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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

WAL-MART STORES, INC.,

Defendant.

Case No. C-01-2252-CRB

PLAINTIFFS' OPPOSITION TO WAL-MART'S MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT

Date: May 11, 2012

Time: 10:00 a.m.

Location: Courtroom 6

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court set forth "new precedent altering existing case law" that changed the landscape for certification of Title VII employment discrimination class actions. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 974 (9th Cir. 2011); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 11-3639, __F.3d __, 2012 U.S. App. LEXIS 3683, at *14-15 (7th Cir. Feb. 24, 2012) (finding a renewed motion for class certification permissible in light of a "change in the landscape" after *Dukes*). To address this new precedent, Plaintiffs' Fourth Amended Complaint ("FAC"), Dkt. 767 (Oct. 27, 2011), substantially modifies Plaintiffs' class allegations to propose certification of narrower regional classes, with monetary claims certified under Rule 23(b)(3).

Wal-Mart's Motion to Dismiss Plaintiffs' Fourth Amended Complaint ("Mot."), Dkt. 781 (Jan. 16, 2012), identifies no basis to justify dismissal of Plaintiffs' revised class claims. First, the motion prematurely seeks to resolve disputed factual issues about whether a class may be certified. Plaintiffs have substantially redefined the proposed class to satisfy the standards the Supreme Court outlined, and thus these class allegations may not be dismissed as a matter of law. Second, Wal-Mart's assertion that Plaintiffs' class claims are time barred ignores controlling authority that establishes that Plaintiffs retain their tolling rights when they amend their complaint to seek certification of modified claims on behalf of a narrower class. *See* Def's Supp. Mot. to Dismiss ("Supp. Mot."), Dkt. 787 (Mar. 21, 2012). Third, for similar reasons, each class member need not individually file a charge with the Equal Employment Opportunity Commission ("EEOC"). Finally, Wal-Mart's novel claim that each absent class member must separately satisfy Title VII's venue provision, Mot. 33-35, is contrary to all federal court authority on this issue, including the law of this case.

Wal-Mart first argues erroneously that the Supreme Court's mandate forecloses former members of the national class from challenging the company's pay and promotion practices through more narrowly-tailored class claims. *See* Mot. 12-13, 21-22. As the Ninth Circuit has recognized, however, a "reversal" without a remand or any further instructions permits a district court to consider a motion that is not inconsistent with the appellate decision. *See, e.g., United*

States v. Cote, 51 F.3d 178, 181-82 (9th Cir. 1995). The Supreme Court did not dismiss this action nor did it direct the district court to proceed with individual claims only. Instead, the Court found that the *evidence presented* did not satisfy the commonality requirement of Rule 23(a)(2), for an *expansive nationwide class*. *Dukes*, 131 S. Ct. at 2554-55. The Supreme Court reformulated the standard for satisfying commonality under Rule 23(a)(2), holding that plaintiffs must provide "significant proof" of a "general policy of discrimination" for the proposed class to support their classwide disparate treatment claim. *Id.* at 2553. The Court found that the members of the nationwide class were "subject to a variety of regional policies that all differed," which presented an obstacle to certification. *Id*. at 2557 (internal quotations and citation omitted). The Court certainly did not bar Plaintiffs from amending their complaint to *allege* a narrower regional class consistent with these new standards.

Nor does the Supreme Court's decision bar Plaintiffs from seeking to certify individualized monetary claims under Rule 23(b)(3), as Wal-Mart asserts. Mot. 22. The Court overturned prior precedent allowing certification of claims for back pay under Rule 23(b)(2), instead finding – contrary to every circuit to consider the question – that such monetary claims must be certified under Rule 23(b)(3). *Dukes*, 131 S. Ct. at 2549. Following the precedent at the time, this Court had certified Plaintiffs' claims entirely under Rule 23(b)(2), and thus neither this Court nor the Supreme Court addressed certification under Rule 23(b)(3), which Plaintiffs had also earlier requested. In response to the Court's instruction, Plaintiffs propose certification of an "Injunctive Relief Class" under Rule 23(b)(2) comprised of women currently employed at Wal-Mart retail stores in a California Region. FAC ¶¶ 15, 21. In addition, Plaintiffs propose a "Monetary Relief Class" under Rule 23(b)(3), comprised of women who may have been subject to the alleged discriminatory pay and promotion practices. FAC ¶¶ 15, 22. In the alternative, Rule 23(c)(4) permits certification of issues that can be adjudicated on behalf of the class, such as liability, the award of punitive damages and other discrete issues of monetary relief. FAC ¶ 23.

Rather than relitigate the same claims that the Court rejected, the FAC proposes substantially narrowed regional classes that rely on newly adduced evidence, to state class claims amenable to certification under the Court's new standards. For example:

- The proposed classes are limited to women who worked in stores located in Wal-Mart regions centered in California, rather than seeking to encompass women nationwide.

- To provide the "glue" that ties their claims together, Plaintiffs allege the central role of a discrete group of California District and Regional Managers who provided common direction, oversight and approval of the challenged discriminatory pay and promotion practices and, with knowledge of their adverse impact on women, approved the challenged pay and promotion decisions. FAC ¶¶ 39, 41, 43-46, 49, 61. Rather than contest the use of decentralized decisionmaking by local store managers, as the original national class did, Plaintiffs have alleged a common mode of decisionmaking across the California Regions through a pattern or practice of intentional discrimination perpetuated by the Regional, District and Store Managers.

- To establish a "general policy of discrimination" Plaintiffs have included substantial factual allegations of overt discriminatory conduct and statements by senior managers throughout the California Regions, in addition to relying on statistical analyses reflecting a consistent pattern of disparities adverse to women. FAC ¶¶ 71-82, 48, 58-60, 70. Indeed, the FAC relies on evidence not available when the class was certified, including "smoking gun" statements of discriminatory animus from high-level corporate officials. FAC ¶¶ 74-81.

- In support of their disparate impact and systemic disparate treatment claims, Plaintiffs rely on more granular statistical analyses of pay and promotion decisions, studied at the store and district as well as at the regional levels, rather than just regionally and nationally as they did previously. *See Dukes*, 131 S. Ct. at 2555. Plaintiffs allege that these analyses reveal a consistent pattern of disparities at each of these levels throughout the California Regions. FAC ¶¶ 48, 58-60, 70.

Plaintiffs' FAC directly responds to the Supreme Court's concerns, and proposes classes amenable to certification consistent with the Court's mandate. Thus, Wal-Mart cannot demonstrate that the class allegations will never satisfy Rule 23 as a matter of law.

Wal-Mart's second claim in support of its motion to dismiss – that members of the proposed modified classes no longer have *American Pipe* tolling rights – is contrary to circuit precedent, and entirely without merit, since this is the same pending action, not a new case. *See Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1146 (9th Cir. 2000) (en banc). Even if this were a new case, recent Supreme Court precedent makes clear Plaintiffs cannot be barred from aggregating claims protected by individual tolling rights. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

Finally, this Court should reject Wal-Mart's invitation to reconsider this Court's prior orders holding that absent class members need not each file individual charges with the EEOC or

separately satisfy Title VII's venue requirements. The single-filing rule, which relieves absent class members from having to file individual charges in order to participate in a Title VII class action, continues to apply here where Plaintiffs seek to certify narrower classes. Moreover, Wal-Mart offers no authority for abandoning the well-settled rule this Court applied at Wal-Mart's urging—that only the Named Plaintiffs need satisfy Title VII's venue provision. For these reasons, Wal-Mart's Motion must be denied in its entirety.

FACTUAL AND PROCEDURAL HISTORY

On June 19, 2001, Plaintiffs filed an amended complaint alleging a national class. Dkt. 3. Following the Court's dismissal of Named Plaintiffs who failed to satisfy the specific Title VII venue requirements, Dkt. 36 (Dec. 3, 2001), Plaintiffs moved for leave to amend the complaint to include additional California Named Plaintiffs. Dkt. 51 (Apr. 26, 2002). Wal-Mart opposed the motion on grounds that some of the new Named Plaintiffs had not filed their own EEOC charges, contending that the claims of these new plaintiffs were untimely. *See* Dkt. 58 (May 21, 2002). On September 9, 2002, this Court held the earliest EEOC charge filed by former Named Plaintiff Stephanie Odle, alleging that Wal-Mart engaged in a pattern or practice of sex discrimination, tolled the statute of limitations for all class members beginning on December 26, 1998, which was 300 days prior to the date on which Ms. Odle filed her charge. *See* Order Granting Pls.' Mot. for Leave to Amend at 4, Dkt. 81; *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974); Charges of Stephanie Odle, Dkt. 3, Ex. 3, 5, attached hereto as Ex. A, B.

Discovery prior to class certification was, by order of the Court, limited to "policies of nationwide applicability to defendant's retail stores," and did not permit discovery concerning the districts and stores within the California Regions, other than those where the Named Plaintiffs were employed. Case Mgmt. Scheduling Order at 4, Dkt. 41 (Jan. 3, 2002) ("CMO"). The period for discovery leading to class certification closed in January 2003. On June 21, 2004, the district court certified a nationwide class of female retail sales employees with pay or promotion claims arising on or after December 26, 1998. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188

(N.D. Cal. 2004).[1] The Ninth Circuit affirmed in significant part this Court's certification order. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc).

On June 20, 2011, the Supreme Court issued an order that the "judgment of the Court of Appeals is Reversed." *Dukes*, 131 S. Ct. at 2561. The Court held that the evidence presented was insufficient to satisfy the commonality required to sustain a national class encompassing 1.5 million women. *Id.* at 2555-56. The Court further held the back pay claims could not be certified under Rule 23(b)(2). *Id.* at 2557. Since the district court had certified Plaintiffs' claims entirely under Rule 23(b)(2), neither the district court nor the Supreme Court addressed certification under Rule 23(b)(3), which Plaintiffs had earlier requested before the district court. *See Dukes*, 222 F.R.D. at 188; Pls.' Class Cert. Mot. 47, Dkt. 99 (Apr. 28, 2003). The Supreme Court's ruling did not address whether a narrower class could be certified. Nor did it resolve the claims of the Named Plaintiffs, which are still before this Court, or the claims of the former class. On September 23, 2011, the Ninth Circuit remanded this action to the district court to comply with the Supreme Court's decision. *Dukes v. Wal-Mart Stores, Inc.*, 659 F.3d 801 (9th Cir. 2011).

On June 24, 2011, Plaintiffs filed: (1) a motion to extend tolling of the statute of limitations for all members of the former national class, Dkt. 740; and (2) an administrative motion to address issues raised by the Supreme Court's decision -- including a process for Plaintiffs to pursue a more narrowly-defined class in this action. Dkt. 738. In ruling on Plaintiffs' tolling motion on August 19, 2011, this Court extended tolling for "all former class members," setting May 25, 2012, as the date by which former class members must file a charge with the EEOC or a lawsuit in deferral states such as California. Dkt. 760 at 1-2. This Court's ruling did not bar Plaintiffs from pursuing more narrowly defined classes.

On October 26, 2011, Wal-Mart consented to Plaintiffs' filing their FAC. Dkt. 766. On October 28, 2011, this Court entered the parties' stipulation as to the filing of the FAC. Dkt. 769.

[1] Thereafter, discovery was stayed pending interlocutory appellate review of the class certification decision. To preserve testimony, the Court allowed a single deposition of former Wal-Mart vice chairman, Thomas M. Coughlin, III. *See* Sept. 27, 2004 Order, Dkt. 665. The deposition was held on April 2, 2008, before which Wal-Mart produced additional documents.

PLAINTIFFS' FOURTH AMENDED COMPLAINT

By limiting the proposed classes to women who challenge pay and promotion decisions attributable to a discrete group of District and Regional Managers, the FAC alleges class claims that satisfy the commonality requirement of Rule 23(a) as set forth by the Supreme Court. Likewise, the FAC alleges that the claims to monetary relief satisfy the requirements of Rule 23(b)(3), or Rule 23(c)(4) as an alternative basis for partial certification of such claims. The changes to the complaint are significant, and include the following.

1. Narrowed scope of classes. Plaintiffs have significantly narrowed the proposed classes to include only present and former female Wal-Mart employees who have been subjected to gender discrimination within four regions largely based in California, in contrast to the 41 regions comprising the nationwide class. *Compare* FAC ¶ 31, *with Dukes*, 222 F.R.D. at 145. In these four regions, "most of these districts were comprised entirely of California stores." FAC ¶ 31.[2]

[2] Under Local Rule 7-3, Plaintiffs object to the Brass Declaration where Wal-Mart's counsel makes factual assertions on the scope of these regions. Decl. of Rachel S. Brass ¶¶ 1-3, Dkt. 783 (Jan. 16, 2012). This Declaration cannot be considered in ruling on a motion to dismiss. *Roots Ready Made Garments v. Gap Inc.*, No. C 07-03363 CRB, 2007 U.S. Dist. LEXIS 81108, at *13-14 (N.D. Cal. Oct. 18, 2007) (refusing to consider "declaration filed after the complaint") (citing *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) ("generally a district court may not consider any materials beyond the pleadings" in deciding a motion to dismiss)). The Declaration does not qualify under either of two exceptions to the general ban on consideration of extraneous materials in deciding a motion to dismiss. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Declaration was not attached to or necessarily relied on by the FAC and, thus, fails to qualify under the first exception. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (first exception, when complaint "necessarily relies" on a document, applies if "(1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to" the motion to dismiss); *United States v. Richie*, 342 F.3d 903, 908 (9th Cir. 2003) (post-complaint declaration cannot satisfy first exception, as it cannot "form the basis of the complaint"). Likewise, the Declaration alleges facts that are inappropriate for judicial notice and, therefore, fails to qualify for the second exception to the ban on use of such materials. *Lee*, 250 F.3d at 688-89 (second exception for judicial notice applies to a document that is a "matter[] of public record," *and* not "subject to reasonable dispute"). Plaintiffs also object under Local Rule 7-5, as the Declaration fails to lay a foundation to establish Brass's personal knowledge or the basis of any of the facts asserted. N.D. Cal. L.R. 7-5(b) (declaration must be stricken if it does not "conform … to the requirements of Fed. R. Civ. P. 56(e)" and any statement "must specify [its] basis"); *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (en banc) (citing Fed. R. Civ. P. 56(e) ("A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.").

2. Limited job positions. Plaintiffs have excluded women holding Store Manager positions from the proposed classes, thereby limiting the classes to women in hourly retail and salaried management positions up to and including Co-Manager. FAC ¶¶ 3, 15.

3. Focus on actual decisionmakers. The FAC focuses on the decisions of a discrete group of regional decision-makers who "have the ultimate authority whether, and by how much, to adjust the pay of all hourly employees." FAC ¶ 43. These decisionmakers "received regular reports about compensation for hourly and salaried employees within California showing that female employees were paid less than men on average," FAC ¶ 49, and have "long known about gender disparities in promotion in the California Regions and have failed to take any remedial action." FAC ¶ 61.

