No. 04-80057

IN THE

United States Court of Appeals for the Ninth Circuit

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ANANA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

On Appeal From The United States District Court
For The Northern District Of California
No. C-01-02252 MJJ

OPPOSITION TO WAL-MART'S PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION AND CONDITIONAL CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

RULES

I. INTRODUCTION

The class certification decision in this case is a textbook example of the kind of "rigorous analysis" of Rule 23 requirements envisioned by the Supreme Court in *Gen. Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 161 (1982). In his 84-page ruling granting in part and denying in part class certification, Judge Jenkins conducted a careful and thorough review of every legal and factual argument raised. His opinion is supported by extensive factual findings and is securely grounded in the rich body of Title VII substantive law from the Supreme Court and this Court. As the court noted, the legal issues in the case are "not novel." Slip op. at 5.

Indeed, the only unusual aspect of this case is its size. The case is large because Wal-Mart, as it boasts in its petition, is the largest private employer in the world. Petition for Permission to Appeal ("Pet.") at 2. But, as the district court recognized, Title VII makes "no special exception for large employers." Slip op. at 4. Similarly, Wal-Mart is not entitled to automatic interlocutory review by virtue of its enormity and market dominance. The district court, presided over by an experienced trial judge, gave "considerable thought and deliberation" to issues of manageability, and crafted an effective trial plan specifically tailored to meet these concerns. Slip op. at 58-82. The district judge is uniquely placed to assess whether the litigation is manageable and he has determined that he can manage it. This Court

should allow the district court the opportunity to try the effectiveness of the plan, not declare it a failure in advance.

Wal-Mart rests its argument for interlocutory review primarily on its claimed "right" to contest each class member's claim *individual by individual.* There is no support in Title VII or Rule 23 jurisprudence for this radical proposition which, if accepted, would eliminate civil rights class actions of any appreciable size. Ironically, Wal-Mart claims its "fundamental right" – essentially to be free from civil rights class actions – can be found in *Teamsters v. United States,* in which the Supreme Court established the standards for pattern and practice claims, and in the 1991 Civil Rights Act, through which Congress intended to expand the remedies available to victims of discrimination. Wal-Mart can make this claim only by ignoring clear statutory language and 25 years of Title VII jurisprudence. In fact, there is ample authority for determining liability and damages in Title VII class actions on an aggregate basis when warranted by the facts. Wal-Mart's remaining claims of alleged legal errors are garden variety issues, all well within the discretion of the district court. None of these alleged errors meets the heightened standards for interlocutory review. Thus, Wal-Mart's petition should be denied.

II. STANDARD OF REVIEW

Appellate review of class certification rulings is limited to a determination of

whether the district court committed an abuse of discretion. As a result, Rule 23(f) appeals are "the exception, not the norm." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002). Interlocutory appeals from class certification decisions are "generally disfavored" because they are "'inherently disruptive, time-consuming, and expensive.'" *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000), *quoting Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). Moreover, interlocutory review is particularly inappropriate in cases, like this, where the decision is heavily dependent on case-specific facts. *Prado-Steiman*, 221 F.3d at 1275-76 *citing* Advisory Committee Notes, Rule 23.

The appellate courts have recognized three narrow circumstances where Rule 23(f) review might be appropriate: where the certification decision (i) involves an "unsettled and fundamental issue of law" which is central to the court's ruling and "likely to evade end-of-the-case review;" (ii) constitutes a "death-knell" for the litigation and is "questionable;" or, (iii) is "manifestly erroneous." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). These are far more exacting standards than Wal-Mart has suggested apply. Pet. at 4- 5. This case meets none of these demanding standards.

While Wal-Mart does not have the temerity to claim that the class certification order is a death knell to the litigation, Amici in support of the petition predict that

class certification rulings may make other employers feel undue pressure to settle; that is not, however, an argument for interlocutory review in *this* case. As the largest and wealthiest corporation in America, with annual revenues of $256 billion,[1] Wal-Mart cannot and does not argue that the class certification order creates undue pressure to settle. *See e.g. Mowbray,* 208 F.3d at 294 ("what might be 'ruinous' to a company of modest size might be merely unpleasant to a behemoth, and the record makes manifest that [the defendant] is a massive corporation").

Wal-Mart rests its petition primarily on the contention that the district court's decision was legally flawed. A losing party can always identify some issue of law it believes is unsettled, but interlocutory review demands a showing that there is a "compelling need" to address the issue *immediately*. *Prado-Steiman*, 221 F.3d at 1274. As demonstrated below, the court committed no legal error and certainly not one that meets these high standards for interlocutory review. Wal-Mart has also failed to explain why any alleged error could not be addressed through the ordinary appellate process.

