely to satisfy the commonality requirement”); *Chicago Teachers Union, Local No. 1 v. Bd. of Educ.*, 797 F.3d 426, 440 (7th Cir. 2015) (finding commonality where facts showed “one decision-making body, exercising discretion as one unit, with the ultimate decision in the hands of one single person”).

4. ***Commonality for a Disparate Treatment Claim May Be Proved Through Statistical and Anecdotal Evidence.*** Although the Supreme Court has not explained precisely what constitutes “significant proof” of a “general policy of discrimination,” *Dukes*, 564 U.S. at 353, sufficient to satisfy the commonality requirement for class certification under a disparate treatment theory, multiple courts have addressed this issue. In *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015), the Fourth Circuit held that statistical and anecdotal evidence could provide the “glue” of commonality demanded by *Dukes*, and therefore could be sufficient to show a general policy of discrimination causing injury across the class. The *Brown* court noted that unlike a disparate impact claim, “a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination.” *Id.* at 915 (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977)). Thus, statistical and anecdotal evidence showing a pattern of discrimination “can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making.” *Id.* See also *Scott*, 2016 WL 9665158, at *7 (“[P]laintiffs’ pattern-or-practice claim looks to the pattern alleged rather than the individualized decisions Here, plaintiff has produced multiple regression analysis studies indicating gender-based pay disparities, amounting to considerable evidence of a classwide pattern-or-practice of discrimination.”) (citing *Bazemore v. Friday*, 478 U.S. 385, 400 (1986); *Rollins v. Traylor Bros.*, No. C14-1414 JCC, 2016 WL 258523, at *7 (W.D. Wash. Jan. 21, 2016) (“Significant proof of ... a policy [of discrimination] can be shown entirely through statistics and anecdotal evidence that demonstrate a pattern of discrimination even where the pattern is the result of discretionary decision-making. The required discriminatory intent may be inferred upon such a showing.”)).

As the Supreme Court explained in *Teamsters*, a decision the *Dukes* Court reaffirmed,

564 U.S. at 352 n.7, pattern or practice claims may establish liability upon showing that discrimination was the “regular rather than the unusual practice.” *Teamsters*, 431 U.S. at 336. 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.” *Id.* at 339.

5. *A company’s response to disparities as a class-wide issue demonstrates commonality.* In *Ellis*, the court found that the plaintiffs had provided sufficient proof of commonality in part by showing that the defendant regarded gender disparities as a company-wide issue, and had taken steps to increase diversity within the company in response to those widespread disparities. 285 F.R.D. at 501-02. *See also id.* at 515–16 (“Costco’s own briefing touts its companywide efforts as effective in increasing diversity through various companywide policies. Costco thus implicitly concedes that its promotion practices are subject to companywide control and adjustment depending upon senior management’s goals and instructions.”). Thus, when a company addresses a lack of diversity as a class-wide problem, this itself demonstrates the existence of a common issue capable of class-wide resolution.

* * *

Consistent with these authorities, Plaintiffs have set forth evidence that satisfies the requirements of commonality for their compensation and promotion claims under both disparate impact and pattern or practice disparate treatment theories of liability under Title VII.

1. Plaintiffs Have Identified Common Questions for Their Hourly Pay Claims

Plaintiffs have satisfied the commonality requirement for their disparate impact claims on hourly pay by identifying discrete employment policies to which all members of the proposed class have been subject and which have resulted consistently in significant disparities adverse to

women. First, Plaintiffs challenge the manner in which Wal-Mart authorized Store Managers to consider “additional skills, abilities and education that would enhance their ability to perform the job” in setting starting pay rates for hourly employees above the minimum rate. This policy, combined with the exception process and other oversight from the regional management team, created a consistent manner in which managers relied upon these criteria to make pay decisions that caused a disparate impact on women in hourly positions.