4. New and more specific evidence of gender bias. Even without the benefit of discovery focused on the California Regions, the FAC sets forth new allegations of gender bias against women working in the California Regions that focus on the discrete group of Regional, District and Store Managers within the California Regions, including:

- New evidence obtained from a District Managers' meeting with Wal-Mart CEO, Thomas Coughlin -- held four months after the class certification hearing -- where District Managers were instructed that the key to success was "single focus to get the job done. . . . *women tend to be better at information processing. Men are better at focus* single objective." (sic) FAC ¶ 75 (emphasis added). At the meeting, District Managers were directed to select "[f]uture leaders" to create a "culture of execution." FAC ¶ 75.

- California Regional Vice President Butler presumed women did not seek management positions because of "family commitments." FAC ¶ 76. District and Store Managers echoed the same biases when denying women promotional opportunities because they had children or because managers assumed women were unable to relocate their residences, something Wal-Mart had required in the past. *See, e.g.*, FAC ¶ 78 (District Manager justified denying promotion of a woman to Assistant Manager position due to concern she had a small child); FAC ¶ 77 (District Manager concluded women were uninterested in management based on his own mother); FAC ¶ 81 (Store Manager told female Assistant Manager who missed work due to a sick child, "this is why we are concerned about promoting women with children.").

- Managers similarly justified paying women less than men on the expressed belief that only the male employees had families to support. *See, e.g.*, FAC ¶ 79 (District Manager justified paying less to a female Manager than a male Manager on the

ground that he "supports his wife and two kids"); FAC ¶ 80 (Plaintiff Kwapnoski's Store Manager justified giving a larger raise to a male employee as he had a family to support and suggested she "doll up" and "blow the cobwebs off" her make-up to make herself more promotable); FAC ¶ 82 (other California Managers justified denying promotions to women because they were presumed unable to relocate and paying women less than men since they assumed men had families to support).

5. Disparate Impact Claims. Plaintiffs challenge Wal-Mart's facially neutral practice of failing to require managers to base pay and promotion decisions on job-related criteria such as experience or documented performance. FAC ¶¶ 47, 50, 51, 70, 148. Plaintiffs also challenge other discrete practices, including Wal-Mart's failure to consistently post job vacancies, and Wal-Mart's practice of requiring that candidates for promotion into management be willing to relocate their residence. FAC ¶¶ 66, 148. Plaintiffs further allege that because Wal-Mart fails to maintain records that identify the impact of separate components of its policies, its pay and promotion decisionmaking process is "not capable of separation for analysis." FAC ¶¶ 50, 70.

6. Ineffective anti-discrimination policies. Plaintiffs allege that prior to the filing of this action, Wal-Mart had no meaningful anti-discrimination policies and did not hold managers accountable for equal employment and diversity policies and goals. FAC ¶¶ 83-86.

7. Certification of injunctive relief and monetary claims. Plaintiffs propose an Injunctive Relief Class, subject to certification under Rule 23(b)(2), comprised of "all women who are currently employed or will be employed at any Wal-Mart retail stores in a California Wal-Mart Region," FAC ¶¶ 15, 21, as well as a Monetary Relief Class subject to certification under Rule 23(b)(3), comprised of all women subject to the alleged discriminatory pay and promotion practices. FAC ¶¶ 15, 22. In the alternative, Plaintiffs allege that under Rule 23(c)(4) issues concerning liability and damages may be partially certified where they "present common issues, the resolution of which would advance the interests of the parties in an efficient manner." FAC ¶ 23.

ARGUMENT

I. PLAINTIFFS' REVISED CLASS ALLEGATIONS ARE CONSISTENT WITH THE SUPREME COURT'S RULING

A. The Supreme Court's Mandate Does Not Divest this Court of Discretion to Certify Narrower Modified Classes

Nothing in the Supreme Court's decision divests this Court of its discretion to consider certification of modified, narrower classes defined in accordance with the new standards for certification the Supreme Court adopted. As this Court observed in permitting Plaintiffs to request certification of a redefined class after an earlier denial of certification, "Rule 23 confers 'broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court.'" *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 106-07 (N.D. Cal. 2008) (quoting *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001)), and authorizing a renewed motion after an "ample opportunity for discovery"). The Supreme Court has repeatedly held that Rule 23(c)(1)(C), which provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment," means that class certification orders are "inherently tentative" and subject to reassessment.[3] Thus, courts often entertain renewed certification motions seeking to certify a narrower class or rely upon different evidence or legal theories, especially where, as here, plaintiffs amended the complaint.[4] For example, in *In re Methionine Antitrust Litigation*, MDL No. 00-1311 CRB, 2003 U.S. Dist. LEXIS 14828 (N.D. Cal. Aug. 26, 2003), this Court declined to certify a broad class, but later

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[3] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (when a court "denie[s] certification of a class," it "would expect to reassess and revise such an order in response to events occurring 'in the ordinary course of litigation'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 n.14 (1983)); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978).

[4] *See, e.g.*, *Bushbeck v. Chicago Title Ins. Co.*, No. C08-0755JLR, 2012 U.S. Dist. LEXIS 15248, at *5-8 (W.D. Wash. Feb. 8, 2012) (granting "motion for leave to file a second class certification" to certify class limited to single county and certain claims after prior order denying certification of state-wide class); *The Apple iPod iTunes Antitrust Litig.*, No. C 05-00037 JW, 2011 U.S. Dist. LEXIS 134836, at *4-6, *16 (N.D. Cal. Nov. 22, 2011) (decertifying class but later granting renewed certification motion after plaintiffs amended complaint to rely on different allegations); *Coleman v. GMAC*, 220 F.R.D. 64, 96-97 (M.D. Tenn. 2004) (allowing plaintiffs to seek certification of a different class after court of appeals reversed certification).

granted certification after plaintiffs filed an "amended complaint to bring its claims on behalf of a much narrower class," undertook further class discovery, and offered new statistical analysis to satisfy the Court's prior concerns. *Id.* at *3-8.

Nor does an appellate ruling that rejects certification of a class ordinarily bar a district court from considering whether a narrower or different class can be certified. As the Second Circuit explained in *In re Initial Public Offering Securities Litigation*, 483 F.3d 70 (2d Cir. 2007), its earlier order reversing certification of broad classes without further instruction did not bar the district court from considering different or narrower proposed classes in the same action, because "[d]istrict courts have ample discretion to consider (or to decline to consider) a revised class certification motion after an initial denial." *Id.* at 73. Thus, nothing precluded plaintiffs "from returning to the District Court to seek certification of a more modest class, one as to which the Rule 23 criteria might be met, according to the standards" set forth on appeal. *Id.* The Ninth Circuit and other courts have routinely endorsed and applied the same principle.[5]

Although Wal-Mart concedes that the Supreme Court's mandate was limited to stating the "judgment of the Court of Appeals is Reversed," *Dukes*, 131 S. Ct. at 2561, Wal-Mart nonetheless seeks to infer that this reversal without further instruction bars the pursuit of a narrower class. *See* Mot. 8, 22. In fact, the Ninth Circuit has repeatedly held an appellate decision that solely states the lower court's order is "reversed," without stating it is "remanded" or giving any further instruction, does not foreclose the lower court from exercising discretion to consider a motion that is not inconsistent with the appellate decision. *United States v. Cote*, 51 F.3d 178, 181-82 (9th Cir. 1995) (holding prior "reversal" of conviction without "remanding" or providing any instructions did not bar court from considering a new trial since "the mandates did not contain an order dismissing the cases or an order directing acquittal, a second trial was not

[5] *See Costco*, 657 F.3d at 987-88 (reversing certification but noting district court may consider whether a different type of class could be certified); *Myers v. Hertz Corp.*, 624 F.3d 537, 557-58 (2d Cir. 2010) (reversal of certification "does not prevent plaintiffs from renewing their motion," as plaintiffs may obtain further discovery to support allegations) (citing *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1241-43, 1262 (11th Cir. 2008)); *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 389 (5th Cir. 1989) (affirming certification after same appellate court previously affirmed denial of certification).

necessarily prohibited"). As the Ninth Circuit explained in *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000), "the rule of mandate is designed to permit flexibility where necessary, not to prohibit it," and the "ultimate task" in applying the rule "is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the lower court, from matters that have not." *Id.* at 1093, 1095 n.12. Indeed, the Supreme Court has long held that plaintiffs may amend their complaint to revise allegations to satisfy standards adopted by an appellate court. *See id.* (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).[6]

Moreover, as the Supreme Court declined to provide specific instruction on how the district court must implement a judgment on the merits, its mandate does not bar reconsideration of class certification.[7] *See Vizcaino v. United States Dist. Ct. for the West. Dist. of Wash.*, 173 F.3d 713, 717 (9th Cir. 1999), *as amended by* 184 F.3d 1070 (9th Cir. 1999);[8] *cf. Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1146 (9th Cir. 2000) (en banc) (as prior "panel of this court . . . remanded with instructions to dismiss the complaint," trial court did not "allow amendment of the complaint to deal with" issues arising on appeal, such as need for sub-classes).

Contrary to Wal-Mart's assertion, the Supreme Court's decision did not expressly or implicitly bar Plaintiffs from seeking certification of regional classes. The decision did not direct the court on remand to dismiss Plaintiffs' complaint or proceed only on the individual claims. Instead, the Court's analysis focused on whether there was "substantial evidence" of a general policy of discrimination *throughout Wal-Mart's operations nationwide*. Indeed, in rejecting

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[6] *See also Rogers v. Hill*, 289 U.S. 582, 587-88 (1933) (citing *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 181-82 (1920) (district court may "permit the amendment" of complaint after reversal of denial of demurrer without directing complaint be dismissed, as district court "could, and probably would, have allowed an amendment curing the defect" had it held the complaint was insufficient in the first place) (citing *Sanford*, 160 U.S. at 258-59)).

[7] The only other time a district court cannot certify a revised class is after a "final judgment," Fed. R. Civ. P. 23(c)(1)(C), but the Supreme Court's reversal was clearly not a final judgment.

[8] In *Vizcaino*, the Ninth Circuit held a trial court erred by revisiting certification and drastically reducing the size of the class, where the Ninth Circuit had previously remanded with specific instructions that the district court decide any questions of individual eligibility for benefits and calculate class members' damages. Because those instructions "presupposed the existence of the certified class," it could not "be read as contemplating redefinition of the class." *Id.* at 717, 721.

nationwide certification, the Court observed that Plaintiffs were "'subject to a variety of regional policies that all differed.'" *Dukes*, 131 S. Ct. at 2557 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, C.J., dissenting)). The Court held the evidence reviewed did not rise to the level of "convincing proof of a companywide discriminatory pay and promotion policy" sufficient to satisfy commonality under Rule 23(a)(2), for "one of the most expansive class actions ever."[9] *Dukes*, 131 S. Ct. at 2547, 2556. But the Court acknowledged that claims alleging a pattern or practice of discrimination through use of subjective personnel decisions can satisfy commonality where there is "significant proof" Wal-Mart "operated under a general policy of discrimination" throughout the class. *Id.* at 2553. Thus, nothing in the decision prevents Plaintiffs from pursuing certification of modified classes that, after the development of an appropriate record, will rest on "significant proof" of a "general policy of discrimination," perpetuated by a discrete group of managers within considerably narrower classes. *See id.*

Nor does the Supreme Court's opinion foreclose certification of Plaintiffs' disparate impact claims. Contrary to Wal-Mart's assertion that Plaintiffs' class claims are "flawed as a matter of law," Mot. 12-13, 19, the Supreme Court reaffirmed that "an employer's undisciplined system of subjective decisionmaking" may provide the basis for a Title VII claim "in appropriate cases." *Dukes*, 131 S. Ct. at 2554 (quoting *Watson v. Fort Worth Bank*, 487 U.S. 977, 990-91 (1988)). Indeed, Wal-Mart's assertion is directly at odds with the *Costco* decision, in which the Ninth Circuit remanded to the district court to consider whether plaintiffs' Title VII disparate impact challenge to subjective practices were amenable to certification under Rule 23(b)(3) – declining to hold that *Dukes* precludes certification of disparate impact claims challenging subjective decisionmaking as the defendant argued. *Costco*, 657 F.3d at 975, 988. Moreover, Plaintiffs' FAC addresses the Supreme Court's direction that disparate impact claims must challenge a "common mode" of decisionmaking by identifying and challenging several discrete policies. FAC ¶ 148. In addition, although there had been no need to do so before, Plaintiffs' FAC now alleges that Wal-Mart's failure to record the basis for the challenged decisions makes

[9] Wal-Mart does not contest that the FAC makes factual allegations that can satisfy Rule 23(a)'s prerequisites of numerosity, typicality, and adequacy. Fed. R. Civ. P. 23(a)(1), (3), (4).

the challenged pay and promotion policies "not capable of separation for analysis" under 42 U.S.C. § 2000e–2(k). FAC ¶¶ 50, 149. Rather than ask this Court to revisit issues already decided on appeal, therefore, Plaintiffs have alleged significantly revised disparate impact claims.

Finally, Wal-Mart is wrong in contending that the majority opinion implicitly rejected the opportunity for *any* further proceedings, as neither the majority opinion nor the dissent addressed whether a narrower class could be certified. *See* Mot. 8, 22. Nor does Justice Ginsburg's dissent support Wal-Mart's position, as it simply expressed a preference for a remand to consider certification of the *same* nationwide class under Rule 23(b)(3) based on the *same record* presented to the district court.[10] The majority, of course, had no reason to address the need for a remand to consider Rule 23(b)(3) certification on the same record, since it held Plaintiffs could not satisfy the commonality requirement of Rule 23(a), a prerequisite to certification under either Rule 23(b)(2) or Rule 23(b)(3). *See* Fed. R. Civ. P. 23(a)-(b). Far more important, neither the majority nor the dissent explicitly or implicitly addressed the key question now before this Court – whether narrower classes may be certified, based on revised allegations and new evidence, as a hybrid class under Rule 23(b)(2) and (b)(3), solely under Rule 23(b)(3), or through a partial certification under Rule 23(c)(4). In sum, there is nothing about the Supreme Court's mandate or opinion that requires dismissal of the regional classes plead in the FAC.