III. THE DISTRICT COURT PROPERLY APPLIED RULE 23(a)

Wal-Mart asserts that the district court erred in finding that plaintiffs have

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[1] *http://www.walmartstores.com/Files/annualreport_2004.pdf.*, Wal-Mart 2004 Annual Report at 16.

satisfied the requirements of Rule 23(a). The issues Wal-Mart raises are inappropriate for interlocutory review because they are fact-intensive, based on settled law, and better addressed at the end of the trial.

1. Wal-Mart argues plaintiffs may not properly challenge a company practice of subjective decision-making where individual pay and promotion decisions are made at the local level. Pet. at 8-9. The law on this issue could not be more clearly settled. The Supreme Court has twice affirmed that subjective decision-making is a practice that may be challenged in a pattern or practice case, *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 998 (1988); *Falcon,* 457 U.S. at 159 n.15 (1982), and the theory has been employed in countless Title VII class actions.[2] In an opinion that Wal-Mart fails to cite, this Court recently rejected precisely the argument about local decision-making raised by Wal-Mart. *Staton v. The Boeing Co.,* 327 F.3d 938, 956

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[2] *See e.g. Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 80 FEP 627 (2d Cir. 1999); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316, 66 FEP 375 (5th Cir. 1993); *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 485 (D. Minn. 2003); *McReynolds v. Sodexho Marriott Serv.*, 208 F.R.D. 428, 441 (D.D.C. 2002); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608 (D. Minn. 2000); *Daniels v. Fed. Reserve Bank* , 194 F.R.D. 609, 615 (N.D. Ill. 2000); *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101 (E.D. Ark. 2000); *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370 (N.D. Ill. 1997); *Stewart v. Rubin*, 948 F. Supp. 1077, 1093 (D.D.C. 1996), *aff'd,* 124 F.3d 1309 (D.C. Cir. 1997) (table); *Butler v. Home Depot*, No. C 94-4335 SI, 1996 U.S. Dist. LEXIS 3370 at *8 (N.D. Cal. Jan. 24, 1996); *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Stender v. Lucky Stores*, 803 F. Supp. 259, 331 (N.D. Cal. 1992).

(9th Cir. 2003) ("The unsurprising fact that some employment decisions are made locally does not allow a company to evade responsibility for its policies.") [3]

Wal-Mart also misrepresents the factual record in support of the district court's determination of commonality. Wal-Mart would have this Court believe that Judge Jenkins' decision rested solely on a finding that pay and promotion decisions are made at the local level at Wal-Mart based on subjective criteria. Pet. at 8. In fact, the district court's 36-page discussion of commonality makes extensive findings about the uniformity of policies, training and culture across Wal-Mart and the high degree of centralized control from Wal-Mart's Home Office.

For example, the court found "significant uniformity" across all stores in all regions. Slip op. at 15. Each of the stores had "similar job categories, job descriptions and management hierarchies." Slip op. 11. The Home Office sets minimum starting wages for each store as well as rates for consecutive pay classes. *Id.* at 13. The Home Office decides which positions will be posted and the minimum criteria for promotion. Slip op. at 16-17.

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[3] Notwithstanding this overwhelming authority, Wal-Mart points to *one* unpublished district court opinion, *Grosz v. The Boeing Co.*, 92 Fair Empl. Prac. Cas. (BNA) 1690, 1695 (C.D. Cal. 2003), *permission to appeal granted,* No. 04-55428 (9th Cir. Mar. 11, 2004) for the proposition that district courts in the Circuit are divided on the issue. Pet. at 9-10. This Court has accepted Rule 23(f) review of the *Grosz* decision so its precedential value is, at present, questionable. In any event, this Court's decision in *Staton* is controlling.

It further found that "Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture," which promotes uniformity of practices. Slip op. at 21. The court noted that Wal-Mart uses the same orientation and training programs for employees and a broad range of "uniform communication tools." Slip op. at 22. Wal-Mart frequently transfers managers to different facilities in different states, a practice that "could only be efficient" where there is a "high degree of store-to-store uniformity." *Id.*

Based upon these facts, the court concluded that plaintiffs have "presented evidence that basic operational structure and staffing patterns of stores are quite uniform and each individual store is subject to oversight from the company's Home Office, where all regional and higher level managers are based." Slip op. at 23. In determining that commonality had been satisfied, the district court relied on a broad range of evidence, only one component of which was excessive subjectivity in decision-making. Slip op. at 45.

