

Rulings from the Arbitrator and Courts

- Order Regarding Respondent's Communication with Class Members – March 16, 2015
- Class Determination Award (Part 1) – February 2, 2015
- Class Determination Award (Part 2) – February 2, 2015
- Second Circuit Order – July 1, 2011
- EEOC Determination Letter – July 21, 2008

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS ACTION TRIBUNAL

LARYSSA JOCK, CHRISTY	:	
MEIERDIERCKS, MARIA HOUSE,	:	
DENISE MADDOX, LISA McCONNELL,	:	
GLORIA PAGAN, JUDY REED, LINDA	:	
RHODES, NINA SHAHMIRZADI,	:	
LEIGHLA MURPHY, DAWN SOUTO-	:	AAA CASE NO. 11 20 0800 0655
COONS, and MARIE WOLF, individually	:	
and on behalf of all others similarly	:	
situated,	:	
	:	
Claimants,	:	Arbitrator: Kathleen A. Roberts
	:	
-against-	:	
	:	
STERLING JEWELERS INC.,	:	
	:	
Respondent.	:	

ORDER RE RESPONDENT'S COMMUNICATIONS WITH CLASS MEMBERS

This Order addresses Claimants' Emergency Motion to Restrict Communications with the Certified Class and for Corrective Notice.

On February 2, 2015, I issued a Class Determination Award ("Award") that addressed Claimants' class certification motion for pay and promotion claims under Title VII and the Equal Pay Act ("EPA"). The Award described in detail the disparate treatment and disparate impact claims sought to be certified pursuant to Title VII and analyzed the evidence and expert witness testimony provided in support of and in opposition to these claims. The Award certified a class of current and former female Sterling employees with respect to pay and promotion claims under Claimants' disparate impact theory, but declined to certify claims pursuant to Claimants' disparate treatment theory. The Award also denied certification of the Claimants' EPA claims as an opt-out class, but invited Claimants to file a motion seeking certification of the EPA claims as an opt-in class pursuant to Section 216(b) of the Fair Labor Standards Act. The Award requests

that the parties submit a proposed form of opt-out notice consistent with the Award pursuant to AAA Supplementary Rules 5 and 6. The Arbitrator has not yet received a proposed opt-out notice; accordingly members of the certified class have not received notice of the Award from the Arbitrator, and the opt-out period has not commenced.

On February 3, Sterling sent an email to all of its employees, including members of the certified class, containing a memorandum entitled “Legal Update: Arbitrator Finds No Convincing Proof of Companywide Discriminatory Pay and Promotions Policies at Sterling” (Sterling Memorandum) (annexed to this Order as Exhibit 1).

Claimants contend that Sterling’s unilateral communication with class members is prohibited by the rules of professional responsibility, that the Sterling Memorandum is biased and misleading, and that it contravenes the purpose of the Class Notice to be issued by the Arbitrator. Claimants seek an order restricting Sterling’s communications with class members and directing Sterling to send a “corrective notice” to all recipients of the Sterling Memorandum.

For the reasons set forth below, Claimants’ motion is GRANTED in part and DENIED in part.

APPLICABLE LAW

Rules of Professional Responsibility

It is a well-established rule of professional responsibility that a lawyer shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. See ABA Code of Professional Responsibility, DR 7-104(A); ABA Model Rule 4.2.

The application of this so-called “anti-contact” rule in the context of class actions has been addressed by a number of courts and commentators.

It is generally recognized that the attorney-client relationship between class members and class counsel is not a traditional relationship. In contrast to the relationship between the representative parties and their lawyers, which is one of private contract, the relationship between class counsel and the members of the class is one of court creation. *Amos v. Board of Directors of City of Milwaukee*, 408 F.Supp. 765, 774-75 (E.D. Wis. 1976), *aff'd sub nom. Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976) (issue not discussed on appeal), *vacated and remanded on other grounds*, 433 U.S. 672 (1977) . Because the relationship between absent class members and class counsel is one of court creation rather than private contract, and because of the nature of class action lawsuits, courts have been required to define the parameters of that relationship during the time between the institution of a class action and the close of the opt-out period.