B. Plaintiffs Have Alleged Viable Class Claims

1. Wal-Mart's Motion to Deny Certification on the Pleadings is Premature

Wal-Mart's motion to dismiss or strike Plaintiffs' class allegations should be denied, as it prematurely seeks to resolve disputed factual issues about whether a class may be certified. Here,

[10] In her dissent, Justice Ginsburg concluded Plaintiffs *had* satisfied the commonality requirement and the other Rule 23(a) requirements, but agreed with the majority that the "class in this case . . . should not have been certified under . . . 23(b)(2)." *Dukes*, 131 S. Ct. at 2561 (Ginsburg, J., dissenting). As Justice Ginsburg explained, since "[t]he plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail," *id.* at 2562 n.1, "[w]hether *the class the plaintiffs describe* meets the specific requirements of Rule 23(b)(3) is not before the court," and she therefore "would reserve that matter for consideration and decision on remand." *Id.* at 2561 (emphasis added). Justice Ginsburg thus made clear that, she envisioned a remand in which the district court would consider Rule 23(b)(3) certification of the *same nationwide class based on the record* presented in 2004. *Id.*

as in most class actions, "the pleadings alone will not resolve the question of class certification," and therefore "'the better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action [is] maintainable.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) [11] (quoting *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977)); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1094 n.5 (9th Cir. 2011) (it is an abuse of discretion to dismiss class action if "propriety of a class action cannot be determined . . . without discovery") (citations omitted). This is particularly true here, where Plaintiffs have not had an opportunity to conduct discovery since January 2003, with one minor exception, and prior discovery was limited to "policies of nationwide applicability to defendant's retail stores." *See supra* at p. 4-5 & n.1; CMO at 4. Discovery did not focus on the practices specific to the districts and stores in the California Regions, other than those stores in which the Named Plaintiffs were employed. CMO at 4. Thus, Plaintiffs have yet to conduct discovery into the pay and promotion practices at most of the stores, districts and regions encompassed by the California Regions.

[11] Wal-Mart erroneously asserts that *Vinole* stated "'district courts throughout the nation' have considered preemptive motions to rule on class certification questions *at the pleading stage*." Mot. 10 (emphasis added) (quoting *Vinole*, 571 F.3d at 940). But *Vinole* did not make such an observation or approve of deciding certification at the pleading stage. Instead, it recognized some trial courts have "considered defendants' 'preemptive' motions to deny certification" before plaintiffs have filed a certification motion (*i.e.*, "before a plaintiff files a motion to certify a class"), and found a district court could consider a motion to deny certification three weeks before the close of discovery when plaintiffs "did not intend to propound any additional discovery." 571 F.3d at 940-41, 943. Also, the cases *Vinole* cited for this point show courts rarely dismiss class allegations on the pleading alone. In fact, four of the five cases decided certification long after the pleadings and the fifth deferred the question and later certified a class. *Fedotov v. Peter T. Roach & Assocs., P.C.*, 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005) (concurrent with summary judgment, directing the adequacy of named plaintiff be decided by "affidavits, declarations, or any other evidence which he would normally submit" under Rule 23); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 215 F.R.D. 511, 513-16 (W.D. La. 2003) (denying certification *two years* after it held class members had no right of action); *Bryant v. Food-Lion, Inc.*, 774 F. Supp. 1484, 1497 (D.S.C. 1991) (refusing to deny certification as it can't "say, as a matter of law, that the plaintiffs will be unable to certify their classes" and "further discovery may support the allegations"); *Brown v. Milwaukee Spring Co.*, 82 F.R.D. 103, 104-05 (E.D. Wisc. 1979) (denying certification as *after three years* lead plaintiff failed to prosecute, move for certification, or oppose decertification); *Osborn v. Penn.-Del. Serv. Station Dealers Ass'n*, 499 F. Supp. 553, 560 (D. Del. 1980) (deferring issue), 94 F.R.D. 23, 25-26 (D. Del. 1981) (certifying class).

Because class allegations are almost always disputed and require ample discovery, it is "rare" for courts to dismiss class allegations "in advance of a motion for class certification." *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1245-46 (C.D. Cal. 2011) (collecting numerous cases rejecting motions to dismiss or strike as premature). In fact, dismissing or striking class allegations at the pleading stage is so rare that Wal-Mart could only identify two such instances in this Circuit, both of which are plainly inapposite.[12] Unlike the cases Wal-Mart relies on, resolving class certification here does not solely involve pure legal questions and the relevant facts are not undisputed.

Nor has Wal-Mart accurately framed the standard for assessing the sufficiency of the class allegations on a motion to dismiss. A Rule 12(b)(6) motion considers whether the allegations are "sufficient to cross the federal court's threshold," not whether plaintiffs "will ultimately prevail" on their Title VII claim. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011) (citations and internal quotations omitted). A motion to dismiss must be denied where, as here, plaintiffs plead "'enough facts to state a claim to relief that is plausible on its face,'" which requires pleading "factual content that allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged." *Haggarty v. Wells Fargo Bank*, No. C 10-02416 CRB, 2011 U.S. Dist. LEXIS 9962, at *5 (N.D. Cal. Feb. 2, 2011) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007))). As there is "[n]o heightened pleading standard" for Title VII claims, the ordinary notice pleading standard applies here.

[12] *See* Mot. 11 (citing *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1146-47 (N.D. Cal. 2010) (striking class claims, as class included consumers who suffered no injury and thus had no standing), and *Sheppard v. Capital One Bank*, No. CV 06-7535 GAF, 2007 U.S. Dist. LEXIS 70061, at *3-7, *14 (C.D. Cal. July 11, 2007) (striking class allegations, as "the issues involved are pure questions of law," and "the record before the Court is undisputed")). Wal-Mart's out-of-circuit cases are equally inapposite. *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (class claim defective where 50 state laws governed claims, certification decision turned on purely legal question of Ohio choice of law, and plaintiffs did not explain what discovery would alter defect in claims); *John v. Nat'l Sec. Fire & Casualty Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (plaintiffs conceded proposed class was "unascertainable" and argued on appeal for the first time that subclasses could be certified).

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); *Stewart v. Monogram Biosciences*, C 11-01181, 2011 U.S. Dist. LEXIS 141960 CRB, at *5 (N.D. Cal. Dec. 9, 2011).

Further, this Circuit has established two principles for assessing the sufficiency of the complaint. First, although a complaint "may not simply recite the elements of a cause of action," in order to credit its allegations, the complaint only needs to "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1215-16 (9th Cir. 2011) (as amended); *accord Haggarty*, 2011 U.S. Dist. LEXIS 9962, at *5 (court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party") (internal citations and quotations omitted). Second, "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr*, 652 F.3d at 1216.

In considering a challenge to class certification at the pleading stage, the motion must be denied if plaintiffs make *either* a "prima facie showing that the class action requirements of [Rule] 23 are satisfied," *or* show that "discovery is likely to produce substantiation of the class allegations." *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985); *accord Vinole*, 571 F.3d at 942; *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). To make a prima facie showing, plaintiffs are only required to show that they have pled claims that *may* later be certified after discovery, not that certification will *likely* be granted.[13]

[13] *See, e.g.*, *Artis v. Deere & Co.*, No. C 10-5289, 2011 WL 2580621, at *2-4 (N.D. Cal. June 29, 2011) (prima facie showing does "not concern" "whether Plaintiff will ultimately satisfy her burden of establishing that a class action is proper under Rule 23"), *aff'd* 276 F.R.D. 348 (N.D. Cal. 2011); *Kaminske v. JP Morgan Chase Bank*, CV 09-00918, 2010 U.S. Dist. LEXIS 141514, at *8-9 (C.D. Cal. May 21, 2010) (magistrate erred by conflating "a prima facie showing" with far stricter standard of "likelihood of success at the class certification stage"; prima facie showing may be satisfied even if certification "may be an uphill battle for Plaintiffs"); *Lewis v. First Am. Title Ins. Co.*, No. CV 06-478-S-EJL-LMB, 2008 U.S. Dist. LEXIS 43518, at *9 (D. Idaho June 2, 2008) ("commonality of claims will be addressed at the class certification stage," and "likelihood of such certification is not relevant to [prima facie] inquiry").

The FAC fully satisfies this Circuit's standards for stating a class claim at the pleading stage: the allegations give fair notice of the nature of the class claims, they plausibly suggest Plaintiffs are entitled to relief, and they demonstrate a class may later be certified after discovery.

Finally, Wal-Mart is wrong that Rule 12(f) and Rule 23(d)(1)(D) can be used to dismiss the class allegations here. As the Ninth Circuit held in *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970 (9th Cir. 2010), Rule 12(f) cannot be used to strike allegations where a motion, as here, seeks a ruling on legal or factual issues and does not show the allegations are "'an insufficient defense, or are redundant, immaterial, impertinent, or scandalous.'" *Id.* at 973-74 (quoting Fed. R. Civ. P. 12(f)).[14] Nor can Rule 23(d)(1)(D) be used to dismiss class allegations at this stage, as this provision does not apply until *after* a court decides whether a class may be certified.[15] In any event, courts that have invoked Rule 12(f) or 23(d)(1)(D) to strike class allegations have applied the same standard as this Circuit's rule for deciding the propriety of certifying a class at the pleading stage – whether a class may later be certified after discovery.[16]

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[14] In *Whittlestone*, the Court explained Rule 12(b)(6) serves this purpose already and it makes no sense to subject the same substantive motion under Rule 12(f) to a more lenient standard of review on appeal than a Rule 12(b)(6) motion. 618 F.3d at 973-74. Courts have repeatedly held Rule 12(f) motions to strike class allegations, similar to Wal-Mart's motion, are improper under *Whittlestone*. *See, e.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387, 2011 U.S. Dist. LEXIS 57348, at *39 (N.D. Cal. May 26, 2011); *Clerkin v. MyLife.com, Inc.*, No. C 11-00527, 2011 U.S. Dist. LEXIS 96735, at *7-11 (N.D. Cal. Aug. 29, 2011); *Swift v. Zynga Game Network, Inc.*, C 09-5443 SBA, 2010 U.S. Dist. LEXIS 117355, at *29 (N.D. Cal. Nov. 3, 2010).

[15] *See Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-0715 SC, 2006 U.S. Dist. LEXIS 88988, at *9-11 (N.D. Cal. Nov. 28, 2006) (rejecting "an improper attempt to argue against class certification before the motion for class certification has been made and while discovery regarding class certification is not yet complete"); 5 Moore's Federal Practice § 23.145 at 23-543 (3d ed. 2010); *Vinole*, 571 F.3d at 942 (citing *Beauperthuy* with approval). *Whittlestone's* reasoning also bars striking class claims under Rule 23(d)(1)(D), as Rule 12(b)(6) already serves the same purpose and a more lenient standard of review governs Rule 23 orders (abuse of discretion) than Rule 12(b)(6) orders (de novo). 618 F.3d at 974; *Vinole*, 571 F.3d at 939.

[16] *See, e.g.*, *Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232, 1235-36 (S.D. Cal. 2009) (denying motion to strike class allegations since "it cannot determine from the face of the pleadings that a class is not certifiable as a matter of law, as there are factual and legal issues yet to be determined"); *Tietsworth*, 720 F. Supp. 2d at 1145-46; *Francis v. Mead Johnson & Co.*, 10 Civ. 701, 2010 U.S. Dist. LEXIS 105887, at *3 (D. Colo. Sept. 16, 2010) (to strike class allegations, defendant must show "from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.").

2. Plaintiffs' Revised Complaint Alleges Class Claims that Satisfy the Supreme Court's New Commonality Standard

In reversing nationwide certification, the Supreme Court reformulated the standard for interpreting the commonality requirement of Rule 23(a) and provided new guidance on how to structure classes challenging discretionary decisionmaking. Plaintiffs have amended their complaint to propose narrowed classes in response to this new standard, and therefore, Plaintiffs should be afforded an opportunity to develop evidence to support certification of the California Regions claims. *See infra* § I(B)(1); *Mantolete*, 767 F.2d at 1424.

In rejecting similar premature efforts to dismiss class allegations, courts have repeatedly recognized that where, as here, the factual issues critical to class certification are disputed, a court may not resolve the merits of plaintiffs' request for certification without the benefit of a developed record.[17] Accordingly, Plaintiffs should be permitted to conduct discovery relevant to their redefined class allegations detailed below.[18]

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[17] *See Cholakyan*, 796 F. Supp. 2d at 1245-46 (rejecting motion to dismiss class allegations in advance of a motion for class certification as class allegations are disputed and require ample discovery); *Hibbs-Rines v. Seagate Techs., LLC*, No. C08-0540, 2009 U.S. Dist. LEXIS 19283, at *7-8 (N.D. Cal. Mar. 2, 2009) ("Discovery is integral to developing the shape and form of a class action and granting of motions to dismiss class allegations before discovery has commenced is rare'") (internal quotations and citations omitted). Since the Supreme Court issued *Dukes*, courts have repeatedly denied premature requests to dismiss class allegations such as this, recognizing that discovery is necessary to evaluate class claims. *See, e.g.*, *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, 2012 U.S. Dist. LEXIS 12961, at *13-14 (S.D.N.Y. Jan. 19, 2012) (denying motion to strike class allegations as premature in Title VII gender discrimination action since plaintiffs may be able to establish commonality with further discovery); *Sliger v. Prospect Mortg., LLC*, 789 F. Supp. 2d 1212, 1218 (E.D. Cal. 2011) (denying motion to dismiss the claims of commission-based employees, finding that "plaintiff must only allege facts from which the court can plausibly infer a right to relief"); *Covillo v. Specialtys Café*, No. C-11-00594 DMR, 2011 U.S. Dist. LEXIS 147489, at *17-18 (N.D. Cal. Dec. 22, 2011) (denying defendants' motion to dismiss wage and hour class claims as premature); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4937, 2011 U.S. Dist. LEXIS 57348, at *37-39 (N. D. Cal. May 26, 2011) (declining to dismiss or strike class claims, as "whether the class is ascertainable and whether a class action is superior should be resolved in connection with a class certification motion").

[18] Such discovery would include, but not necessarily be limited to, an examination of pay and promotion practices in place in the California Regions, criteria used in making pay and promotion decisions, the role of managers in making, reviewing and approving such decisions, and views of managers about the suitability of women to serve in management and be paid comparably to men.

a. Plaintiffs' Pattern or Practice Disparate Treatment Claims Satisfy Commonality

To address the Supreme Court's new commonality standard, Plaintiffs have substantially narrowed the geographic scope of the proposed classes and revised their pattern or practice disparate treatment claims to focus on actions by a core group of decisionmakers responsible for the biased pay and promotion decisions in the California Regions.

(1) Narrowed Class. The Supreme Court expressed concern that, in light of the size and geographic scope of Wal-Mart, the evidence presented on behalf of a nationwide class was not sufficiently tied to the conduct of the decisionmakers who actually made the pay and promotion decisions, and thus did not raise an inference that the decisions were discriminatory throughout the expansive class. *Dukes*, 131 S. Ct. at 2555-56. The Court also viewed as a barrier to nationwide certification that Plaintiffs were "'subject to a variety of regional policies that all differed.'" *Id*. at 2557 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, C.J., dissenting)). To overcome these concerns, Plaintiffs have structured the proposed classes to follow the geographic contours of Wal-Mart's decisionmaking process. As the challenged pay and promotion decisions were made, reviewed, and approved by managers within each region, the proposed California Regional classes have the homogeneity that the Court found the national class lacked. In order to avoid any risk of an internal conflict within the proposed classes, Plaintiffs have also excluded women holding Store Manager positions. FAC ¶ 15.