2. Wal-Mart next charges the district court with error for refusing to accept its expert's disaggregated statistical analysis, over the aggregated analysis used by plaintiffs' expert. Slip op. at 10. [4] Again, Wal-Mart fails to cite settled law.

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[4] Wal-Mart repeatedly – but inaccurately – describes its expert's analyses as store-by-store. Wal-Mart's expert actually broke each store into multiple sub-units and conducted over 7500 separate regression analysis on these extremely

The district court "may not conduct a preliminary inquiry into the merits" at class certification, *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974), weigh competing expert evidence, or engage in "statistical dueling." *In re VISA Check/Mastermoney,* 280 F.3d 124, 132 (2d Cir. 2001), *citing Caridad,* 191 F.3d at 291. The court ruled:

> The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence will ultimately be persuasive.

Id. This is precisely the question that the district court examined.[5] While the experts' competing analyses were highly contested, the district court correctly refused to engage in a weighing of the competing evidence. Slip op. at 26-44. In a proper exercise of discretion, the district court concluded that plaintiffs may rely on aggregated statistical data to support their claims of employment discrimination, which is the law in this Circuit. *Paige v. California,* 291 F.3d 1141, 1148 (9th Cir.

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small units. Slip op. at 29. This technique appears designed to create artificially small sample sizes, confounding detection of statistical significance.

[5] The court relied upon plaintiffs' statistical analysis of compensation practices, which reveal significant disparities for women for job classifications in stores in all regions. Slip op. at 30. Women earned 5 to 15 percent less than similarly situated men throughout the class period. Slip op. at 29. The court also found, and Wal-Mart did not dispute, that it "consistently takes women longer than comparable men to reach the higher management levels." Slip op. at 38.

2002).[6]

3. Finally, Wal-Mart claims that it was legal error to include hourly and management workers in the same class, because of alleged conflicts of interest. Pet. at 12-13. Again, Wal-Mart fails to cite settled Ninth Circuit authority on this issue. In *Staton*, this Court rejected a "*per se* rule concerning adequacy of representation where the class includes employees at different levels of the employment hierarchy." *Staton*, 327 F.3d at 958. Instead, the Court identified three factors that led to its finding that no conflict existed: (1) the named plaintiffs included representatives from each major employee sub-group; (2) the relief sought applied equally throughout the class; and (3) the plaintiffs offered evidence of a general discriminatory policy. *Id.* Here, the district court applied the *Staton* test and made specific factual findings to support its determination. Slip op. at 49-50.[7] This presents no unsettled issue of law

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[6] Wal-Mart challenges the district court's determination of typicality, arguing that it improperly relied on evidence of "individual sexist acts" which may not be typical of the rest of the class. Pet. at 11-12. The argument misrepresents the court's opinion and misstates the law. The only reference to "individual sexist acts" is found in the court's discussion of *commonality* where it summarizes the testimony of the anecdotal witnesses. Slip op. at 44 - 45. The typicality inquiry asks whether "the claims or defenses of the *representative parties*" – not the anecdotal witnesses – are typical of the claims of the class.

[7] Because the adequacy inquiry is fact-driven, it is not surprising that district courts in this Circuit have reached different results on this issue based upon the unique facts in each case. *See e.g. Donaldson v. Microsoft Corp.*, 205

worthy of immediate review.

IV. THE DISTRICT COURT PROPERLY APPLIED RULE 23(b)

A. Wal-Mart Has No Right to Individualized Hearings

Although Wal-Mart asserts a statutory and due process right to litigate separately each class member's entitlement to relief, there is no authority for such a far-reaching proposition, which would make large class actions all but impossible. Nor did the district court alter any tenet of substantive law of Title VII in determining how this case could be effectively managed as a class action.[8]

In *Teamsters,* the Supreme Court specifically held that, in pattern or practice cases, defendant's liability to the class does *not* turn on proof of liability to each individual class member. *Teamsters*, 431 U.S. at 360 n.46. Once class-wide liability

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F.R.D. 558. 568 (W.D. Wash. 2001). Different outcomes arising from different facts do not constitute an intra-circuit split of authority.