The Supreme Court has long endorsed challenges to subjective employment criteria under the disparate impact theory. *Watson*, 487 U.S. at 982, 991. In *Watson* the discretionary criteria included “personal appearance,” “drive,” and “friendliness and courtesy.” *Watson v. Fort Worth Bank & Tr.*, 798 F.2d 791, 813 n.26 (5th Cir. 1986) (Goldberg, J., dissenting), *vacated*, 487 U.S. 977 (1988). Here, Plaintiffs challenge subjective criteria—skills, abilities and education—which demonstrates that store managers exercised their discretion in a common manner.¹³⁰ That Store Managers exercised their discretion in setting starting pay in an environment polluted by gender stereotypes only reinforces the conclusion that they exercised their discretion in a common manner. *See Ellis*, 285 F.R.D at 532.

Second, Plaintiffs’ disparate impact claim as to hourly pay challenges Wal-Mart’s policy of setting pay increases as a percentage of the existing employee’s hourly rate. By applying a percentage to the base pay of employees in awarding performance, merit, and promotional

¹³⁰ *See Scott*, 733 F.3d at 113-14 (“[E]ven where company-wide subjective decision-making or discretion is alleged in the employment discrimination context, [*Dukes*] indicates that if another company-wide policy is also alleged, courts must also consider it.”) (citing *Dukes*, 131 S.Ct. at 2553); *Calibuso*, 893 F. Supp. 2d at 381, 390 (challenging compensation practices, including criteria that were “not adequately communicated to employees” and “not consistently and/or even-handedly applied”; whereas “in *Dukes*, the plaintiffs merely alleged a strong corporate culture of gender discrimination, here plaintiffs allege that the implementation of company-wide procedures, *i.e.* the compensation ... systems, results in a disparate impact on women ...”).

increases, Wal-Mart merely perpetuated the disparities in base pay rates that began at the time of hire. And, as with starting pay, there was a common mode of exercising discretion when it came to which employees deserved a merit increase over and above the performance increases available to all. Store Managers were told to award associates who exhibited “exceptional performance above job responsibilities,” and thus merit increases were intended to award the same sorts of conduct, and Store Managers had regular communication with District Managers to ensure the award of merit increases was consistently applied. 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 Wal-Mart’s percentage increase policy perpetuated and magnified the discrimination in starting pay. *McReynolds*, 672 F.3d at 490 (“This spiral effect attributable to companywide policy and arguably disadvantageous to black brokers presents another question common to the class.”).¹³¹

Plaintiffs’ challenge to these policies is supported by the statistical evidence of pay disparities adverse to women resulting from these policies. *See supra* at 19-21.¹³² Plaintiffs will

¹³¹ The *Scott, Ellis* and *Chen-Oster* courts have all recognized this same dynamic. *Scott*, 2016 WL 9665158, at *6 (company’s salary range policy could be reinforced by the annual pay raise percentage policy to perpetuate pay disparities throughout a class member’s career); *Ellis*, 285 F.R.D. at 532 (“the derivative effects of a companywide policy could themselves present issues common to the class.”); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at *3 (S.D.N.Y. Jan. 19, 2012) (“Because Goldman Sachs compensates its finance professionals in each year as a percentage increase from the prior year’s [total compensation,] each discriminatory compensation decision further widens the pay gap.”) (internal quotation marks omitted).

¹³² Statistical analyses must account for the decisionmaker to ensure that observed disparities are not the result of just a few bad apples. *Dukes*, 564 U.S. at 357. In accordance with *Dukes*, Plaintiffs’ have presented statistical analysis of hourly pay at the store level, as well as analysis of the pattern presented by these store-level decisions. The store-level pattern is an important focus through 2003, but in 2004 a region-wide pay policy was implemented across all stores and decisions were no longer made at the store level (*see infra* at 47). And while a store-by-store analysis is required for Plaintiffs’ pre-2004 hourly pay claims, courts examining disaggregated

show at trial that each of these policies has had an adverse impact on women and that, where they challenge the discretion afforded managers in implementing these policies, the managers have engaged in a common mode of exercising that discretion. Resolution of the common question of whether these compensation policies created a disparate impact adverse to female employees will “resolve an issue that is central to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350.