(2) Core Group of Decisionmakers. The Supreme Court held that Plaintiffs had not "identified a common mode of exercising discretion that pervades the entire company" where the class challenged the discretionary decisionmaking of thousands of managers. *Dukes*, 131 S Ct. at 2548, 2554-55. The Court explained that to satisfy commonality, Plaintiffs' claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Id*. at 2551. Applying this guidance, Plaintiffs have focused their challenge on the biased decisions made by a discrete group of Regional, District and Store Managers who participated in, approved or reviewed the pay and promotion decisions at issue. The FAC alleges that managers in the California Regions provided common direction to lower level managers that

result in biased pay and promotion decisions. FAC ¶¶ 39, 41, 43-46, 71-82. Indeed, as Wal-Mart concedes, the FAC contains new allegations that California Regional Vice Presidents and District Managers have ultimate authority over the challenged decisions. *See* Mot. 17; FAC ¶¶ 43, 53-54.

(3) New Evidence of Overt Bias by Core Decisionmakers. The Supreme Court found Plaintiffs could not satisfy the commonality requirement by showing only that the exercise of discretion by Wal-Mart managers was "vulnerable" to bias. *Dukes*, 131 S. Ct. at 2553. Rather than relitigate this issue here, the FAC now attributes to a core group of decisionmakers involved in the contested pay and promotion decisions allegations of gender bias that could support a pattern or practice claim in the California Regions, FAC ¶¶ 71-82. *See Dukes*, 131 S. Ct. at 2552 n.7 (citing with approval *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977)). In addition, the FAC also alleges disparities in pay that are adverse to women throughout the vast majority of districts and stores in the California Regions, FAC ¶¶ 48-50, 70, creating a more powerful inference of discrimination than the regional and national statistical analyses that the Supreme Court found insufficient. The FAC also alleges that Wal-Mart endorsed the bias against women working in the California Regions and ignored reports of discrimination against female employees. *See, e.g.*, FAC ¶¶ 49, 62-66, 68, 75-82. Further, Plaintiffs allege that Wal-Mart had no "meaningful" anti-discrimination policies, FAC ¶¶ 83-86, and thus Wal-Mart cannot rely on the existence of a mere written policy, when the de facto unwritten policy was one of discrimination. Accordingly, Plaintiffs have pled allegations from which it is plausible to conclude that Wal-Mart, through its California Regions' managers with final authority to make the challenged decisions, has followed a general policy of discrimination against its female employees in its California Regions.

(4) Refined Analysis of Workforce Patterns. The Supreme Court faulted the statistical analysis Plaintiffs presented in support of the nationwide class because the national and regional disparities observed "may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by store-disparity upon which plaintiffs' theory of commonality depends." *Dukes*, 131 S. Ct. at 2555. To address this concern, the FAC alleges a pattern of disparities in pay and promotions adverse to women drawn from analyses conducted at the Store,

District and Regional levels in order to demonstrate a common practice consistent throughout the regions. FAC ¶¶ 48, 58-60. The refined statistical analyses reflect that women in the California Regions have regularly been paid less on average than similarly-situated men, in each of the California Regions and Districts and in the vast majority of stores within the Regions. FAC ¶ 48.

(5) Plaintiffs' Allege Common Questions. Plaintiffs have thus alleged common questions and will rely on common evidence to establish their classwide disparate treatment claims. Common questions include:

> whether defendant, through its California Region managers with final authority to make the challenged decisions, has engaged in a pattern or practice of discrimination in pay and management track promotions against its female employees in its California Regions, [and] whether there are statistical patterns adverse to female employees in pay and management track promotions in defendant's California Regions.

FAC ¶ 18. Through discovery, Plaintiffs will satisfy the commonality requirement by, for example, demonstrating that: (1) Wal-Mart provided common direction to managers within the California Regions to intentionally disfavor women; and/or (2) Wal-Mart implemented "a common mode of exercising discretion," which consistently disfavored women in pay and promotion decisions made within the California Regions. *See Dukes*, 131 S. Ct. at 2554-55.

Wal-Mart's assertion that Plaintiffs' FAC "recounting isolated instances of alleged discrimination . . . is still 'too weak to raise any inference'" that the challenged discretionary decisions are discriminatory, Mot. at 15 (citing *Dukes*, 131 S. Ct. at 2556), conflates the standards for *satisfying* class certification, which the Supreme Court addressed on appeal, with Plaintiffs' burden at this juncture to *plead* class claims that may be amenable to certification on an appropriate record. Of course, Plaintiffs need not plead in their complaint all the evidence they will rely on in support of their class claims before they have even had the opportunity to complete necessary discovery. Plaintiffs' FAC may not be dismissed, where as here, they have plead factual allegations that provide "some glue holding together the alleged reasons" for the challenged pay and promotion decisions, such as through a "common mode of exercising discretion" that pervaded the entire region or bias attributable to common decisionmakers. *See Dukes*, 131 S. Ct. at 2552, 2554.

Moreover, to support their pattern or practice claims, Plaintiffs will rely on common evidence. In *Dukes*, the Supreme Court reaffirmed that under *Teamsters*, to establish a pattern or practice case, a plaintiff seeks to "'establish by a preponderance of the evidence that . . . discrimination was the company'[s] standard operating procedure[,] the regular rather than the unusual practice.'" *Dukes*, 131 S. Ct. at 2552 n.7 (quoting *Teamsters*, 431 U.S. at 358). As *Teamsters* explained, "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." *Id*. at 360 n.46. Such suits "have more commonly involved proof of the expected result of a regularly followed discriminatory policy," *id*., and "[s]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. *Id*. at 339. Similarly, Plaintiffs here will rely on common evidence of biased decisonmaking by a core group of managers in the California Regions as well as common statistical evidence as proof of the discriminatory practice alleged. As Plaintiffs' allegations of a redefined class identify "a common mode" by which Wal-Mart has discriminated against the putative class and by which their claims can be adjudicated in a common manner, their amended complaint is not subject to dismissal.

b. Plaintiffs' Disparate Impact Claims Satisfy Commonality

The Supreme Court found Plaintiffs' evidence insufficient to satisfy commonality for their disparate impact claims across a national class for three principal reasons: (1) Plaintiffs had not identified a "common mode of exercising discretion" across a national class, and thus could not challenge a policy of allowing decentralized discretionary decisionmaking by itself, *Dukes*, 131 S. Ct. at 2554; (2) the national and regional statistical analyses Plaintiffs offered were not sufficiently tied to the level of decisionmaker and did not eliminate the possibility that pay disparities resulted from store level differences, *id*. at 2555-56; and (3) Plaintiffs had not identified a "specific employment practice" that may be subject to disparate impact challenge. *Id*.

The FAC has addressed each of these concerns in pleading Plaintiffs' revised disparate impact claims. First, rather than simply challenging the discretion provided to lower-level managers, the FAC challenges Wal-Mart's central failure to ensure managers made pay and

promotion decisions based on job-related criteria, such as particular experience or documented performance. FAC ¶¶ 47, 55, 70. The FAC also identifies other policies that are not job-related, such as Wal-Mart's failure to consistently post management-level job vacancies, FAC ¶¶ 51-5, 66, 148, and its practice of expecting candidates for promotion into and within management jobs to agree to relocate their residences. FAC ¶ 66. These allegations survive a motion to dismiss.

Second, the Supreme Court explained that Plaintiffs' nationwide and regional statistics were insufficient to infer that the challenged practices adversely affected members throughout the nationwide class. *Dukes*, 131 S. Ct. at 2555. The FAC addresses this concern by relying on analyses conducted at a more granular level than what had been presented in support of the nationwide class, including promotion data analyzed according to the regional structures in which promotion decisions are made, as well as statistics reflecting pay disparities at the vast majority of stores. FAC ¶¶ 48, 58-60, 70.

Third, as an alternative to identifying a specific employment practice, the FAC alleges that the policy of failing to require managers to base pay and promotion decisions on job-related criteria is not capable of being analyzed separately and, therefore, the Civil Rights Act of 1991 relieves Plaintiffs from identifying a specific employment practice with greater particularity. FAC ¶¶ 50, 70, 149. Here, the FAC alleges Wal-Mart's failure to require managers to document the reasons for pay or promotion decisions or "maintain records which identify the impact of separate components" of its pay and promotion practices, may foreclose the ability to identify the particular employment practice that caused the observed disparities adverse to women. FAC ¶¶ 50, 70, 149. As such, the Civil Rights Act of 1991 would, as the FAC alleges, relieve Plaintiffs of the obligation to identify the specific facets of these practices that caused the disparities, and the entire decisionmaking process for compensation and promotions decisions may be analyzed as one employment practice. 42 U.S.C. § 2000e-2(k)(1)(B)(i); FAC ¶¶ 50, 70, 149.

Indeed, the Sixth Circuit has cited the Supreme Court's decision in *Dukes* concerning the requirement that plaintiffs are "responsible for isolating and identifying the specific employment practices," while recognizing that "subjective decision-making" can be challenged as a single practice that does not require isolating the effect of each specific practice, where plaintiffs

demonstrate "the elements of [an employer's] decisionmaking process are not capable of separation or analysis." *Grant v. Metro. Gov't of Nashville & Davidson Cnty.*, 446 Fed. App'x 737, 740 (6th Cir. Aug. 26, 2011) (unpublished) (citing 42 U.S.C. § 2000e–2(k)(1)(B)(i) and *Phillips v. Cohen*, 400 F.3d 388, 398 (6th Cir. 2005)). Thus, Wal-Mart's contention that this provision excludes subjective decisionmaking processes is entirely without merit.

Wal-Mart is wrong in contending that Plaintiffs have waived reliance on this provision of the Civil Rights Act, Mot. 20, as this provision was not at issue before this Court or the Supreme Court. In its class certification ruling, this Court ruled that Wal-Mart's policy of providing managers with broad discretion in making pay and promotion decisions was subject to challenge as a single employment practice. *See Dukes*, 222 F.R.D. at 167-68. Accordingly, Plaintiffs had no need to raise this issue earlier and, in fact, neither party raised this issue below. *See* Dkt. Nos. 99, 223, 562. Thus, neither the district court nor the Ninth Circuit ever considered whether the policy was "capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i). Not surprisingly, the Supreme Court did not address this issue, leaving open the question whether Plaintiffs must identify with more particularity those employment practices that caused the observed disparities adverse to women.

Wal-Mart is equally mistaken in contending this provision of the Civil Rights Act of 1991 is inapplicable here. Citing no authority, Wal-Mart asserts that the interpretive guidance Congress provided for this provision limits its applicability to tests or specific evaluation criteria. *See* Mot. 21.[19] The plain language of the statute, however, does not so narrowly limit application of this section. The Act states that where "the elements of a respondent's *decisionmaking process* are not capable of separation for analysis, the *decisionmaking process* may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added). In interpreting this section of the Act, courts have repeatedly recognized that subjective decisionmaking processes

[19] The Title VII Interpretive Memorandum provides that "[w]hen a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test . . . the particular, functionally-integrated practices may be analyzed as one employment practice." *See* 137 Cong. Rec. S15,273 (daily ed. Oct. 25, 1991).

may be challenged as a single, functionally integrated practice.[20]

Wal-Mart is on no stronger footing in arguing Plaintiffs' claims must "point to specific policies that affected *every* proposed class member similarly." Mot. 20 (emphasis added). No requirement exists that, to certify a disparate impact claim, plaintiffs must demonstrate every class member was adversely affected by the challenged policy. That standard would be more onerous than what is required to prove liability. Disparate impact claims "involve employment practices that are facially neutral in their treatment of different *groups* but that in fact fall more harshly on one *group* than another and cannot be justified by business necessity." *Teamsters*, 431 U.S. at 336 n.15; *accord Watson*, 487 U.S. at 987 (quoting *Teamsters*, 431 U.S. at 336 n.15). To sustain a prima facie case for a disparate impact claim, plaintiffs must show: "(1) an identifiable, facially neutral personnel policy or practice; (2) a disparate effect *on members* of a protected class; and (3) a causal connection between the two." *McClain*, 519 F.3d at 275-76 (emphasis added) (citing *Watson*, 487 U.S. at 994).

The causation inquiry focuses on the impact of the challenged practice on the protected group as a whole, not on every individual class member. As the Supreme Court explained in *Teamsters*, at the liability stage of a pattern or practice suit a plaintiff is not "required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." *Teamsters*, 431 U.S. at 360. The same is true in certifying a class in a disparate impact case,

[20] *See, e.g.*, *McClain v. Lufkin Indus.*, 519 F.3d 264, 272 (5th Cir. 2008) (finding subjective practices challenged were not capable of separation for analysis and, therefore, could be challenged as a single employment practice); *Phillips*, 400 F.3d at 398-99 (considering subjective promotion practices as one practice incapable of separation for analysis); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal. 1992) (finding that in light of the absence of written policies or justifications for promotional decisions the "subjective and ambiguous decision making processes are not separable for the purposes of analysis, and therefore may be analyzed as one employment practice"); *Butler v. Home Depot, Inc.*, No. C-94-4335, 1997 U.S. Dist. LEXIS 16296, at *47 (N.D. Cal. Aug. 28, 2007) (subjective decisionmaking process incapable of separation where there were "[v]irtually no written criteria for systematically evaluating the qualifications of individual candidates"); *Schallop v. N.Y. State Dept. of Law*, 20 F. Supp. 2d 384, 402 (N.D.N.Y. 1998) (entire process may be characterized as a single employment practice when decisions are made based on variable, subjective criteria).

since the focus at the liability phase will be on discrimination against "the *protected group as a whole*." *United States v. City of New York*, 276 F.R.D. 22, 34 (E.D.N.Y. 2011) (emphasis added).