[8] Wal-Mart's reliance on tort cases such as *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002) in which substantive law explicitly required individual proof of liability are inapplicable here where there are well-developed Title VII standards establishing the burdens of proof in a pattern or practice case. Title VII explicitly authorizes the United States to bring "pattern or practice" cases, and it is undisputed that substantive standards governing class actions under Title VII are the same as for pattern or practice cases. 42 U.S.C. § 2000e-6; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359-60 (1977); *Cooper v. Fed'l Reserve Bank,* 467 U.S. 867, 876 n.9 (1984). This substantive Title VII law provides the foundation for the district court's ruling.

is established, all class members are entitled to a presumption that they are eligible for damages. *Id.* 431 U.S. at 361-62; *see also Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 252-53 (5th Cir. 1974).

Wal-Mart argues that *Teamsters* mandates individual hearings at the remedial phase. The *Teamsters* decision held only that "a district court must *usually* conduct *additional proceedings* after the liability phase of the trial to determine the scope of individual relief." *Teamsters,* 431 U.S. at 361 (emphases added). Thus, additional proceedings are *not* always required and, where a court finds additional proceedings appropriate, *Teamsters* does not dictate that the proceedings be done individual by individual. As further explained below, courts have endorsed different approaches to the remedial phase tied to the specific circumstances of each case.

The Civil Rights Act of 1991 likewise did not confer on Wal-Mart a statutory right to individual hearings for each class member. The 1991 Act codified an alternative method for proving intentional discrimination, *not* an affirmative defense. *Desert Palace v. Costa,* 539 U.S. 90, 94 (2003) ("The first [provision] establishes an *alternative* for proving that an 'unlawful employment practice' has occurred.") (emphasis added). Instead of proving that discrimination occurred "because of" one's gender, 42 U.S.C. § 2000e-2(a), plaintiffs may also seek to establish liability for a "mixed motive" violation, albeit with more limited remedies. 42 U.S.C. §2000e-

2(m). Wal-Mart's argument is that, by conferring on victims of discrimination an *additional* method of proof, Congress abrogated *sub silencio* 25 years of Title VII class action jurisprudence. No court has accepted this argument.

Wal-Mart cannot dictate which model for proving an unlawful employment practice plaintiffs may invoke. *See Bogle v. McClure*, 332 F.3d 1347, 1357 (11th Cir. 2003) (defense cannot invoke mixed motive analysis where plaintiff established claim under higher standard). Moreover, the "mixed motive" provision of Title VII does not require that determinations be made on an individualized basis in a class case. Thus, even if Wal-Mart had the right, which it does not, to address plaintiffs' claims on mixed motive grounds, then it could do so on a classwide basis by demonstrating that it would have followed the same pattern or practice of conduct even in the absence of the discriminatory motive.[9]

Wal-Mart's argument has no basis in statute or case law. As such, it is an unaccepted theory, not an "unsettled and fundamental issue of law" for which

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[9] Wal-Mart's assertion that *Teamsters* was codified by the Civil Rights Act of 1991 in the mixed motive provision is flatly untrue. The Civil Rights Act of 1991 was enacted partly to abrogate several Supreme Court decisions, and partly to provide additional remedies to plaintiffs. *Landgraf v. USI Film Products*, 511 U.S. 244, 250-52 (1994). The legislative history makes clear that the mixed motive standards were specifically enacted to alter the substantive liability standards adopted in *Price Waterhouse v. Hopkins*, not adopt rules on the remedial stage from *Teamsters*. *Id.* at 251.

immediate review is compelled.

B. This Court Should Not Second-Guess the District Court's Conclusion that the Class Is Manageable

Consistent with *Teamsters*, courts have used different approaches to the remedial phase depending on the circumstances of the case. Where, as here, an employer's lack of objective standards or adequate records would make any attempt to reconstruct the career paths or quantify lost earnings of affected employees a "quagmire of hypothetical judgments," courts have approved statistical or formulaic approaches to the relief phase of class litigation. Slip op. at 64-66; *Pettway*, 494 F.2d at 261; *McKenzie v. Sawyer*, 684 F.2d 62, 76 (D.C. Cir. 1982) (where employees similarly situated to plaintiffs received a benefit through a subjective system without having to apply for it, individual hearings unnecessary).

Here, Wal-Mart awarded differential pay increases in a subjective manner, usually without documenting the reasons. Slip op. at 13-15. It granted promotions based overwhelmingly on subjective criteria, under circumstances where many more plaintiffs were qualified than could have been promoted. Slip op. at 66. The district court concluded, *based on the extensive factual record*, that "this is precisely the kind of case in which 'a class-wide approach to the measure of back-pay is necessitated.'" *Id.* This Court and other circuits have approved the use of statistical methods to

determine back pay in similar circumstances. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984);[10] *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 876 (7th Cir. 1994); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984); *see* also *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996).