Courts and commentators agree that the anti-contact rule does not apply pre-certification, except with respect to class representatives. However, the application of the anti-contact rule has proved particularly challenging with respect to the period following certification but before the close of the opt-out period. See H. Newberg, *Newberg on Class Actions* § 15.15 (4th ed. 2002) (“During this exclusion period, the status of class members is particularly amorphous because the putative class may contain members who will reject the class action remedy. This period of limbo ma[kes] the application of [the anti-contact rule] more difficult.”).

Claimants contend that the anti-contact rule applies upon certification of a class. This is the majority view. See, e.g., *Fulco v. Cont'l Cablevision, Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992) (after the class has been certified, defendants' counsel must treat the unnamed class

members as "represented by" class counsel for purposes of DR 7-104); *Kingsepp v. Wesleyan University*, 142 F.R.D. 597, 599 (S.D.N.Y. 1992) (in certifying a class action, the Court confers on absent persons the status of litigants and creates an attorney-client relationship between those persons and a lawyer or group of lawyers found to be adequate under Rule 23(a)(4)); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986) (communicating with class members in securities action after district court orally certified class violated DR7-104(A)); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1034 (E.D. Wash. 1985) (after class certification defense counsel may not communicate with any class member with respect to matters that are the subject of the litigation without prior consent of class counsel or the court); *Impervious Paint Industries, Inc., v. Ashland Oil*, 508 F. Supp. 720, 722-23 (W.D. KY 1981) (defendants' counsel must treat plaintiff class members as represented by counsel, and must conduct themselves in accordance with both sections of DR 7-104); Manual for Complex Litigation, Fourth (2014), § 21.33 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel. Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation."); Restatement (Third) of the Law Governing Lawyers §99A, cmt. 1 ("For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class.").

Sterling argues that the anti-contact rule takes effect only after the expiration of the opt-out period. The sole authority cited by Sterling is ABA Formal Ethics Opinion 07-445 ("A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the

client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period.”).¹ Sterling accordingly argues that the imposition of any limitations on contact between Sterling attorneys and class members prior to the expiration of the opt-out period must meet the requirements of the Supreme Court’s decision in *Gulf Oil Company v. Bernard*, 452 U.S. 89, 100 (1981), discussed below.

Control of Communications with Class Members

Separate and apart from the rules of professional responsibility, it is well-established that “[b]ecause of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” *Gulf Oil*, 452 U.S. at 100; *see also Erhardt v. Prudential Group Inc.*, 629 F.2d 843, 846 (2d Cir. 1980) (“It is the responsibility of the court * * * to safeguard [class members] from unauthorized, misleading communications from the parties or their counsel.”); Fed. R. Civ. P. 23(d).

The *Gulf Oil* Court recognized that misleading communications to class members concerning the litigation pose a serious threat to the fairness of the litigation process, the

¹ This approach was adopted by the court in *Logan v. Hargraves*, No. CS/04-0214, 2006 WL 4101355 (E.D.Wash., October 23, 2006); *see also Resznick v. Am. Dental Ass’n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982), in which the court found that communications between defense counsel and plaintiff class members concerning the litigation were barred by DR7-104. The court stated that “[w]ithout question the unnamed class members, once the class has been certified, are ‘represented by’ the class counsel,” but also stated that “[a]fter a court has certified a case as a class action and the time for exclusions has expired, the attorney for the class representative represents all class members who are otherwise unrepresented by counsel” (quoting *Newberg on Class Actions* §2730(d) at 1220 (1977)). Although it is not clear from the court’s opinion, it appears that *Resznick* involved post-opt-out period communications.

adequacy of representation and the administration of justice generally. *Gulf Oil*, 454 U.S. at 101 n.12 (citing *Waldo v Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790-91 (E.D. La. 1977), *appeal dismissed without published opinion*, 579 F.2d 642 (5th Cir. 1978)). At the same time, the *Gulf Oil* Court observed that orders regulating communications between litigants pose a grave threat to first amendment freedom of speech. *Id.* Accordingly, any order limiting communications “should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties,” and must limit speech as little as possible. 454 U.S. at 101-102. The court need not find “actual harm” has occurred because of the communication; the imposition of a restrictive order is authorized “to guard against the ‘likelihood of serious abuses.’” *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3rd Cir. 1988) (quoting *Gulf Oil*, 452 U.S. at 104) (emphasis added by the Third Circuit).