Here, Plaintiffs' disparate impact claims present questions common to the class that can be adjudicated on behalf of the class. The FAC challenges: Wal-Mart's failure to ensure its managers relied upon job-related criteria in making pay and promotion decisions; Wal-Mart's requirement that, as a pre-condition to advancement, candidates must be willing to relocate their residence; and Wal-Mart's failure to post management job vacancies consistently. Each of these neutral policies or practices, which allegedly had an adverse effect on women, present questions that can be adjudicated together on behalf of each member of the California Regions classes. As the Ninth Circuit has recognized, "the focus in a disparate impact case is usually 'on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.'" *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (quoting *Watson*, 487 U.S. at 987); *see also Paige v. California*, 291 F.3d 1141, 1145 (9th Cir. 2002) ("the best evidence of discriminatory impact is proof that an employment practice selects members of a protected class . . . in a proportion smaller than in the actual pool of eligible employees."). The FAC's alternative allegation, that the subjective decisionmaking practices are "not capable of separation for analysis," likewise presents a question common to the class. FAC ¶¶ 50, 70, 149. As such, the disparate impact claim presents questions common to the class that are capable of adjudication "in one stroke." *Dukes*, 131 S. Ct. at 2551.

c. Plaintiffs' Class Claims Satisfy Rule 23(b)(3) and 23(c)(4)

The FAC also fundamentally recasts the way monetary relief claims would be pursued by the proposed class. Prior to the Supreme Court's decision, every circuit to address the issue had held Title VII back pay claims could be certified under Rule 23(b)(2). *Dukes*, 603 F.3d at 618. But the Supreme Court held claims for monetary relief cannot be certified under Rule 23(b)(2), "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief," and should instead be considered for certification under Rule 23(b)(3). *Dukes*, 131 S. Ct. at 2557.

Both before and after *Dukes*, the Ninth Circuit and other courts have repeatedly held that class claims for injunctive and declaratory relief under Title VII may be certified under Rule

23(b)(2). Nothing in the Supreme Court's decision alters the susceptibility of such remedies to certification under Rule 23(b)(2). Wal-Mart's assertion that Plaintiffs are not permitted to seek certification of a different (b)(2) class is entirely without merit, and relies on a single inapposite case.[21] Nor did the Supreme Court address the circumstances in which claims to various forms of monetary relief can be eligible for class treatment. Since the *Dukes* decision, however, the Ninth Circuit and other courts have ruled back pay claims can be certified pursuant to Rule 23(b)(3), as Plaintiffs have alleged here.[22] Courts subsequent to *Dukes* have also recognized that the Supreme Court did not overrule prior precedent permitting certification under Rule 23(c)(4), which permits partial certification of particular issues, where it will reduce the range of disputed issues and achieve judicial efficiencies -- even where separate individualized proceedings will be necessary to resolve individualized monetary issues. *See, e.g.*, *McReynolds*, 2012 U.S. App. LEXIS 3683, at *27; *City of New York*, 276 F.R.D. at 33-35. Accordingly, the FAC has set forth allegations that would permit their claims to declaratory, monetary and injunctive relief to be certified.

II. CLASS MEMBERS RETAIN THEIR *AMERICAN PIPE* TOLLING RIGHTS IN THIS NARROWED PENDING CLASS ACTION

Wal-Mart argues that the FAC's redefined classes are time-barred because the putative class may no longer benefit from *American Pipe* tolling rights that began with the filing of the national class complaint in this action. Wal-Mart asserts that (1) Plaintiffs' amended class action complaint in this proceeding constitutes a new, separate case, and (2) members of a second narrower putative class action are categorically barred from relying on tolling to seek certification

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[21] *See* Mot. 22 (citing *SEC v. Tambone*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc)). But *Tambone* held only that a party may not raise for the first time on appeal a new argument that was not made before the district court.

[22] *See, e.g.*, *Costco*, 657 F.3d at 987 n. 10 (directing that on remand district court should consider whether it may appropriately certify a class seeking injunctive relief under Rule 23(b)(2) and damages under Rule 23(b)(3)); *City of New York*, 276 F.R.D. at 26-27 (post-*Dukes* certifying under Rule 23(b)(2) liability and injunctive relief alleged under disparate treatment and impact theories, and certifying claims of over 7000 class members for back pay and other relief pursuant to Rule 23(b)(3)); *Easterling v. Connecticut Dep't of Corr.*, No. 3:08-cv-826, 2011 U.S. Dist. LEXIS 134524, at *27-28 (D. Conn. Nov. 22, 2011) (post-*Dukes* certifying in a 23(b)(2) class liability and declaratory and injunctive relief on disparate impact claims, while certifying in a 23(b)(3) class claims for monetary and individualized injunctive relief).

of a second class action. Supp. Mot. 1-4. Wal-Mart's arguments fail for three important reasons. First, this is not a new or successive case but a continuation of the same pending action. Second, even if this could be considered a second class case, under Ninth Circuit precedent former class members from a prior case in which certification was denied are not foreclosed from relying on tolling to pursue a narrower or substantially different class. Third, recent Supreme Court authority has superseded earlier decisions that had barred plaintiffs from pursuing certain types of second class actions after certification was denied in an earlier class action.

A. Supreme Court and Ninth Circuit Jurisprudence Supports Tolling of Class Claims

The Supreme Court has twice addressed the tolling rights class members *acquire* when a class action is filed and *retain* after certification is denied. *American Pipe*, 414 U.S. 538; *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). In *American Pipe*, the Court established that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class," and held that absent class members may intervene in an individual action that continued after denial of class certification. 414 U.S. at 554. In *Crown*, the Court extended *American Pipe* to allow tolling not only where plaintiffs sought to intervene in a continuing action, but also where they sought to file an entirely new action. *Crown*, 462 U.S. at 354. Thus, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id*.

Since *Crown* involved a plaintiff who filed a new *individual action* after certification was denied in a prior class action, *id.* at 347, the Court did not specifically address two questions: (1) do class members retain *American Pipe* tolling rights after certification is denied when they amend the complaint in the same pending action to seek certification of a different or narrower class; and (2) may class members who retain tolling rights as individuals aggregate their claims in a new, second class action asserting the same or similar claims as the first class action?

The Ninth Circuit, sitting en banc, answered both questions in *Catholic Social Services*, 232 F.3d at 1146-49. As to the first, the Ninth Circuit recognized that class members *do retain* their tolling rights when named plaintiffs amend their complaint to seek certification in the same

pending action. *Id.* at 1146. There, because a prior Ninth Circuit panel had earlier vacated a district court's order granting certification and "remanded with instructions to dismiss the complaint," class members were required to file a new action, and, as a result, confronted whether tolling continued in the second action -- a question that would not be an issue if they were permitted to continue their pending action. *Id.* The Ninth Circuit recognized that:

> [I]t would have been by far the better course for the panel in *CSS V* to remand with instructions to allow amendment of the complaint to satisfy requirements imposed for the first time while the case was on appeal. If the panel in *CSS V* had allowed such amendment, *there would be no tolling and class certification issues.* But because the panel ordered the dismissal of the action in *CSS V*, plaintiffs were obliged to file a new action rather than allowed to continue their pending action.

Id. (emphasis added). Here, since the Supreme Court did not order dismissal of Plaintiffs' action, and Plaintiffs have amended their complaint to state claims that satisfy the new requirements set forth on appeal, there should be no question that tolling continues for the proposed modified classes.

B. This Is the Same Pending Action, Not a New or Second Class Case

Wal-Mart's argument that this is a separate, successive class case, Supp. Mot. 1-4, ignores that this action is a continuation of the same pending action, not a separately filed new case. Plaintiffs amended their complaint to propose a narrower class that satisfies the new standards established by the Supreme Court, and thus, as *Catholic Social Services* instructs, "there would be no tolling . . . issues" as there would be with the filing of a "new action." 232 F.3d at 1146. Wal-Mart's contention that it does not matter that "plaintiffs have amended their complaint instead of filing a new action," Supp. Mot. 4,[23] ignores this principle recognized by the Ninth Circuit and other courts that when plaintiffs respond to an initial unsuccessful certification

[23] Wal-Mart's citation to a single out-of-circuit district court decision denying intervention to seek certification of a modified class after certification was denied is of no moment here. Supp. Mot. 4 n.2 (citing *Fleck v. Cablevision VII, Inc.*, 807 F. Supp. 824, 827 (D.D.C. 1992)). First, *Fleck* conflicts with *Catholic Social Services*, which recognized that tolling continues where plaintiffs amend their complaint to seek certification of a different class. 232 F.3d at 1146. Second, the only reason *Fleck* gave for eliminating tolling rights in a pending action was that to do otherwise may create "the potential for abuse," 807 F. Supp. at 827, a rationale the Supreme Court soundly rejected in *Smith v. Bayer*, 131 S. Ct. 2368, 2381 (2011).

bid, or an order dismissing the class action, by amending the complaint to seek certification of a narrower or different class, their *American Pipe* tolling rights remain undisturbed. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 617 F. Supp. 2d 195, 199-200 (S.D.N.Y. 2007) (holding tolling rights continued for class members in same pending class action where plaintiffs sought to certify narrower class after Second Circuit vacated prior certification); *Coleman v. GMAC*, 220 F.R.D. 64, 96-97 (M.D. Tenn. 2004) (holding class members' tolling rights in discrimination case were undisturbed by Sixth Circuit's vacating grant of certification, as named plaintiffs amended complaint and moved to certify different class to satisfy Rule 23(b)(2) as interpreted by prior appeal, and action "is not an additional or new class action, but merely the continuation of the original class action"); *see also Andrews v. Orr*, 851 F.2d 146, 148-50 & n.1 (6th Cir. 1988) (noting that after denial of certification, named plaintiffs in an earlier action could potentially have "revived or reactivated tolling" by filing a renewed certification motion in the first action within the administrative charge filing period).

In such cases, it remains reasonable for members of the absent class to rely on an amended class complaint to advance their rights, and the class members' tolling rights continue until the proposed class is definitively denied.[24] Similarly, here, the Named Plaintiffs have taken action to pursue substantially revised proposed classes within the time frame set in this Court's August 19, 2011 tolling order. Dkt. 760.

Further, as Rule 23 clearly affords district courts discretion to re-consider certification any time before final judgment, Fed. R. Civ. P. 23(c)(1)(C), Wal-Mart's argument is at odds with Rule 23 and, if accepted, would divest this Court of its discretion under that rule. *See Crown*, 462 U.S. at 353 (rejecting view that tolling should be limited to intervenors, as it would conflict with and render meaningless Rule 23's opt-out provision).

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[24] The statute of limitations period recommences once it is no longer reasonable for class members to rely on the class to protect their rights. *See In re IPO*, 617 F. Supp. 2d at 200 ("until this Court (or a higher Court) definitively denies the pending motion for class certification" "it remains reasonable for [putative class members] to rely on these actions continuing as class actions and on their inclusion in those class actions") (citing *Crown*, 462 U.S. at 352-53); *see also Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985) (plaintiff could rely on tolling in a related class action until she opted-out).

C. Plaintiffs Retain Tolling Rights Because They Propose Certification of Substantially Revised, Narrower Classes and Do Not Seek to Relitigate the Denial of Certification

Even if the pending action were considered a *new, second* class action for the purposes of *American Pipe* tolling, it satisfies the standard adopted in *Catholic Social Services*, 232 F.3d at 1147, 1149, for allowing class members to retain their tolling rights. Plaintiffs are not relitigating deficiencies in the earlier class, but instead have proposed a narrower revised class.

In addressing the second question left open by *Crown*, the Ninth Circuit rejected a categorical bar on second class actions benefiting from *American Pipe* tolling, holding that class members may join in a successive class case with the benefit of tolling from the original action when they "are not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Catholic Soc. Servs.*, 232 F.3d at 1149. Explaining the meaning of this standard, the court observed that *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), had "interpreted *American Pipe* not to allow tolling when the district court in the previous action had denied class certification, and when the second action sought to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Catholic Soc. Servs.*, 232 F.3d at 1147; *see also id.* (citing *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998), as an example of another circuit applying the same principle). In *Robbin*, the second action attempted to circumvent the prior certification decision, because the second class case tried to certify the same nationwide class of shareholders that another federal court had rejected based on the same violations. 835 F.2d at 213-14. Similarly in *Basch*, four separate actions sought to certify "nearly identical" classes alleging company-wide age discrimination. 139 F.3d at 7-8.

Applying these decisions, a court in this district interpreted *Catholic Social Services* to permit *American Pipe* tolling in a second class action proposing a narrower class based on similar claims. *Gardner v. Shell Oil Co.*, No. 09-05876(CW), 2010 U.S. Dist. LEXIS 38357, at *11-14 (N.D. Cal. Apr. 19, 2010). In *Gardner*, the court held that the plaintiffs' new case, by proceeding on behalf of a narrower class, remedied "the flaws identified in the class proposed in the prior lawsuit," which was brought on behalf of a broader class. *Id.* The newly narrowed class thus fell within the exception identified by *Catholic Social Services*, since plaintiffs did not seek "to

relitigate the same issues addressed in the [prior] denial of class certification" or "correct a procedural deficiency." *Id*. (citing *Catholic Soc. Servs.*, 232 F.3d at 1149). Similarly, *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp.2d 710 (S.D. Ind. 2008), held that *American Pipe* tolling must be permitted in a second class case since the Supreme Court's reasoning was not "limited to individual suits as distinct from fresh attempts to certify a class," and a rule foreclosing tolling would undermine *American Pipe*'s goals since it would create incentives for class members to file new class cases before a certification decision. *Id.* at 713, 716. The court recognized that cases denying tolling in second class actions "have departed from the reasoning of the Supreme Court decisions," and the court explained that the problem of relitigation is "better addressed by the usual tools for such issues: issue preclusion and the precedential value of the initial decision." *Id*.

Although some courts have interpreted *Catholic Social Services* and other circuits' precedent to bar plaintiffs from bringing even narrower second class cases that rely on *American Pipe* tolling,[25] those decisions have been superseded by recent Supreme Court authority in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), as described below. Moreover, in light of the fundamental principles established in *Shady Grove* and *Smith* regarding class members' rights under Rule 23, the standards *Catholic Social Services* adopted to determine when tolling is permissible in second class cases should, at the very least, be read broadly and consistently with these decisions to permit tolling here, where Plaintiffs have substantially revised and narrowed their class claims and do not seek to relitigate issues concerning the denial of the original nationwide class.

D. Recent Supreme Court Authority Makes Clear Class Members Retain Tolling Rights in a Second Class Action Seeking to Certify a Narrower Class or the Same Class

Two recent Supreme Court decisions have superseded any rule in *Catholic Social Services* and other decisions that would bar a second class action from relying on *American Pipe* tolling rights. *See Smith*, 131 S. Ct. 2368 (2011); *Shady Grove*, 130 S. Ct. 1431 (2010).

[25] *See, e.g., Sheppard v. Capital One Bank*, CV 06-7535 GAF (FFMx), 2007 U.S. Dist. LEXIS 70061 at *10-12 (C.D. Cal July 12, 2007) (finding tolling did not extend to a second class case that included a narrowed subclass, but "contains virtually the same allegations" as a prior broader class action filed in state court that certified only an Arkansas subclass).