The district court provided an outline of the remedial proceedings that it believed would make this case manageable. Slip op. at 67-79. Following *Domingo*, the district court anticipated that the remedial proceedings would first determine the total amount of harm to the class and then the eligibility of individual class members to share in the award. *Id.* The total lost wages can be determined most accurately for the class as a whole. *Hameed*, 637 F.2d at 520. In promotion cases, individual eligibility has ordinarily turned on a showing of the class member's interest in promotion. *Domingo*, 727 F.2d at 1445 (claimants prove they applied or would have applied for a position but need not show they were qualified for position sought); Slip

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[10] The *Beck* decision did not, as Wal-Mart claims, reject the use of a statistical approach to back pay. Pet. at 18. *Beck v. Boeing*, 203 F.R.D. 459 (W.D. Wa. 2001), *modified by slip op.* Dec. 27, 2001. While the court initially rejected the use of a formula for back pay, it clarified its ruling and reserved the question of whether back pay claims would be certified and a statistical method used.

op at 69-73. However, for pay discrimination claims, no such showing is required since "courts can safely assume that all employees uniformly desire equal pay for equal work." Slip op. at 75. The court found that Wal-Mart maintains substantial computer-readable personnel and payroll data which would permit identification of "not only the *potential* victims but also the *actual* victims" of discrimination with a "sophisticated use of data." Slip op. at 76.

With respect to promotion claims, the district court found that monetary claims were only manageable for those class members for which there was objective applicant data, a limitation on the class which made individualized hearings unnecessary.[11] Wal-Mart has established few minimum objective qualifications, and

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[11] While plaintiffs disagree with the district court's ruling on this point, they recognize that the district court retains the ability to modify its ruling in light of any further discovery and, if the court declines to modify the ruling, plaintiffs have the right to seek post-trial review of this decision. Wal-Mart should similarly accept that post-trial review is the proper route for addressing its concerns about this initial class certification order. Disagreement with a portion of a class certification decision is not enough to warrant extraordinary review under Rule 23(f).

However, if this Court chooses to grant the petition for interlocutory review in this case, the Court should, in the interests of judicial economy, also review the trial court's decision to deny certification of the back pay claims of those class members who cannot establish interest through objective evidence. Title VII's remedial purpose does not countenance a requirement that, to be made whole, victims of discrimination be required to present evidence which, through the fault of their employer, does not exist and was never a requirement for promotion. Plaintiffs thus note this conditional cross-petition.

any relevant question about such qualifications can also be resolved by reference to Wal-Mart's extensive database in a manageable fashion. Slip op. at 73-75.

The district court specifically addressed Wal-Mart's concern that a class-wide approach to remedies would result in compensation to women who were not victims of discrimination and punishment of Wal-Mart for lawful conduct. The court determined that punitive damages would be based solely on Wal-Mart's conduct towards *injured* class members.[12] Slip op. at 56. Moreover, as Title VII is a federal law that applies throughout the United States, there is no danger that Wal-Mart will be punished for conduct that is legal where it occurred. *See State Farm Mut. Ins. v. Campbell,* 538 U.S. 408 (2003); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002). Under the court's ruling, plaintiffs must establish that Wal-Mart injured class members – and acted in reckless disregard of their federally protected rights – before an award of punitive damages may be assessed. Slip op. at 56. Thus, Wal-Mart's fear that it will be punished for lawful conduct is baseless. Moreover, as long as the total award it pays is fair, Wal-Mart would have no legitimate interest in its allocation

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[12] As the district court ruled, a determination of which class members would be entitled to back pay, and in what amounts, could be drawn from the expert economic models which compare the pay each woman received to the pay of similarly-situated male employees. The class-wide award of punitive damages may be allocated among class members who received lost wages, in proportion to their lost wages. Slip op. at 56; *Hilao*, 103 F.3d at 782-87.

among class members. *Hilao*, 103 F.3d at 786; *Hameed*, 637 F.2d at 520.