In order to make a free and unfettered decision to participate or withdraw, “it is critical that the class receive accurate and impartial information regarding the status, purposes and effects of the class action.” *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202, 1203 (11th Cir. 1985) (“Unsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal. Damage from misstatements could well be irreparable.”) The established mechanism for accomplishing this is the class notice, which is designed to present the relevant facts in an unbiased format.

Following *Gulf Oil*, restrictions on communications with class members have been imposed and upheld by numerous courts. *See e.g.*, *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985); *Stransky v. HealthOne of Denver*, 929 F. Supp. 2d 1100 (D. Colo. 2013); *Romano v. SLS Residential, Inc.*, 253 F.R.D. 292 (S.D.N.Y. 2008); *Belt v. Emcare, Inc.*, 629 F.

Supp. 2d 664 (E.D. Tex. 2003); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994); *Tedesco v. Mishkin*, 629 F. Supp. 1474 (S.D.N.Y. 1986). Several of these courts have noted the potential for coercion in unilateral communications by the class opponent where the class and the class opponent are involved in an ongoing business relationship. *Kleiner* 751 F.2d at 1202 (class consisted of bank borrowers, many of whom were dependent on bank for future financing); *see also Belt*, 299 F. Supp. 2d at 668 (E.D. Tex. 2003) (letter sent from employer to employees had “heightened potential for coercion”); *Tedesco*, 629 F. Supp. at 1484 (S.D.N.Y. 1986) (class members who have a continuing investment in enterprises controlled by attorney defendant are “particularly vulnerable” to defendant’s communications).

Other courts have declined to impose restrictions on communications with class members or held that restrictions imposed by a trial court failed to meet the “clear record” and “specific findings” requirements of *Gulf Oil*. *See, e.g., Great Rivers Co-op of Southeastern Iowa v. Farmland Industries, Inc.*, 59 F.3d 764 (8th Cir. 1995); *Fengler v. Crouse Health Sys., Inc.*, 634 F. Supp. 2d 257 (N.D.N.Y. 2009); *Gerlach v. Wells Fargo & Co.*, No. 05-CV-0585, 2006 WL 824652 (N.D. Cal. March 28, 2006); *Wiginton v. Ellis*, No. 02-CV-6832, 2003 WL 22232907 (N.D. Ill. September 16, 2003); *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082 (C.D. Cal. 2002); *Burrell v. Crown Central Petroleum, Inc.*, 176 F.R.D. 239 (E.D. Tex. 1997).

DISCUSSION

I find that under the prevailing case law regarding the application of the rules of professional responsibility in class actions, the members of the certified class are represented by class counsel. Sterling’s attorneys are therefore prohibited from contacting class members with respect to the subject of this arbitration without the consent of class counsel or order of the Arbitrator. Communications with class members in the ordinary course of business, unrelated to

the arbitration, remain permitted. Counsel are also permitted to make public statements regarding the arbitration, consistent with the AAA Supplementary Rules..

I further find that the Sterling Memorandum presents a seriously incomplete and misleading description of the Award that diminishes the significance of the Award and could potentially discourage interest and participation in the class arbitration.

First, the title of the Sterling Memorandum improperly and erroneously suggests that the Award contains a determination by the Arbitrator *on the merits* that Sterling has not engaged in intentional discrimination. In fact, as Sterling well knows, the Award is limited to a finding that Claimants failed to present sufficient proof of a general policy of pay and promotion discrimination to permit certification of a class with respect to their claim of disparate treatment under the standards set forth in *Wal-Mart*. The Named Claimants and other current and former employees remain free to pursue individual claims of intentional discrimination.

Second, the Sterling Memorandum fails to convey the central determination of the Award: the certification of a class of tens of thousands of current and former female employees with respect to claims of discrimination based upon disparate impact. Indeed, the Sterling Memorandum wholly omits *any* reference to class certification. Rather, the Sterling Memorandum misleadingly suggests that the claims of discrimination in this arbitration are being pursued by a “small group” of “private” claimants.

Third, the Sterling Memorandum minimizes the significance of the Award by presenting a misleading description of the claim of disparate impact, which is described as involving “the very limited question of whether certain Sterling policies had an unintentional impact on female Team Members,” and which if proven “may require the company to change the policy or practice

in question.” The Sterling Memo fails to mention that class members may also be entitled to an award of back pay.