In June 2004, Wal-Mart reorganized its pay structure by assigning jobs to different job classes (and associated pay rates) based in large part on department. This corporate policy was uniform, applied to every hourly employee in Region 43, and was implemented completely outside the discretionary decisions made by store, district or regional managers. As Plaintiffs’ statistical evidence demonstrates, Wal-Mart’s departments had very different representations by gender, and the implementation of this pay policy had a disparate effect on female hourly employees. *See supra* at 20-21. This is a classic example of a facially neutral policy, untethered to any discretionary decisionmaking, forming the basis of a class-wide disparate impact claim. *See Dukes*, 564 U.S. at 355. And although Wal-Mart has claimed privilege over the reasons it

results must consider the *pattern* of those results. *Ellis*, 285 F.R.D. at 523-24 (finding commonality satisfied although statistically significant disparities not present in every region); *McReynolds v. Sodexo Marriot Servs., Inc.*, 349 F. Supp. 2d 1, 14-16 (D.D.C. 2004) (plaintiffs’ expert found commonality where “73.7% (84 out of 114) of the [sub-units] show[ed] a disparity (although not a statistically significant one)”); Ramona L. Paetzold and Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* 169-171 (West, 2012-2013 ed.), Ex. 71; Joseph L. Gastwirth et al., *Some Important Statistical 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, 228, 234-35 (2011), Ex. 103. Here, the pattern of separate regression results—92 -97% adverse to women in Region 43 before 2004, including 57-74% that were adverse to women and individually significant—would not occur in a neutral system. As discussed by Plaintiffs’ statistical expert, Bendick Decl. ¶¶ 43-49, the probability that this large of a pattern of results adverse to women is simply a matter of chance is less than one in one trillion.

created and implemented this new pay structure, whether a business necessity justification exists is itself a question applicable to the class as a whole, further demonstrating commonality. See *McReynolds*, 672 F.3d at 490 (A “question common to the class ... [is] whether ... the team-inflected account distribution system ... nevertheless is justified by business necessity.”); *Ellis*, 285 F.R.D. at 503 (same).

Likewise, beginning in 2005, Wal-Mart implemented a credit-based system of setting starting pay within the new job classes, which had an adverse effect on women because credits were assigned for each year of retail experience *during the previous five years*, and women are more likely than men to have interruptions in their work history. *Supra* at 10-11. This is another textbook example of a class-wide, facially-neutral, non-discretionary pay policy forming the basis of Plaintiffs’ disparate impact claim.

Plaintiffs have also satisfied the commonality requirement for their Title VII claims alleging a pattern or practice of discrimination in the compensation decisions for hourly employees in Wal-Mart’s 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, as well as evidence of widespread stereotyping of women attributable to the relevant decisionmakers. See *supra* at 42-44 (citing *Teamsters*, 431 U.S. at 336, 339; *Brown* 785 F.3d at 909; *Scott*, 2016 WL 9665158, at *7; *Rollins*, 2016 WL 258523, at *7). This evidence demonstrates the presence of a general policy of discrimination in satisfaction of Rule 23(a)(2).

2. Plaintiffs Have Identified Common Questions for Their Management Pay Claims

Plaintiffs allege that management pay was set using company policies that had a disparate impact on female employees. First, starting pay for MIT and Assistant Managers was set based

on a formula taking into account prior compensation, thus reinforcing the disparities in pay rates that originated in Plaintiffs' prior positions. Second, pay for external hires were not subject to this same pay formula, allowing men to be paid more than women. Third, performance and merit increases were set on a percentage basis, compounding any differences in starting pay.

In addition, decisions concerning pay were made at the regional level: exceptions for starting pay were decided on by the RPM; pay increases and merit increases for Assistant Managers were reviewed and approved by the RVP. This evidence of a single decisionmaker strongly supports that Wal-Mart managers had a common mode of exercising discretion and/or operated under a general policy of discrimination.¹³³ *See supra* at 42 (citing *Scott*, 733 F.3d at 114; *Brown*, 785 F.3d at 910; *Chicago Teachers Union*, 797 F.3d at 440; *Ellis*, 285 F.R.D. at 518-519). The statistically significant disparities in management pay and any disputes regarding that statistical evidence present further common questions.