1. *Shady Grove* Mandates That Absent Class Members Be Permitted to Aggregate Their Individual Claims in a Rule 23 Class Action

Catholic Social Services and similar cases in other circuits rested upon a belief, since rejected by the Supreme Court, that class members who possess individual *American Pipe* tolling rights could be foreclosed from relying on their tolling rights in pursuing a successive class action. In *Catholic Social Services*, the Ninth Circuit explained that, while there "is no dispute" that members of the first proposed class could "have filed individual actions after the dismissal of their class action," given that they retain *American Pipe* tolling rights as individuals, it remained unclear "whether th[e] same plaintiffs should be permitted to aggregate their individual actions into a class action." 232 F.3d at 1147; *see also id.* (noting this question is not "a statute of limitations question at all," but "rather a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class to litigate those actions").

The Supreme Court answered this question in *Shady Grove*, 130 S. Ct. at 1437-40. There, the Court held that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question." *Id.* at 1437. As Justice Scalia explained on behalf of a unanimous Court, New York State could not give individuals a right to obtain statutory penalties but prohibit a class action that aggregates the individual claims for penalties. Whatever New York's objective was in barring the aggregation of claims, the Court held that "it cannot override [Rule 23's] clear text." *Id.* at 1438-40.

After *Shady Grove*, it is now clear that plaintiffs who retain *American Pipe* tolling rights as individuals must be able to aggregate their individual claims by pursuing a class action. Neither a legislature nor a court has the power to trump Rule 23 in service of a judicially-crafted policy by barring litigants whose class action otherwise satisfies Rule 23. *See Hershey v. Exxon Mobil Oil Corp.*, No. 07-1300-JTM, 2011 U.S. Dist. LEXIS 147755, at *13-18 (D. Kan. Dec. 22, 2011) (noting the trend in federal courts of allowing second class actions to aggregate their *American Pipe* tolling rights is "reflected in" *Shady Grove*) (citing *Sawyer v. Atlas Heating &*

Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011) (Easterbrook, J.), *superseded on other grounds by Smith*, 131 S. Ct. 2368 (2011)).

2. *Smith* Squarely Rejected the Two Policy Rationales Courts Had Relied Upon to Bar Some Second Class Actions From Retaining Tolling Rights

Smith even more clearly supports the ability of former members of a failed class action to retain their *American Pipe* tolling rights when they pursue a second class action. *Smith* firmly rejected the two policy reasons on which courts have relied to bar new, successive class actions in which class members retain their original tolling rights. *See Smith*, 131 S. Ct. at 2379-82. The first rationale "concern[s], not the statute of limitations or the effects of tolling, but the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Sawyer*, 642 F.3d at 563 (citing decisions from eight circuits, including *Catholic Social Services*). The second rationale is to prevent abuse of the class action device. *Robbin*, 835 F.3d at 214 (allowing use of the original tolling in a new, second class action "'falls . . . into the range of abusive options'") (quoting *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987)).

In *Smith*, however, a unanimous Supreme Court held that neither of these rationales gives a court authority to bar a second class action. 131 S. Ct. at 2379-82. There, the Supreme Court held the denial of certification by a first court cannot bar absent class members from pursuing the same claims in a second class action, and a federal court therefore cannot enjoin another court from considering the second class action. *Id.* at 2379-80.[26] The Court explained that unless a class is properly certified, absent class members are not parties before the court and, therefore, they cannot be collaterally-estopped from litigating class certification after it was previously denied by a different court. *Id.* at 2380-81 ("[n]either a proposed class nor a rejected class may bind nonparties."). In addition, *Smith* soundly rejected the very argument Wal-Mart advances

[26] While *Smith* involved a federal court enjoining a state court from considering a second class action, the Supreme Court subsequently applied the same principle where both tribunals were federal courts. In *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 852-54 (7th Cir. 2010), the Seventh Circuit ordered a district court to enjoin another federal court from allowing a successive class action to proceed after the first district court had denied certification of a similar class. The Supreme Court vacated the Seventh Circuit's ruling and remanded "in light of *Smith v. Bayer Corp.*" *Thorogood v. Sears, Roebuck & Co.*, 131 S. Ct. 3060, 3061 (2011).

here, that use of original tolling in a successive class action would constitute an abuse of class actions. In *Smith*, the defendant had argued that a successor class action must be precluded by "policy concerns relating to the use of the class action device" and how "class counsel can repeatedly try to certify the same class." *Id.* at 2381. The Court rejected this contention, as "this form of argument flies in the face of the rule against nonparty preclusion." *Id.* As the Supreme Court explained, instead of barring second class actions to avoid abuse, "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* After *Smith*, courts cannot deny tolling and refuse to hear successive class actions either because some or all class members were a part of a prior class action in which certification was denied or because pursuit of a successor class action could invite abuse. Thus, courts may not bar former members of a failed class action from relying upon their original tolling in a successive class action.

This result is consistent with *Crown*, which held that class members may file successive actions to enforce their rights and rejected the concern that this would require the defense of multiple subsequent cases. Observing that allowing successive actions to benefit from *American Pipe* tolling is consistent with the purpose of statutes of limitations, *Crown* noted that "[t]olling the statute of limitations" after a prior class action was filed "creates no potential for unfair surprise, *regardless of the method class members choose to enforce* their rights upon the denial of class certification," as the defendant was already notified of potential plaintiffs and their substantive claims. *Crown*, 462 U.S. at 353 (emphasis added). Like the *Smith* Court, *Crown* rejected the argument that a defendant might have "to defend against multiple actions in multiple forums once a class has been decertified," as "this is not an interest that statutes of limitations are designed to protect," and noted there are "[o]ther avenues" to avoid the burdens of successive lawsuits. *Id.* (citing similar procedures as *Smith* did).

3. *Smith* Makes Clear that Collateral Estoppel Cannot Bar the Same Named Plaintiffs From Seeking to Certify a Narrower Class

Even if this could be considered a second class case, which it is not, *Smith* also reinforces why collateral estoppel principles cannot bar *the same named plaintiffs* from seeking to certify *a*

narrower class in a second class case. As *Smith* explained, for a first court's class certification decision to have a preclusive effect in a second action, the "issue" the first court "decided must be the same as the one presented" in the second action. 131 S. Ct. at 2376-79 (holding issue was not same in both actions, as certification standard applied by the first federal court was different than the certification standard applied in second state court action). Here, the issue presented to this Court – whether a regional class may be certified under Rules 23(b)(2) and (b)(3) or (c)(4) – is plainly a different issue than the one the Supreme Court decided – whether a national class may be certified solely under Rule 23(b)(2). *See, e.g., Salgado v. Wells Fargo Fin., Inc.*, No. Civ. 08-0795, 2008 U.S. Dist. LEXIS 78699, at *5-10 (E.D. Cal. Oct. 3, 2008) (holding second class action seeking to certify state-wide class after prior court rejected nationwide class did not raise identical issue, following other cases holding the same). In any event, collateral estoppel cannot possibly bar the Named Plaintiffs from seeking to certify a narrower class here, as there has never been a "'final judgment on the merits'" in this action. *Id.* at *5 (quoting *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000)).

For these reasons, Wal-Mart's contention that Plaintiffs' class claims are untimely must be rejected.

III. ALL ABSENT CLASS MEMBERS NEED NOT FILE EEOC CHARGES TO REMAIN IN THE NARROWED PROPOSED CLASS

Wal-Mart asserts that absent class members in this narrowed putative class action can no longer benefit from the single-filing rule. To participate in this class action, Wal-Mart argues absent class members must file individual EEOC charges by the dates provided by this Court's tolling order. Mot. 24-26. In making this argument, Wal-Mart asks this Court to reconsider and overturn several key aspects of its 2002 order on the single-filing rule. *Id.* 27-33. All of these arguments are meritless and should be rejected.

Under the single-filing rule, "a named plaintiff who has filed a timely [EEOC] charge may bring a class action on behalf of class members who have not filed charges." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984) (citing *Albemarle Paper Co. v. Moody*,

422 U.S. 405, 414 n.8 (1975)).[27] Nearly ten years ago, this Court determined how the single-filing rule applies in this case, holding that: (1) "[a] named plaintiff who has filed a timely EEOC charge may bring a class action on behalf of class members who have not filed such charges," Dkt. 81 at 12 n.4 (citing *Albemarle*, 422 U.S. at 414 n.8); (2) "all named plaintiffs in a Title VII class action need not individually exhaust EEOC charge-filing requirements prior to joining a class action," *id.* at 12; and (3) two Named Plaintiffs who had not filed EEOC charges "may rely on the administrative [charge] of [a] former representative plaintiff," Stephanie Odle, who was dismissed as a Named Plaintiff for improper venue. *Id.* at 16.

A. Plaintiffs May Still Rely on the Single-Filing Rule

Wal-Mart asserts that the single-filing rule does not apply in a new or separate class action after an "initial bid for class certification" fails. Mot. 25. As described above, this is not a new, second class action. Plaintiffs have simply amended their complaint to seek certification of a modified, narrower class. Under such circumstances, tolling rights and single-filing rule rights, in cases brought under Title VII, remain undisturbed for all class members in the amended proposed class. *See Catholic Soc. Servs.*, 232 F.3d at 1146; *In re IPO*, 617 F. Supp. 2d at 199-200; *Coleman*, 220 F.R.D. at 96-97; *Andrews*, 851 F.2d at 148-50 & n.1. Indeed, the Ninth Circuit and other courts interpret the single-filing rule to benefit absent class members to the same extent that

[27] While Wal-Mart suggests the Supreme Court, the Ninth Circuit, and other circuits have incorrectly interpreted Title VII in adopting the single-filing rule, Mot. 25 & n.7, this Court is bound by controlling precedent on this very issue. Moreover, this Court's own decision applying that precedent remains law of the case. *See* Dkt. 81 at 4, 11-13. The Supreme Court has held numerous times that "even [] unnamed class members who have not filed EEOC charges" can receive relief in a class action. *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197 n.4 (2010) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976)); *accord United Airlines, Inc. v. McDonald*, 432 U.S. 385, 389 n.6 (1984) (citing *Albermarle*, 422 U.S. at 414 n.8). Thus, such class members must be permitted to participate in a class action. Wal-Mart's citation to *Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996), is baffling, as that decision did not question the single-filing rule and considered only whether a class claim can rely on an EEOC charge that does not explicitly raise class claims. Similarly, Wal-Mart cites *Almond v. Unified Sch. Dist. # 501*, No. 10-3315, 2011 WL 5925312, at *2 (10th Cir. Nov. 29, 2011), which did not involve a class action or a Title VII claim. Nor did it question the single-filing rule.

American Pipe tolling principles do so. Thus, where *American Pipe* tolling applies, individual administrative exhaustion is not required and class members may rely on the single-filing rule.[28]

Applying the single-filing rule to the narrowed proposed class here fully satisfies "the policy underpinnings of Title VII and the single-filing rule -- notice to the defendant." Dkt. 81 at 12. As this Court explained in 2002, when former Named Plaintiff Odle filed her EEOC charge, "Wal-Mart was put on notice regarding allegations of institutionalized discrimination against woman as early as October 1999 and . . . definitely by July 8, 2001, when this action was filed." *Id.* at 9, 14. As in 2002 when Wal-Mart *unsuccessfully* argued "the notice provided by Odle's charge was negated as a result of this Court dismissing her for improper venue," here again, "Wal-Mart cannot be reasonably heard to argue" that by amending the complaint to seek certification of a *narrower class* the notice that supported a nationwide class 10 years ago was somehow negated. *Id.* at 15 & n.6 ("It is well established that one cannot in reality unring a rung bell.") (citing *inter alia McDonald v. United Air Lines, Inc.*, 587 F.2d 358 (7th Cir. 1978) (settlement of individual charges that put employer on notice of class claims does not negate notice or single-filing rule for rest of class)). Since the Court already held that Ms. Odle's charge provided sufficient notice of a nationwide pattern or practice of sex discrimination, this would necessarily afford Wal-Mart notice of similar discrimination against class members who worked in the California Regions. The EEOC's investigation of a nationwide pattern or practice of sex discrimination would be reasonably expected to consider whether similar discrimination persisted throughout Wal-Mart's California Regions. *See Paige*, 102 F.3d at 1041-42 (individual charge exhausts for class if the class claims could fall "within the scope of . . . an EEOC investigation

[28] *See* Dkt. 81 at 7, 9, 14-15 (considering *American Pipe* tolling principles to decide if single-filing rule applies here and noting how the Ninth Circuit did the same in *Inda v. United Air Lines Inc.*, 565 F.2d 554 (9th Cir. 1977)); *McDonald v. Sec'y of Heath & Human Servs.*, 834 F.2d 1085, 1092 (1st Cir. 1987) (*American Pipe* tolling principles "are generally applicable" to "administrative exhaustion"); *Lopez v. Heckler*, 725 F.2d 1489, 1506-07 (9th Cir. 1984), *vacated on other grounds*, 469 U.S. 1082 (1984) (citing tolling and single-filing rule cases for proposition that under Title VII "the statute of limitations is deemed tolled retroactively for all unnamed class members as of the time the class representative filed his administrative charge with the EEOC," and a single administrative complaint puts the employer on "notice of the class-wide grievance").

which *[could] reasonably be expected* to grow out of the charge of discrimination") (internal quotations and citation omitted).

Wal-Mart's assertion that it is "unaware of the specific complaints . . . of each absent putative class member," Mot. 26, is irrelevant to whether it had adequate notice of Plaintiffs' class claims in this pending class action. As this Court previously held, Wal-Mart has been afforded "notice of the breadth of claims, including claims that its employment practices affected others similarly situated." Dkt. 81 at 9. The Court held that it is "clear from the factual record" that Wal-Mart "received adequate notice of the 'substantive claims being brought against them [and] of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" Dkt. 81 at 9, 14 (quoting *American Pipe*, 414 U.S. at 555). Under these circumstances, allowing class members to rely on the single-filing rule "creates no potential for unfair surprise." *Crown*, 462 U.S. at 351-53.