Fourth, the statement in the Sterling Memorandum that “the arbitrator denied all class-based claims for monetary damages,” although literally true, is misleading in that it suggests that class members are precluded from any monetary recovery—even though the Award expressly provides that if Claimants prevail, class members will be entitled to a presumption of entitlement to back pay, to be sought in individual hearings.

Sterling argues that Claimants have failed to establish “the serious actual or threatened misconduct that the law requires to justify the requested severe restraints on free speech and on Sterling’s ability to operate its business.” Sterling Opposition at 1. Sterling contends that the Sterling Memorandum “was an appropriate communication by a company to *all* of its employees * * * regarding an important development in an ongoing and highly publicized legal proceeding that as had and will have a substantial effect on the company,” Sterling Opposition at 3 (emphasis in original), and that the Sterling Memorandum “does not fall on the spectrum of egregious conduct found in the cases * * * where courts have restricted free speech.” Sterling Opposition at 9.²

² Sterling also argues that “Claimants’ proposed restrictions on Sterling’s communications with its employees are particularly inappropriate in light of Claimants’ media campaign,” which Sterling contends includes numerous misrepresentations regarding the Award that “overstat[e] the remaining class claim in the hopes of soliciting more participation by former or current employees.” Sterling Opposition at 11. Sterling is free to address the accuracy of Claimants’ statements in the public “marketplace of ideas.” Claimants’ public comments cannot, however, justify misrepresentations by Sterling in internal communications over which it has complete control and where there is no opportunity for rebuttal. *See Shores v. Publix Super Markets*, 1996 U.S. Dist. LEXIS 22396, No. 95-1162-CIV-T-25(E) (M.D. Fla., November 25, 1996).

Sterling observes that in a number of the cases cited above and relied upon by Claimants, defendants intentionally and actively used intimidation, threats, false statements and deception to dissuade potential class members from joining a lawsuit. For example, in *Kleiner*, the defendant and its counsel violated an existing protective order post-certification, but prior to the issuance of class notice, by secretly soliciting exclusion requests from potential members of the plaintiff class by having loan officers call their customers and “do the best selling job they had ever done” to persuade the borrowers to “withdraw from the class.” 751 F.2d at 1196-1198. In *Stransky*, the defendant held mandatory staff meetings that the court found to be misleading, coercive and intimidating, at which putative class members were advised that the lawsuit had a low probability of success, and misinformed them regarding the monetary consequences of the outcome, *e.g.*, telling them that if they won, their attorney’s fees would be taken out of their award, and if they lost they would be liable for defendant’s fees and costs. 929 F. Supp. 2d at 1106. In *Romano*, the defendant health care facility related false and misleading information to putative class members and their families about the consequences of participating in the lawsuit by telling them that their psychiatric records would be made public if they joined the class, and contacted other institutions involved in treating putative class members in an attempt to get institutions to sign opt-outs on behalf of putative class members. 253 F.R.D. at 294-296. In *Belt*, defendants sent a letter just prior to the scheduled mailing of a court-approved notice to putative members of a conditionally-certified collective action (composed of nurse practitioners and physicians assistants), mischaracterizing the suit as an attack on the members’ status as “professionals,” mischaracterizing available damages, misrepresenting that attorney fees would be deducted from any recovery, and suggesting that the suit could affect members’ jobs. 629 F. Supp. 2d at 666-667. In *Hampton*, defendant sent letters to potential class members urging them

not to participate in the lawsuit by pointing out the potential negative impact on the plaintiffs' companies and the costs of litigation "that will ultimately come out of your pocket," and by asserting that "by asking you to join the class, [the lead plaintiff] is asking you to sue yourself." 156 F.R.D. at 631-632. Finally, in *Tedesco*, the defendant authored and sent to plaintiff class members a letter purportedly from a class member encouraging the class members to work together to seek different class counsel and committed perjury when asked about it. 629 F. Supp. at 1479 & n.5, 1482.

Sterling relies on several cases rejecting requested restrictions based upon communications similar to the Sterling Memorandum.

For example, in *Burrell*, the court held that employers have a right to inform employees about pending litigation even when those communications are with potential or actual class members, unless there is evidence of coercion, misleading statements, or efforts to undermine the purposes of Rule 23, *e.g.*, by encouraging putative class members not to participate in the suit. In *Burrell*, the defendant employer sent an email and announcement all employees and held informational meetings at its administrative offices discussing the company's position with respect to a pending class action in which certification had not yet been decided. The court found that the email and announcement, and the slides used at the informational meetings were not misleading and contained no explicit or implicit threats, and that there was no evidence that the company tried to discourage participation in the lawsuit. The court acknowledged that workplace communications are potentially coercive, and that the court need not make a finding that a particular abuse has occurred, but held that a restriction on communications cannot be imposed unless there exists "a clear record of * * * *threatened* abuses." 176 F.R.D. at 244 (emphasis in original).