3. Plaintiffs Have Identified Common Questions for Their Promotion Claims

Plaintiffs have identified specific employment policies, established by Wal-Mart and used within Region 43, guiding the discretion of Region 43 managers in making promotion decisions for MIT/Assistant Manager positions.

First, Wal-Mart's policy not to post management openings, applicable until 2003, meant positions were filled through a "tap on the shoulder" system. Courts have found commonality based on disparate impact challenges to this practice. *See Chen-Oster*, 2012 WL 205875, at *5;

¹³³ In *Dukes*, the Supreme Court explicitly provided the example of "the assertion of discriminatory bias on the part of the same supervisor" as a type of claim that is dependent upon a common contention capable of class-wide resolution. 564 U.S. at 350. As discussed above, *supra* at 42-44, Plaintiffs need not show the implementation of a company-wide policy that influenced the discretionary decisionmaking by managers to satisfy their disparate treatment claim; statistical and anecdotal evidence is sufficient.

Ellis, 285 F.R.D. at 531.

Second, Wal-Mart required management candidates to be willing to relocate, until 2003, when Wal-Mart replaced that with requiring candidates to agree to certain job conditions, including driving up to one hour for work each day and traveling for up to six weeks. These requirements had a disparate impact on female candidates and were not necessary for the management positions. Resolution of this common claim will “resolve an issue that is central to the validity of each one of the [plaintiffs’] claims in one stroke.” *Dukes*, 564 U.S. at 350. *See also Ellis*, 285 F.R.D. at 531 (“a premium on schedule flexibility and ability to relocate” were common and specific employment practices). And even after Wal-Mart began posting positions, it permitted so many “exceptions” to the process that, Plaintiffs argue, the “tap on the shoulder” promotion system continued throughout the class period.

The evidence also shows that the selection process for management positions involved approval and oversight by a single regional decisionmaker. MIT selections had to be approved by the RPM, who ensured consistency in the selection of candidates. As discussed above, *supra* at 42, that a single regional manager made these decisions establishes that Wal-Mart managers had a common mode of exercising discretion and, along with the substantial statistical evidence Plaintiffs present, that Wal-Mart had a general policy of discrimination.

The statistical evidence confirms that these challenged promotion practices had common class-wide effects on women, who were systematically subject to unequal consideration for promotion. *See supra* at 30.

Equally compelling, Plaintiffs have demonstrated that Wal-Mart’s own managers identified problems with these practices and the underrepresentation of women that resulted, but failed to take steps to effectively curtail them. A company’s response to disparities as an issue to

be addressed across the class further demonstrates commonality. *See supra* at 44 (citing *Ellis*, 285 F.R.D. at 515; *Brown*, 785 F.3d at 916-17).

C. Plaintiffs' Claims Are Typical of the Class

“A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.” *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (internal citation and quotation marks omitted). “[T]he test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical.” *Davidson v. Henkel Corp.*, 302 F.R.D. 427, 438 (E.D. Mich. 2014) (internal citation and quotation marks omitted).

The proposed named Plaintiffs have claims that are typical of the class because they arise from the same course of conduct—Wal-Mart’s discriminatory policies and practices within Region 43—that give rise to the claims of the absent class members. Named Plaintiff Cheryl Phipps worked at Wal-Mart from 1992 to 2007,¹³⁴ and named Plaintiff Shawn Gibbons worked at Wal-Mart from 1993 to 2017.¹³⁵ Both Ms. Phipps and Ms. Gibbons sought promotion into Assistant Manager positions,¹³⁶ and both allege that they were paid less than their male counterparts and denied promotions because of their gender.¹³⁷ These are the same claims made by the class.