Based on the same reasoning that an original charge puts an employer on notice, courts have applied the single-filing rule to class actions that—unlike this action—are actually new, second actions. *See, e.g.*, *Cronas v. Willis Group Holdings Ltd.*, 06 Civ. 15295, 2007 U.S. Dist. LEXIS 68797, at *2-5, *11-21 (S.D.N.Y. Sept. 17, 2007) (Lynch, J.) (single-filing rule permitted Named Plaintiffs and absent class members alleging discrimination from 1998 to 2006 to rely on charge of plaintiff in prior class action alleging similar types of claims from 1998 to 2001, as purpose of exhaustion rule is served when first charge and class action put employer on notice).[29]

Applying the single-filing rule here is also fully consistent with the rule's secondary purpose of facilitating conciliation. *See Laffey v. Northwest Airlines*, 185 U.S. App. D.C. 322, 365 (1976) (cited by Dkt. 81 at 10); *Horton v. Jackson Cnty. Bd. of Comm'rs*, 343 F.3d 897, 899 (7th Cir. 2003) (Posner, J.). Wal-Mart had an ample opportunity to conciliate and resolve these claims during the past decade, both *before and during* this action. Wal-Mart's failure to do so

[29] *Cf. Gardner*, 2010 U.S. Dist. LEXIS 38357, at *11-15 (granting equitable tolling, given that prior class action gave "timely notice of Plaintiffs' claims in the present case because the claims in the cases largely overlap," and "Defendants suffer no prejudice in gathering evidence to defend against the present case because the present case is narrower than the [prior] case").

creates a strong inference that renewed efforts to conciliate class or individual claims would be futile and create an unnecessary burden on the parties and the EEOC. *See Horton*, 343 F.3d at 900 (when plaintiffs can maintain a class action, "requiring that every class member file a separate charge might drown agency and employer alike by touching off a multitude of fruitless negotiations," and "it is hard to quarrel with the original application of the single-filing doctrine, which was to class actions"). Indeed, Wal-Mart's contention that each putative class member must file her own charge as a condition of membership in this class directly contravenes the purpose of *American Pipe* tolling and single-filing doctrines, would "frustrate the principal function of the class suit," *American Pipe*, 414 U.S. at 551, and would render Rule 23's opt-out procedure a nullity. *See Crown*, 462 U.S. at 351 (Rule 23 and tolling rule of *American Pipe* were designed to avoid "a needless multiplicity of actions" and cannot be interpreted to render Rule 23's opt-out procedure meaningless).[30]

Finally, the two cases Wal-Mart cites for the proposition that some courts do not allow former class members to rely on a named plaintiff's EEOC charge after the class has been decertified are inapposite. *See* Mot. 25-26. Unlike the amended complaint here, which is a continuation of the same ongoing proceeding, both *Ruehl v. Viacom*, 500 F.3d 375 (3d Cir. 2007) and *Andrews*, 851 F.2d at 148-52, addressed efforts to file an entirely separate action. Moreover, *Ruehl* considered a very different question about whether a former putative class member may rely on the single-filing rule in filing an entirely separate new *individual* action after decertification of an ADEA *collective action*, and thus did not address whether the single-filing

[30] Wal-Mart argues that by setting deadlines for absent class members from the initial nationwide class to file individual charges, this Court's August 19, 2011 tolling order intended to preclude absent class members from participating in narrower regional classes in this same pending action or in narrower regional classes in another federal court action. Mot. 23 (citing Dkt. 760). As this Court is well aware, however, its order did not address this issue, and such a reading is at odds with Plaintiffs' motion, which stated their desire to file a narrower class action before class members' tolling rights expired. *See* Dkt. 740 at 4. Moreover, contrary to Wal-Mart's suggestion, Mot. 24 nn.5-6, by urging class members to consider filing individual EEOC charges to fully protect their rights, class counsel have never suggested that absent class members would be required to file individual EEOC charges to participate in regional classes.

rule applies to a pending Rule 23 class action that seeks a narrower certification. *Id*. at 387-89.[31] As the court expressly noted, "[o]ur holding is limited to a decertified collective action. We express no opinion about application of the rule in the context of a decertified, Rule 23 class action." *Id*. at 390 n.19. Further, *Ruehl* reasoned that as a court had earlier decided that plaintiffs' claims were insufficiently similar to warrant collective action certification, the prior action only put the employer on notice of class claims and not plaintiff's "individual claim" and thus conciliation of the individual claim was not futile. *Id*. at 387-89. Here, in contrast, as Wal-Mart has been and continues to be on notice of Plaintiffs' class claims, further conciliation would be futile.

In *Andrews*, the Sixth Circuit did not even discuss the question of whether plaintiffs can rely on the single-filing rule to exhaust administrative remedies under Title VII, but instead addressed the application of the *American Pipe* tolling doctrine to a new or successive class action. *See supra* § II. Moreover, in adopting a rule that certain new, successive class cases cannot rely on *American Pipe* tolling, *Andrews* relied on prior decisions that solely relied on the policy rationale of preventing class action abuse, *Andrews*, 851 F.2d at 149, a rationale the Supreme Court rejected in *Smith*. *See supra* § II(D)(2)-(3). Accordingly, *Andrews*' rule on new, second class actions is superseded by *Smith*, as well as *Shady Grove*. *See id.*

B. Plaintiffs May Continue to Rely on Stephanie Odle's EEOC Charge

The Court should reject Wal-Mart's request to reconsider its prior holding that the single-filing rule allows Named Plaintiffs and all putative class members to rely on the EEOC charge of Stephanie Odle, a former named plaintiff who was dismissed for improper venue. Dkt. 81 at 15-16 ("When the First Amended Complaint was filed, the 300 day statute of limitations period was tolled as to all class members who had a claim falling within Odle's October 1999 charge."). This Court's Order, issued in 2002, which confirmed that Odle's charge qualifies to anchor the opening date of the national class period, remains law of the case, notwithstanding that former

[31] Other circuits have rejected *Ruehl's* unduly narrow view that the single filing rule cannot apply to *subsequent individual actions* after denial of certification in a prior collective action. *See, e.g.*, *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2d Cir. 1990).

named plaintiff Odle is no longer an absent class member in this action.

Wal-Mart's contention that *Inda v. United Air Lines Inc.*, 565 F.2d 554 (9th Cir. 1977), bars application of the single-filing rule, Mot. 27-28, is no more valid today than it was in 2002, when this Court first rejected it. Dkt. 81 at 6-10. First, unlike the plaintiffs in *Inda* who "sought to rely on the administrative charges of individual employees filed in a separate action," Plaintiffs here rely on the charge of Ms. Odle, who filed the original class complaint and served as a class member in the national class action for 10 years. *Id.* at 9. "Second, *and more important*, the plaintiffs in *Inda* attempted to rely on the EEOC charge of [an individual] who sued only on her own behalf," "[w]hereas Odle filed her charges on her own behalf as well as for others similarly situated." *Id.* (emphasis added). Third, as this Court earlier held, *Inda* "predicated its decision on the fact that a filing of an EEOC charge by an employee 'on his own behalf' does not act on behalf of a class and does not provide the defendant-employee with adequate notice of the 'substantive claims,'" whereas here "notice of the breadth of the claims, including claims that its employment practices affected others similarly situated, was afforded Wal-Mart here" through Ms. Odle's charge. *Id.* (quoting *American Pipe*, 414 U.S. at 555).[32]

Further, at least two later rulings have incorporated Odle's charge, including one after the reversal of certification in *Dukes*. This Court's certification order established the beginning of the class period as December 26, 1998, based on Ms. Odle's charge. *Dukes*, 222 F.R.D. at 188. Also, this Court's August 19, 2011 tolling order, which confirmed the dates on which tolling ended for all "former class members," did not alter the prior ruling on the temporal scope of the national class that encompassed all members of the proposed classes here. Dkt. 760 at 1.

Wal-Mart's contention that the 2002 order did not address whether absent class members

[32] A number of courts in this Circuit have followed this Court's 2002 order distinguishing *Inda*. *EEOC v. NCL Am. Inc*, 504 F. Supp. 2d 1008, 1011 (D. Haw. 2007) (application of *Inda* has been limited to where "a plaintiff sought to rely on an administrative charge of an individual employee in a *separate* action, and where the EEOC charge did not give sufficient notice that other similarly-situated persons would also be affected") (citing *Dukes v. Wal-Mart Stores Inc.*, 2002 WL 32769185, at *5 (N.D. Cal. Sept. 9, 2002)); *EEOC v. Cal. Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1265 n.11 (E.D. Cal. 2009) (same); *EEOC v. Fry's Elecs., Inc.*, 770 F. Supp. 2d 1168, 1173 (W.D. Wash. 2011) (citing *Wal-Mart*, 2002 WL 32769184, at *6-7).

can rely on Odle's charge is baseless. *See* Mot. 27-28 & n.9. This Court clearly held Odle's charge and the class complaint tolled the statute of limitations for "all class members." *Id.* at 16. In rejecting Wal-Mart's argument that two Named Plaintiffs who had not filed EEOC charges could not rely on Odle's charge, this Court's holding followed the well-settled rule that absent class members need not individually exhaust their administrative remedies and can rely on the same EEOC charge as named plaintiffs. Dkt. 81 at 4 (citing *Albemarle*, 422 U.S. at 414 n.8).

Contrary to Wal-Mart's assertion, it is legally irrelevant that Odle is no longer an absent class member, as her absence from this action does not alter the notice her charge and class complaint afforded Wal-Mart over 11 years ago. Hardly a "stranger to th[is] suit," Mot. 28, Odle played a crucial role in putting Wal-Mart on notice of the class claims and initiating the action on behalf of a nationwide class that included *all* members of the narrower proposed classes in this same pending action. While this Court's 2002 order noted that Odle was still a class member, that fact was not dispositive to its holding, as Wal-Mart seems to believe, and it was far less significant than the fact that Odle's charge put Wal-Mart on notice of the class claims. *See* Dkt. 81 at 9, 15-16 (holding the "dismissal of Odle" cannot "negate[] the notice afforded by her timely filed EEOC charge"). As this Court made clear, the single-filing rule applies where the original charge put the employer on notice of the nature and scope of the claims, regardless of whether the original charging party remains in the case or retains a live claim. *Id.* at 15 & n.6 (citing *McDonald*, 587 F.2d 357 (settlement of individual charges that put employer on notice of class claims does not negate notice for class)); *see also id.* at 11, 16 (citing *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1389-90 (N.D. Cal. 1979) (allowing class members to intervene as named plaintiffs where original class representative settled individual claim)); *cf. EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 596-97 (7th Cir. 2009) (Easterbrook, J.) (rejecting "legal fiction" that charge withdrawn via single settlement "should be treated just as if no charge ever had been filed," noting "[m]any a defendant would love to decapitate a class after the statute of limitations has run by paying off" a named plaintiff who filed charges, and upholding EEOC rule that "settlement of a single applicant's claim" does not "wipe out a pattern-

or-practice investigation").[33]

Thus, there is no reason to revisit this Court's prior holding that the single-filing rule allows Named Plaintiffs and absent class members to rely on Odle's claim.[34]

C. Plaintiffs Alternatively May Rely on the Charges of Other Named Plaintiffs

Even assuming *arguendo* that Plaintiffs may no longer rely on Odle's charge, they may rely on Betty Dukes' charge or charges of other Named Plaintiffs, albeit with a later starting date for the class period. First, there can be no dispute that Plaintiffs may rely upon Betty Dukes' May 2, 2001 charge as a basis to exhaust the administrative remedies of absent class members in this class proceeding. Wal-Mart conceded as much in earlier briefing. *See* Dkt. 58 at 11 (May 21, 2002). In its brief opposing Plaintiffs' reliance on Odle's charge, Wal-Mart acknowledged without qualification that "only those individuals who were capable of filing timely EEOC charges within 300 days of May 2, 2001," the date Dukes filed her charge, "are able to join in this action." *Id.* (citing *Domingo*, 727 F.2d at 1442, and 42 U.S.C. § 2000e-5(e)). As such, Wal-Mart

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[33] Nor is there any "intervening controlling authority" to avoid application of law of the case doctrine to the 2002 order on the single-filing rule. *Minidoka Irrigation Dist. v. Dept. of the Interior*, 406 F.3d 567, 573 (9th Cir. 2005). Wal-Mart's out-of-circuit cases, Mot. 28, are obviously not *controlling* authority, and in any event mostly involve inapposite situations. *See, e.g., Price v. Choctow Glove & Safety Co.*, 459 F.3d 595, 596-98 (5th Cir. 2006) (group of plaintiffs was *never* part of same class action as employee who filed EEOC charge); *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 293-94 (4th Cir. 2004) (individual action relying on another employee's individual EEOC charge did not even implicate single-filing rule). In addition, the three Supreme Court cases cited by Wal-Mart, Mot. 27 n.9, do nothing to question this Court's prior order. Indeed, this Court's prior order emphasized that applying the single-filing rule satisfies Title VII's goal of providing notice of the charges to the employer and the EEOC. Dkt. 81 at 10-12, 14-16. Moreover, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623 (2007), which involved an individual Title VII action (not a class action), did nothing to disturb the Court's holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), that the administrative charge-filing requirement was not a jurisdictional prerequisite to filing suit under Title VII, but that it was . . . subject to waiver, estoppel, and equitable tolling," Dkt. 81 at 10 (citing *Zipes*, 455 U.S. at 397), or the well settled rule that "unnamed class members who have not filed EEOC charges" can receive relief in a class action. *Lewis*, 130 S. Ct. at 2197 n.4 (2010).

[34] Even if Odle had *never* participated in this pending action, class members in this action could still rely on Odle's charge, as it put Wal-Mart on notice of the class claims at issue in this pending class action. *See Cronas*, 2007 U.S. Dist. LEXIS 68797, at *2-5, *11-20; *Tolliver*, 918 F.2d at 1057 (EEOC has interpreted single-filing rule so "filing requirements [are] satisfied 'so long as the matter complained of was within the scope of [a] previously filed charge, regardless of who filed it.'") (quoting 43 Fed. Reg. 138, 139 (1983)).

agreed that members of what was then a putative national class, of which the instant proposed class was a part, could rely on Dukes' charge to exhaust their administrative remedies, a concession Wal-Mart cannot repudiate 10 years later. *See* Dkt. 81 at 10 (under *Zipes*, 455 U.S. at 397, Title VII's "administrative-charge filing requirement" is "subject to waiver"). Thus, there is no need to consider charges of the remaining Named Plaintiffs filed after May 2, 2001.

Second, even assuming *arguendo* that Wal-Mart did not concede that Dukes' 2001 charge exhausted for the class, this Court should hold that members of the proposed modified class may satisfy Title VII's exhaustion requirement by relying on the EEOC charges filed in 2001 or 2002 by Named Plaintiffs Dukes, Patricia Surgeson, Edith Arana, and Christine Kwapnoski.