Finally, the size of the class, while large, does not itself make the case unmanageable. In *Carnegie v. Household Int'l Inc,* No-04-8008, 04-8009, slip op. at 6-7 (7th Cir. July 16, 2004), a consumer finance class action, defendants argued that the case was unmanageable because there were "millions of class members." The Seventh Circuit, in a decision written by Judge Posner, dismissed this contention as "no argument at all," noting that "[t]he more claimants there are, the more likely a class action is to yield substantial economies in litigation." While defendants objected to class treatment because of individual remedies issues, the Court underscored that "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues." *Id.*

Nor is there any reason to review the district court's carefully considered management plan *now* before it has been implemented. If real problems do arise, the district court has the tools to address them – up to and including decertification. This Court should not guess at whether the case can be managed before the fact.

C. The Court Properly Found that Injunctive Relief Predominated

Rule 23(b)(2) authorizes class actions in which injunctive and declaratory relief predominate over monetary relief. In determining whether injunctive relief

predominates over monetary relief, this Court requires the district court to "focus[ ] on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Molski v. Gleich,* 318 F.3d 937, 950 (9th Cir. 2003). The district court must evaluate the weight and importance of the injunctive relief sought in the specific case. *Id.* This is precisely the fact-specific analysis that the court conducted. Slip op. at 54.

Wal-Mart first argues that injunctive relief could not predominate over monetary relief because four out of six named plaintiffs are former employees, who it claims have no interest in injunctive relief. Pet. at 16. Wal-Mart cites no authority for this proposition as no court has adopted this nonsensical "head counting" of named plaintiffs to determine predominance for the class. The class undisputedly includes hundreds of thousands of current employees with a vital interest in injunctive relief and the two current employee plaintiffs could alone provide adequate representation to the class. Moreover, former employees are appropriate class representatives for claims of injunctive relief, particularly where they may return to the workplace once the court enjoins the discriminatory practices. *Piva v. Xerox Corp.*, 70 F.R.D. 378, 388 (N.D. Cal.1975); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975).[13]

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[13] Wal-Mart's argument concerning Article III standing was not raised below, but is in any event a red herring. Pet. at 16. Each class representative has Article III standing. *Gratz v. Bollinger,* 539 U.S. 244, 260-61, 267-68 (2003);

Wal-Mart next faults the district court for analyzing back pay together with the injunctive relief, rather than as monetary relief. Pet. at 14. Courts have consistently treated back pay under Title VII as an equitable remedy. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000); *Allison v. Citgo Petroleum*, 151 F.3d 402, 423 n. 19 (5th Cir. 1998). Thus the district court properly analyzed back pay separately from monetary damages for Rule 23(b)(2) purposes. *Jefferson v. Ingersoll Int'l*, 195 F.3d 894, 899 (7th Cir. 1999).

Finally, Wal-Mart asserts that the class seeks "billions of dollars" in punitive damages, which it claims dwarfs the benefits from injunctive relief. Pet. at 15. The district court correctly rejected any consideration of the size of the award, noting that would have "the perverse effect of making it more difficult to certify a class the more egregious the defendant's conduct or the larger the defendant." Slip op. at 54.

Punitive damages are not, moreover, dependent on "each class member's individual circumstances."[14] Pet. 15. To the contrary, while compensatory damages

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Grutter v. Bollinger, 539 U.S. 306, 317 (2003).

[14] Nor is the use of the term "aggrieved individual" in 42 U.S.C. § 1981 inconsistent with class treatment of punitive damages. Title VII refers to an "aggrieved person" or "person aggrieved" extensively. 42 U.S.C. § 2000e (c) and (e), § 2000e-5(b), (c) and (f)(1); *see also* 42 U.S.C. § 2000e (a) (a person is defined as "one or more individuals."). Yet this usage has never been read to preclude classwide claims under Title VII and require individual by individual analysis. *See Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996). Further,

are intended to compensate the victim for injuries, the purpose of punitive damages is to "punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Similarly, the "focus" of the punitive damage inquiry under Title VII is the *employer's* state of mind. *Kolstad,* 527 U.S. at 535; *see also Barefield v. Chevron,* 48 F.E.P. Cases 907, 911 (N.D. Cal. 1988) ("Because the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, any claim for such damages hinges, not on the facts unique to each class member, but on the defendant's conduct toward the class as a whole."); *Hilao*, 103 F.3d at 780-81 (approving classwide assessment of punitive damages for torture, kidnaping and murder). As such, the district court correctly concluded that the class has a *common* interest in punitive damages liability, which is consistent with (b)(2) certification. *Barefield,* 48 F.E.P. Cases at 911.

V. CONCLUSION

For the foregoing reasons, Wal-Mart's petition for interlocutory review should be denied.

Respectfully submitted,

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the punitive damages standard focuses on defendant's conduct towards "others," not an individual. *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 536 (1999).

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