D. Plaintiffs Are Adequate Class Representatives

A class representative is adequate if she “fairly and adequately protect[s] the interests of the class.” Fed. R. Civ. P. 23(a)(4). The two elements of adequacy are: (1) the representative

¹³⁴ Cheryl Phipps Employment History, Ex. 105.

¹³⁵ Shawn Gibbons Employment History, Ex. 108.

¹³⁶ Phipps Dep. 61:24-63:9, Ex. 39; Gibbons Dep. 127:4-18, Ex. 40.

¹³⁷ Phipps Dep. 126:2-12, Ex. 39; Gibbons Dep. 114:11-18, Ex. 40.

has common interests with unnamed class members, and (2) the representatives will vigorously prosecute the interests of the class through qualified counsel. *Rosiles-Perez v. Superior Forestry Serv., Inc.*, 250 F.R.D. 332, 342 (M.D. Tenn. 2008).

The proposed named Plaintiffs here have an ample interest in vigorously pursuing the class claims. There is absolutely no evidence to the contrary. They have each devoted years of their lives to fighting this case and remain dedicated to the class.

Plaintiffs have also retained adequate counsel for the class who have the resources and expertise to prosecute this action vigorously on behalf of the class and should be appointed to represent the class. Declaration of Joseph M. Sellers, ¶ 3-5; Declaration of David Garrison, ¶ 3-5; Fed. R. Civ. P. 23(g).

E. The Case Can Properly Be Certified Under Rule 23(b)(3), and Plaintiffs Have Proposed a Manageable Trial Plan

Plaintiffs ask the Court to certify class claims for liability under Title VII, back pay, and punitive damages under Rule 23(b)(3). Certification of a Rule 23(b)(3) class requires that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Both requirements are satisfied as to the class at issue here.

1. Common Questions Predominate

The “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Beattie*, 511 F.3d at 564 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 632 (1997)). “When ‘one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as

damages or some affirmative defenses peculiar to some individual class members.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1778, pp. 123–124 (3d ed. 2005)). Thus, while common questions must predominate over individual ones, they need not be the exclusive questions in the case.

Generally, where a class challenges the legality of a defendant’s procedures applied to the class, common questions predominate over individualized ones. *Sutton v. Hopkins Cty., Ky.*, No. 4:03CV-003-M, 2007 WL 119892, at *6 (W.D. Ky. Jan. 11, 2007); *Salvagne v. Fairfield Ford, Inc.*, 264 F.R.D. 321, 329 (S.D. Ohio 2009). And, “the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones.” *Young*, 693 F.3d at 544 (quoting *Beattie*, 511 F.3d at 564).

Here, many factors support a finding that common questions govern each aspect of this action and predominate over any individual questions, including: (1) Wal-Mart implements consistent compensation and promotion practices across Region 43; (2) all class members will rely upon common statistical evidence in challenging these practices; (3) regional managers are intimately involved with many of the pay and promotion decisions at issue; (4) managers have engaged in stereotyping devaluing women at Wal-Mart; (5) Wal-Mart’s corporate and regional management permits rather than protects against sex discrimination; and (6) defenses to these challenges which Wal-Mart may raise apply to the claims of all class members.

2. A Class Action Is the Superior Approach

The superiority prong is designed to assure “legal assistance in the vindication of small claims” and “to achieve the economies of time, effort and expense.” *In re Am. Med Sys., Inc.*, 75 F.3d 1069, 1084 (6th Cir. 1996) (internal quotation marks omitted). “In considering whether the superiority requirement of Rule 23(b)(3) is satisfied, courts consider ‘the difficulties likely to be

encountered in the management of a class action.” *Young*, 693 F.3d at 545 (quoting *Beattie*, 511 F.3d at 567).

Where individuals allege harm caused by systemic practices of discrimination that require statistical evidence, expert analyses, and marshalling proof 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 Plaintiffs, who were not in high-paying positions, can afford to prosecute their claims individually. A class proceeding, therefore, is superior to any possible alternative approach.