In this Circuit, a Title VII class action may rely on an employee's individual EEOC charge to exhaust administrative remedies when the class claims fall "'within the scope of the EEOC's *actual* investigation or an EEOC investigation which *[could] reasonably be expected* to grow out of the charge of discrimination.'" *Paige*, 102 F.3d at 1041-42 (quoting *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994)). To satisfy this standard, a charge need not mention class claims or identify other affected employees, as "discrimination charges are to be construed with the utmost liberality," and an EEOC investigation "is not limited by the literal terms of the charge." *Id.* at 1041-42 & n.9. Thus, an employee's charge stating she was paid less and her promotion application was denied "because of my sex" "'could [] be understood to complain of discriminatory treatment of all women applicants and employees'" of the same employer, and an "'EEOC investigation of class discrimination against women'" of the employer could be reasonably expected. *Id.* at 1042 (quoting *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 451 (5th Cir. 1983)). Similarly, a single charge of bias in the "process that determines eligibility for promotion would necessarily result in an investigation" of the employer's "promotion practices, interview system, and any pattern of [] discrimination that results from the [employer's] procedures," and a company-wide "investigation of class claims." *Id.*[35]

[35] Wal-Mart's citation to *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632 (9th Cir. 2002), for factors courts consider to determine whether class claims were encompassed within a charge is misplaced, as *Freeman* only addressed whether an *individual litigant's* Title VII complaint was

To a far greater extent than the individual charges in *Paige* or *Fellows*, each Named Plaintiff here filed charges that could reasonably lead to an investigation of class-wide claims of sex discrimination, including Wal-Mart's pay and promotion policies. Not only did the Named Plaintiffs allege with particularity sex discrimination in being denied equal opportunity for promotions and compensation, they also made their claims "on behalf of all other women similarly situated" at Wal-Mart and asserted that the discrimination of which they complained was part of "a larger and continuing pattern of sex discrimination at Wal-Mart."[36] As this Court previously held regarding Odle's charge, Dkt. 81 at 14, these types of allegations are more than sufficient to exhaust class claims that stretch far beyond the store or district of the charging party.

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encompassed within the scope of *his own individual EEOC charge* about a completely different subject, and did not suggest those factors apply to class complaints or charges. *Id.* at 633-38.

[36] Charge of Betty Dukes (May 2, 2001), Ex. 5 to Pls.' First Am. Compl. (Dkt. 3), and Ex. C to Dukes Decl. (Dkt. 133), attached hereto as Ex. C (stating she "was denied promotions because of my gender," was "discouraged from applying for other positions because of Wal-Mart's prior . . . general discrimination," and "prior discriminatory treatment I and other women received from Wal-Mart," that Wal-Mart management discriminates in promotions by not posting positions, that "the discrimination and retaliation I experienced is part of a larger and continuing pattern of sex discrimination at Wal-Mart," that "[w]omen are discriminated against because of their gender . . . and are subjected to adverse terms and conditions of employment," and that "I make this claim on my own behalf and on behalf of all other women similarly situated"); Charge of Edith Arana (Dec. 10, 2001), Ex. 9 to FAC (stating she was not allowed to apply for assistant manager training program, she twice applied for a department manager position but was not interviewed in violation of company policy and each time a man was hired, she complained about discrimination to district, regional, and national officials who did not care, and "discrimination" she "experience[s] is part of a larger and continuing pattern of sex discrimination at Wal-Mart," where "[f]ew women are promoted to management" and are given inferior opportunities, and she "make[s] this claim on my own behalf and on behalf of all other women similarly situated"); *see also* Charge of Patricia Surgeson (May 14, 2001), Ex. 4 to FAC (describing how her manager position was eliminated but later re-instated for a man who was paid more for same work, how many male employees with less seniority and responsibility "were being paid more than" her, and stating she "was discriminated against based upon my gender with respect to pay, promotion, and training" and "I bring this charge on behalf of myself and similarly situated women who I believe receive less pay, promotions and training"); Charge of Christine Kwapnoski (Feb. 15, 2002), Ex. 5 to FAC (stating she "was discriminated against based upon my gender, female, with respect to pay, promotion, and training" that she "was repeatedly passed over for promotion to managerial positions, and these positions were given to men who were less than or no more qualified than I," that she "received less pay than" comparable men, she was told she received a smaller raise than a man "because he had a family to support," that she was excluded from the management training program, and she brings "this charge on behalf of myself and other similarly situated women who I believe receive less pay, promotions and training than male employees").

Indeed, the plain language of these charges should have led to an investigation of the alleged discrimination throughout the company, particularly in light of the language raising concern about "a larger and continuing pattern of sex discrimination *at Wal-Mart*" generally. *See supra* at 46 n.36 (emphasis added). Moreover, given that this Court previously held that Odle's charge put Wal-Mart and the EEOC on notice of a nationwide pattern or practice claim, Wal-Mart's assertion that similar charges could not put them on notice of a regional problem or could not reasonably lead to an investigation of regional practices is baseless. *See* Mot. 29-33.

Ultimately, Wal-Mart's attack on each named plaintiff's charge boils down to the same two highly flawed arguments: (1) that while each woman's charge identifies how she was personally treated in the store and district where she worked, the charge does not identify other women who were similarly affected, and (2) that filing a charge on behalf of "similarly situated" women *limits* any investigation to the same store where the charging employee worked. *See id.* First, "no case . . . supports [the] interpretation that a plaintiff must, as a threshold requirement to a later class action, allege facts in her EEOC charge about herself *and* about other co-workers," *Chen-Oster*, 2012 U.S. Dist. LEXIS 2894, at *8-9, and Wal-Mart offers no such authority.[37] In any event, the charges of Dukes and other Named Plaintiffs went to great length to point out that other female employees throughout Wal-Mart had been subjected to similar types of sex discrimination, including their co-workers. *See supra* at 46 n.36.

Second, Wal-Mart's argument that using the term "similarly situated" in an EEOC charge *limits* the scope of an investigation to employees of the same gender in the same local workplace, Mot. 32-33 (citing *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2004)), is wholly unpersuasive. It conflates use of the term "similarly situated" in individual and class cases under

[37] *Griffin v. Home Depot USA, Inc.*, No. 11-2366-RDR, 2012 U.S. Dist. LEXIS 2502 (D. Kan. Jan. 9, 2012), did not hold an EEOC charge must identify specific experiences of other workers to allow class claims to rely on a charge. In any event, *Griffin's* application of exhaustion principles must be disregarded, as it applied the Tenth Circuit's rule that the "administrative claim [must] give notice that class-based discrimination was being alleged and that the subsequent plaintiff was a member of the class," *id.* at *12-13, an onerous standard that conflicts with the lenient rule the Ninth Circuit adopted in *Paige*, 102 F.3d at 1041-42 (class claims allowed if they "*[could] reasonably be expected* to grow out of the charge of discrimination").

Title VII, despite the fact that the term has a very different meaning in each context. *Compare Vasquez*, 349 F.3d at 640-42 (using "similarly situated" in applying the *McDonnell Douglas* test in an individual case to consider whether the employer "treated similarly situated employees outside [the plaintiff's] protected class more favorably"), *with Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 150-51 (1982) (named plaintiff filed Title VII action "on his own behalf and on behalf of other persons similarly situated," to represent class of other Mexican-American employees). Plainly, the Named Plaintiffs were complaining on behalf of a broad group of similarly situated *women* who work at Wal-Mart and were subjected to "a larger and continuing pattern of sex discrimination *at Wal-Mart*," *supra* at 46 n.36, and not on behalf of male comparators.

IV. ONLY NAMED PLAINTIFFS MUST SATISFY TITLE VII'S VENUE RULE

Eleven years ago, "Wal-Mart contend[ed] that, in a class action, it is settled law that each named plaintiff must individually satisfy venue," including under Title VII. Dkt. 36 at 3.[38] This Court agreed, holding that in a class action only "each named class representative must satisfy the venue provisions of [Title VII]." *Id.* at 3-5 (following *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98 (D.D.C. 1976)). As the Court explained, "the status of absent class members [is] not material to [] venue," as absent class members do not personally appear before a court. *Id.* Applying these principles, this Court dismissed the four Named Plaintiffs who worked outside California, but allowed them to stay in the case as absent class members. *Id.* at 15.

Today, however, Wal-Mart abandons the settled law it invoked in 2001 and urges the Court to adopt the opposite position that "[c]laimaints outside California could not satisfy Title VII's special venue requirements in their own right, and should not be excused from doing so here merely because this is a class action[.]" Mot. 34.

Wal-Mart's attempt to relitigate this issue should be rejected. First, this Court's 2001 order is now law of the case, as the same issue – whether only named plaintiffs must satisfy Title

[38] *See* Mot. to Dismiss at 5, Dkt. 16 (Aug. 10, 2001) ("in the class action . . . courts will look to the [venue status] of the named parties for determining whether venue is proper," and "it is settled law that, in a class action, *each named plaintiff* must establish that venue is proper as to her.") (citations omitted); *id.* at 6 ("each *named plaintiff*" must "establish proper venue under Section 5(f)(3)" of Title VII); Reply on Mot. to Dismiss at 3-4, Dkt. 30 (Sept. 12, 2001); *id.* at 5-6.

VII's venue requirements – was "previously decided by the same court . . . in the same case." *Minidoka*, 406 F.3d at 573.[39] Second, judicial estoppel bars relitigation of this issue, as all three factors that courts "typically consider" to "determin[e] whether to apply" judicial estoppel strongly support applying it. *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)).[40] Third, Federal Rule 12(g) bars Wal-Mart from moving to dismiss absent class members from outside California for improper venue, as it failed to move on this ground that was equally available when it moved to dismiss the First Amended Complaint. *Chilicky v. Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1987), *rev'd on other grounds*, 487 U.S. 412 (1988) (under Rule 12(g) "[i]f a party files a pre-answer motion, but

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[39] None of the three exceptions to law of the case applies. Wal-Mart's failure to identify even a single *district court* case adopting its view shows this Court's 2001 decision was not "clearly erroneous" and a "manifest injustice," and that there is no "intervening controlling authority." *Minidoka*, 406 F.3d at 573. There is not "substantially different evidence," *id.*, as the evidence on venue is exactly the same as it was in 2001. *Compare* FAC ¶¶ 87-90, 102-109, *with* First. Am. Compl. ¶¶ 29-32, 60-67. While Wal-Mart argues absent class members must satisfy venue because non-California class members could possibly "overwhelm the potential claimants who could satisfy Title VII's venue requirements," Mot. 34, this was even more true of a nationwide class, as opposed to the regional classes proposed here, and in any event is irrelevant to the legal rule this Court adopted in 2001. Moreover, there is no basis to Wal-Mart's suggestion that this Court held each *absent class member* must satisfy venue. *See* Mot. 35 ("this Court rightly held that 'each plaintiff in a class action must individually satisfy venue'") (quoting Dkt. 36 at 15). When read in proper context, it is clear this Court's use of "each plaintiff" in its conclusion implicitly referenced only the *named plaintiffs*. As this Court noted at the outset of its opinion, in a Title VII class action, "*each named plaintiff* must satisfy the venue provisions," and under *Trucking Employers* "the status of absent class members [is] not material to the venue determination." Dkt. 36 at 3-5. Indeed, the Court applied this rule in dismissing four non-California *named plaintiffs*, but allowing them to remain absent class members. *Id.* at 15.

[40] First, Wal-Mart's new position that absent class members must satisfy Title VII's venue rule, Mot. 33-35, is "'clearly inconsistent' with its original position," *Ibrahim*, 522 F.3d at 1009 (quoting *New Hampshire*, 532 U.S. at 750-51), that only "each named plaintiff must establish that venue is proper as to her" in a Title VII class action, and "only the class representatives [] need be considered" for venue. Dkt. 30 at 3-6; *compare* Dkt. 36 at 3 (Wal-Mart "principally relies upon [] *Trucking Employers*" in 2001); Dkt. 16 at 5 (citing *Trucking Employers*), *with* Mot. 34 n.11 (*Trucking Employers* is "wrong and should not be followed."). Second, Wal-Mart clearly "successfully persuaded [this] court of [its] earlier position." *Ibrahim*, 522 F.3d at 1009; Dkt. 36 at 3-7, 11-13 (following Wal-Mart's arguments). Third, accepting its position could cause "unfair detriment" to absent class members from outside California, *New Hampshire*, 532 U.S. at 750, who relied on the prior order by staying in the putative class for 10 years and not filing new class actions, and who may forever be denied relief if they are excluded from the case at this stage.

does not raise one of the defenses [including improper venue], the party waives the omitted defense and cannot subsequently raise it in his answer or otherwise") (collecting cases). In addition, the fact that Plaintiffs have since amended their complaint does not permit Wal-Mart to lodge this venue objection for the first time. *See Rowley v. McMillan*, 502 F.2d 1326, 1332-33 (4th Cir. 1974) (Rule 12(g) "prevents [a] defense from being revitalized even though plaintiffs amend[] their complaint and provide[] [the defendant] with an opportunity to file a new motion under Rule 12, or an answer setting forth a defense") (following leading commentators); *see also Church of Scientology v. Linberg*, 529 F. Supp. 945, 967 (C.D. Cal. 1981) (barring motion to dismiss after "the filing of a very different amended complaint" as "the grounds for the objections 'were available' at the time the previous motion was filed").

Finally, courts uniformly follow the rule this Court adopted in 2001. While Wal-Mart argues these cases "are wrong and should not be followed," it does not point to *a single case* adopting its view. *See* Mot. 34 n.11.[41] Instead, many federal courts and the "leading treatises" that Wal-Mart cited in 2001, Dkt. 16 at 5, continue to follow this Court's approach.[42]

CONCLUSION

For the above reasons, Wal-Mart's Motion to Dismiss Plaintiffs' Fourth Amended Complaint must be denied in its entirety.

[41] Mot. 34 n.11 (citing *Trucking Employers* and two other cases). While Wal-Mart cites several cases to support its argument on Congress' intent on Title VII's venue provision, *id.* 35, they are inapposite as none addressed whether absent members must satisfy venue in a class action.

[42] *Valerino v. Holder*, Civ. No. 10-0123, 2011 U.S. Dist. LEXIS 100148, at *3 (D.V.I. Aug. 29, 2011); *Bell v. Lockheed Martin Corp.*, Civ. No. 08-6292, 2011 U.S. Dist. LEXIS 41766, at *25 (D.N.J. Apr. 18, 2011); *Ring v. Roto-Rooter Servs. Co.*, No. 1:10-cv-179, 2010 U.S. Dist. LEXIS 108202, at *1-12 (S.D. Ohio Sept. 28, 2010); *Amochaev v. Citigroup Global Mkts. Inc.*, No. C-05-1298, 2007 U.S. Dist. LEXIS 13154, at *4 (N.D. Cal. Feb. 12, 2007) (following *Wal-Mart* and *Crawford v. U.S. Bancorp Piper Jaffray, Inc.*, No. C-00-1611-PJH, 2001 U.S. Dist. LEXIS 1520, at *4-5 (N.D. Cal. Jul. 23, 2001)); *Cook v. UBS Fin. Servs., Inc.*, 05 Civ. 8842, 2006 U.S. Dist. LEXIS 12819, at *8-9 (S.D.N.Y. Mar. 21, 2006); 17 Moore's Federal Practice § 110.07, at 110-48 (3d ed. 2010); 7A Wright, Miller & Kane, Federal Practice & Procedure § 1757 (3d ed. 2005).

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