Similarly, in *Gerlach*, the court rejected a request for restrictions on communications and a corrective notice, which was based upon defendant's allegedly misleading and coercive communications with potential collective action members prior to certification. 2006 WL at 824652. The court found that the document at issue was "not sufficiently misleading or coercive to justify the relief sought," noting that "[i]t informs potential collective action members that it is their decision whether to speak to any lawyer that contacts them and that, if they decide to speak to Plaintiffs' attorneys, they will not be retaliated against. It reiterates that their jobs will not be affected by participating in the lawsuit or by speaking to Plaintiffs' counsel." 2006 WL 824652 at *7 (citation omitted). In addition, the court noted that the document "does not give legal advice, does not suggest retaliation if employees opt in, and does not undermine any notice given by the Court." *Id.* The court further observed that "there is nothing improper about telling potential collective action members, at this point in the litigation, to speak with their manager of an HR representative if they want to learn more about the lawsuit." *Id.*

Sterling also relies upon the decision in *Wiginton*, in which the court denied a motion to restrict defendant's communications with putative class members, based upon its review of two internal e-mails, and its conclusion that they were "not intended to discourage putative class members from participation in this case." 2003 WL 22232907 at *3. Although the court noted its disapproval of defendant's direction to its employees that "they should deny knowledge of the facts of the case to third persons such as friends or clients," the court found that "this does not threaten to undermine the class action process," observing that "there is evidence that this e-mail was sent in response to publicity surrounding the filing of the complaint, not that it was sent to intimidate its employees." *Id.* The second e-mail reiterated the policy that all employees have the right to complain of harassment without fear of retaliation, which the court noted is "similar

to disclaimers ordered by courts that have granted plaintiffs' motions to restrict communications." *Id.* Despite some evidence that a manager had told employees not to speak with plaintiffs' counsel, which was disputed by the manager, the court found that the record did not support a "clear finding of actual or threatened abuses" sufficient to justify the relief sought by plaintiffs. *Id.* at *3-4.

Finally, Sterling relies upon the decision in *Parks*, an FLSA action in which the court granted plaintiffs' motion to designate the case as a representative action and ordered an appropriate notice, but prior to the notice being sent, the defendant sent an internal memorandum regarding the case to prospective plaintiffs, advising them that they could contact defendant's general counsel to answer any questions they might have. The court denied plaintiffs' application to stop defendant from communicating with prospective plaintiffs and to make defendant pay for a corrective notice. The court found that the memorandum did not "undermine or contradict the Court's own notice," that "there is no substantial suggestion of retaliation if an employee opts-in," and that defendant's suggestion to direct questions to general counsel is "permissible" at the "pre-opt in" stage, which the court found comparable to the pre-certification stage of a Rule 23 class action. 235 F. Supp. 2d at 1083, 1085.

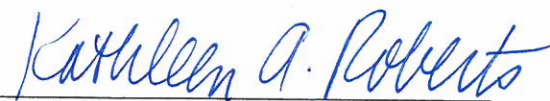
None of the above cases presents the precise circumstances of the Sterling Memorandum, which was sent post-certification and pre-Class Notice, and which I find to be misleading as a result of partial truths and significant omissions, but which contains no implicit or explicit suggestion that prospective plaintiffs opt-out of the arbitration (indeed there is no reference to a class proceeding in which current female employees might participate), or suggestion of negative consequences that could result from participation in the arbitration, and is not accompanied by

evidence of any specific conduct by Sterling that threatens to undermine the purposes of a class proceeding.