Moreover, the pattern or practice method of proof, initially designed by the Supreme Court in *Teamsters* to address the types of systemic violations of the employment laws alleged here, is not available to the “nonclass private plaintiff.” *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 147, 150 (2d Cir. 2011). Broad systemic remedies intended to address underlying causes of discrimination, of the type Plaintiffs seek, are also not available in non-class cases. *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989). Furthermore, adjudicating claims individually would lead to a considerable loss of judicial economies, as Plaintiffs would be forced to repeatedly offer evidence about 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 class-wide notice many, if not most, of the putative class members would never know that Wal-Mart violated their rights to equal pay and equal opportunity. Wal-Mart’s practice of discouraging employees from sharing pay information¹³⁸ has concealed pay inequities and limited the number of putative class members who have

¹³⁸ See Riley Dep 208:6-25, Ex. 8.

sufficient information to allege they have claims of compensation discrimination.

3. This Dispute is Manageable

Class-wide adjudication is more manageable and efficient than separate individual proceedings, since it will permit the adjudication of overarching issues in a single proceeding and avoid inconsistent and perhaps conflicting judgments that might arise from multiple individual proceedings.¹³⁹ See *Ellis*, 285 F.R.D. at 540. As demonstrated by the trial plan described in this section, the application of a class proceeding is the “metho[d] best suited to the adjudication of [this] controversy fairly and efficiently.” *Amgen*, 568 U.S. at 460 (internal quotation marks omitted)

In *Dukes*, the Supreme Court expressly re-affirmed a two-stage approach for trying pattern or practice cases initially established in *Teamsters*. *Teamsters*, 431 U.S. at 361; *Dukes*, 564 U.S. at 366-67 (affirming the *Teamsters* approach). After the establishment of liability, the plaintiffs 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 individual affirmative defenses it may have, and ‘to demonstrate that the individual ... was denied an employment opportunity for lawful reasons.’” *Dukes*, 564 U.S. at 366-67 (quoting *Teamsters*, 431 U.S. at 362).

Plaintiffs seek to utilize a multi-staged bifurcated trial system, in which the parties would first litigate class-wide liability based on Plaintiffs’ claims for disparate impact and pattern-or-practice intentional discrimination. Defendant would then have an opportunity to demonstrate to the Court that the challenged practices are “consistent with business necessity,” and Plaintiffs the chance to show that there was a less discriminatory alternative. 42 U.S.C. § 2000e–

¹³⁹ For example, in the absence of class certification, all 59 individuals who filed EEOC charges arising in Region 43 would have to litigate their claims separately.

2(k)(1)(A)(i)–(ii). The parties would then enter the second stage of proceedings in which the Court would decide backpay and the jury would determine the proper amount of punitive damages.

Plaintiffs propose the following trial plan:

STAGE 1 (Part One):

The jury decides:

- Whether Wal-Mart has engaged in a pattern or practice of intentional discrimination in setting compensation for or in promoting retail store employees
- Whether Wal-Mart’s conduct meets the standard for an award of punitive damages¹⁴⁰

The Court decides:

- Whether any of Wal-Mart’s challenged employment practices have had an adverse impact on the class (*prima facie* case of disparate impact)

STAGE 1 (Part Two):

The Court would decide:

- Whether Wal-Mart’s employment practices were justified by business necessity and, if so, whether there was a less discriminatory alternative

STAGE 2:

The Court would determine:

- Back pay for eligible class members and adjudicate any individual defenses asserted

¹⁴⁰ Under Title VII, “[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). The relevant question at Stage I is the class’s eligibility for punitive damages, not the amount or the distribution thereof. Title VII “provides for punitive awards based *solely* on an employer’s state of mind” *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999) (emphasis added). 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, presented at the Stage I trial. *See, e.g., Ellis*, 285 F.R.D. at 542.

The same jury would determine:

- The aggregate amount of punitive damages owed to the class and the share of those damages owed to each class member, if the jury finds Wal-Mart liable for punitive damages in Stage 1

See Ellis, 285 F.R.D. at 543-44.

Both before and after *Dukes*, courts have routinely approved a two-stage trial plan. *See, e.g., Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004); *Ellis*, 285 F.R.D. at 539; *Moore*, 2013 WL 659111, at *19 n.16; *EEOC v. Performance Food Grp., Inc.*, 16 F. Supp. 3d 576, 583 (D. Md. 2014); *United States v. City of New York*, 276 F.R.D. 22, 34 (E.D.N.Y. 2011).

The Court need not specify the procedures for the Stage II trial at this time. 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 Court and the parties will know the precise contours of the unlawful practices that caused individual class members to suffer economic loss. *See Olden*, 383 F.3d at 509 (damages issues “can be dealt with in the damages phase if necessary, and it is likely premature to address these issues at this point”). However, examining procedures used by other courts in Stage II trials underscores the manageability of this case as a class action. These procedures include the use of class-wide calculations of damages, an efficient claims process, and use of a claims administrator and special master.

Class-wide Calculation of Damages. Monetary damages such as back pay owed to individual class members may be calculated for the class as a whole, so long as the defendant has the right to raise any individual affirmative defenses it may have. *Dukes*, 564 U.S. at 367.¹⁴¹ *See*

¹⁴¹ *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), further supports the use of formulas in a class context; that decision clarified that *Dukes* did not reject the use of formulas

also *Ellis*, 285 F.R.D. at 538 n.38 (presenting calculation of class-wide damages); Bendick Decl. ¶¶ 86-89. If the Court finds that Wal-Mart’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, Wal-Mart would have an opportunity, if applicable, to meet its burden that a particular class member was paid less for lawful reasons.¹⁴²

For Plaintiffs’ promotion claims, the Court would determine the total number of job opportunities lost by women due to unlawful discrimination and the amount of lost earnings that resulted. *United States v. City of New York*, 847 F. Supp. 2d 395, 425-26 (E.D.N.Y. 2012). Wal-Mart could challenge the right of any class member to receive a portion of the aggregate backpay by meeting its burden that the class member was denied the employment opportunity for a lawful reason.¹⁴³

per se and explained that if representative evidence, such as formulaic or statistical measures, could properly be used in an individual case, then they likewise could be used in a class case for the same purpose. *Id.* at 1046.

¹⁴² 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*, 569 U.S. 27, 35 (2013). See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ([I]t 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.”).

¹⁴³ Should the jury find that Wal-Mart’s conduct warrants an award of punitive damages, these damages may be adjudicated on a class-wide basis. See *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) (plaintiffs may proceed under Rule (b)(3) for “compensatory and punitive damages that inure to the group benefit”). Courts have found that a jury may be able to determine a “ratio” that would then be applied to each class member’s compensatory damages, so long as this ratio is grounded in the compensatory damages award, and so long as the defendant has the right to raise individual affirmative defenses. See, e.g., *Iorio v. Allianz Life Ins. Co. of N. Am.*, No. 05 CV 633 JLS (CAB), 2009 WL 3415703, at *6 (S.D. Cal. Oct. 21, 2009); *Johnson v. Nextel Commc’ns Inc.*, 780 F.3d 128, 148-49 (2d Cir. 2015). The Court would then have the ability to reduce the punitive damages award to ensure it complies

Efficient Notice and Claims Process. The Court may establish a notice and claims procedure in order to “implement a workable process by which the thousands of potential victims can be identified and compensated.” *United States v. City of New York*, 681 F. Supp. 2d 274, 284-85 (E.D.N.Y. 2010). After class members file claims showing eligibility for monetary relief pursuant to the presumption created by the Stage I liability finding, Wal-Mart would have the opportunity to identify which, if any, claims it would oppose and to present the basis for that opposition. *Id.* at 285-87. *See also In re Vivendi Universal, S.A. Sec. Litig.*, 284 F.R.D. 144, 155 (S.D.N.Y. 2012) (adopting similar notice and claims procedure in order to permit defendant to challenge whether the presumption of reliance by an investor on the fraud was in fact applicable; based upon the information supplied, defendant could send interrogatories to a specific category of “sophisticated” investors who might be susceptible to a successful challenge).

Claims Administrator or Special Master. The Court may appoint a Special Master or a claims administrator or both in order to assure that an effective remedy is efficiently determined and implemented. *See Olden*, 383 F.3d at 509 (“[I]f liability is found, the issue of damages can be decided by a special master or by another method.”). *See also City of New York*, 847 F. Supp. 2d at 434 (appointing special masters to determine eligibility of class members to individual relief and evaluate affirmative defenses); *In re Vivendi*, 284 F.R.D. at 155-56 (claims administrator to distribute claim forms, assess whether the class members asserted claims within the liability period and apply the “Court-approved damages calculation.”; 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

with constitutional limitations. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

amount of damages calculated by the claims administrator.)

F. Alternatively, the Court May Certify a Rule 23(c)(4) Liability Class

As an alternative to certification under Rule 23(b)(3), the Court may certify only the liability issue under Rule 23(c)(4). This rule provides that “when appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4). *See also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013 (“[A] class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.”)) (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 41 n. * (2013)); *Brown v. City of Detroit*, No. 10-CV-12162, 2014 WL 7074259, at *3 (E.D. Mich. Dec. 12, 2014) (“[B]ifurcation pursuant to Rule 23(c)(4) continues to provide a viable solution if damages cannot be determined on a class-wide basis, so long the proposed class satisfies the requirements of Rule 23(a) and (b) with respect to liability.”). The practices challenged in this case present issues that can most efficiently be determined on a class-wide basis, consistent with this rule.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that their Motion for Class Certification be granted.

Dated: March 30, 2018

Respectfully Submitted,

/s/ Christine E. Webber

JOSEPH SELLERS (admitted *pro hac vice*)
CHRISTINE WEBBER (admitted *pro hac vice*)
BRIAN CORMAN (admitted *pro hac vice*)
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave NW, Suite 500 West
Washington, DC 20005

Telephone: (202) 408-4600
Facsimile: (202) 408-4699
JSellers@cohenmilstein.com
CWebber@cohenmilstein.com

DAVID W. GARRISON (No. 24968)
SCOTT P. TIFT (No. 27592)
SETH M. HYATT (No. 31171)
BARRETT JOHNSTON MARTIN & GARRISON, LLC
Bank of America Plaza
414 Union Street, Suite 900
Nashville, TN 37219
Telephone: (615) 244-2202
Facsimile: (615) 252-3798
dgarrison@barrettjohnston.com
stift@barrettjohnston.com
shyatt@barrettjohnston.com

JOCELYN D. LARKIN (admitted *pro hac vice*)
THE IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
Telephone: (510) 845-3473
Facsimile: (510) 845-3645
jlarkin@impactfund.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, I electronically filed the *Plaintiffs' Motion for Review of the Magistrate Judge's Rulings Regarding Work Product and Waiver* with the Clerk of the Court using the ECF, who in turn sent notice to the following:

Michele L. Maryott
Gibson, Dunn & Crutcher LLP
3161 Michelson Drive
Irvine, CA 92612
Telephone: 949.451.3945
Facsimile: 949.475.4668
mmaryott@gibsondunn.com

Theodore J. Boutrous, Jr.
Gibson Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Phone: (213) 229-7804
Fax: (213) 229-6804
Email Address:
tboutrous@gibsondunn.com

Rachel S. Brass
Gibson Dunn & Crutcher LLP
555 Mission Street
Suite 3000
San Francisco, CA 94105-0921
Phone: (415) 393-8293
Fax: (415) 374-8429
Email Address: rbrass@gibsondunn.com

J. Graham Matherne
Wyatt, Tarrant & Combs, LLP
333 Commerce Street, Suite 1400
Nashville, TN 37201
Phone: (615) 244-0020
Fax: (615) 256-1726
Email Address: gmatherne@wyattfirm.com

Dated: March 30, 2018

/s/ Christine E. Webber

Christine E. Webber