Applying the principles of *Gulf Oil*, I find that although the Sterling Memorandum is troubling, its misleading partial truths and omissions do not threaten serious abuse of the class arbitration process and therefore do not justify the relief requested by Claimants—particularly because members of the certified class will receive a complete and accurate presentation of the Award in a Class Notice to be approved by the Arbitrator, prior to making any decision with respect to their participation in the class arbitration.³

At the same time, I am concerned that formal Class Notice may be delayed as a result of Sterling's pending motion to vacate the Award. In the interim, it is essential that prospective class members receive complete and accurate information regarding the Award. I therefore direct counsel to meet and confer to develop and submit to me no later than March 23, 2015, a document in the form of "Frequently Asked Questions" to be distributed to any potential class member who seeks information from Sterling or from Claimants' counsel regarding the arbitration pending issuance of the Class Notice required by AAA Supplementary Rule 6, which document should also be posted on the AAA website, and which may be updated from time to time to reflect significant developments in the arbitration or court proceedings.

SO ORDERED.



KATHLEEN A. ROBERTS
ARBITRATOR

March 16, 2015

³ Any actual evidence of efforts by counsel to interfere with the free choice of class members regarding participation in the arbitration should be brought immediately to my attention.

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS ACTION TRIBUNAL**

LARYSSA JOCK, CHRISTY	:	
MEIERDIERCKS, MARIA HOUSE,	:	
DENISE MADDOX, LISA	:	
McCONNELL, GLORIA PAGAN,	:	
JUDY REED, LINDA RHODES, NINA	:	
SHAHMIRZADI, LEIGHLA MURPHY,	:	AAA CASE NO. 11 20 0800 0655
DAWN SOUTO-COONS, and MARIE	:	
WOLF, individually and on behalf of all	:	
others similarly situated,	:	
	:	
Claimants,	:	Arbitrator: Kathleen A. Roberts
	:	
-against-	:	
	:	
STERLING JEWELERS INC.,	:	
	:	
Respondent.	:	

CLASS DETERMINATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreements entered into between the above-named parties, and having been duly sworn, do hereby find as follows:

This Class Determination Award addresses Claimants’ motion for class certification, as well as the pending motions to exclude expert testimony filed by both parties pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)*.¹

Claimants are current and former female employees of Respondent Sterling Jewelers, Inc. (“Respondent” or “Sterling”), who allege that Sterling has systematically paid female employees in its stores less than their male counterparts and promoted female employees less frequently and

¹ 509 U.S. 579 (1993). Sterling’s request for an evidentiary hearing with respect to its *Daubert* motions is denied for substantially the reasons set forth in Claimants’ Opposition to Sterling’s Motion for Hearings and Argument. In short, there is no need for an evidentiary hearing in light of the extensive written record pertaining to the qualifications of the experts, which includes expert reports and depositions, as well as briefing.

after a longer wait than their male counterparts. Claimants allege discrimination under both the pattern or practice disparate treatment and the disparate impact theories of liability under Title VII, and under the Equal Pay Act (EPA).² Claimants seek certification of a class, pursuant to American Arbitration Association (AAA) Supplementary Rule 4 and Fed. R. Civ. P. 23, comprised of approximately 44,000 women who have worked in Sterling's retail stores as Sales Associates, Department Managers, or in any Assistant Manager, or Store Manager position³ ("Retail Sales Employees" or "the putative class") for the period from June 2, 2002, to the first day of trial. Claimants seek declaratory and injunctive relief for the class, as well as back pay and punitive damages; they do not seek compensatory damages or individual injunctive relief.

SUMMARY OF CLAIMANTS' ALLEGATIONS

Claimants contend that throughout the proposed class period and across all of Sterling's retail operations, its workforce data show disparities adverse to women in pay and promotion decisions that cannot be attributed to legitimate, non-discriminatory factors. Claimants contend that there are disparities in pay at hire and for incumbent employees throughout their tenure, and that these disparities are the product of a system that sets starting pay rates based upon factors pertaining to prior job experience that are not job-related and which permit the intrusion of bias.

² The Named Claimants timely filed charges with the EEOC based upon Title VII and the Equal Pay Act. The EEOC issued a determination that Sterling "subjected charging parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation." The EEOC found that "[s]tatistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees." EEOC Letter of Determination (January 3, 2008) (Claimants' Exhibit 1).

³In the Jared Division, Assistant Managers are called Assistant General Managers, and Store Managers are called General Managers. In this Award, Mall Assistant Managers and Jared Assistant General Managers will be referred as "Assistant Managers." Similarly, Mall Store Managers and Jared General Managers will be referred as "Store Managers."

According to Claimants, rather than correcting these disparities at the time of annual merit increases, Sterling applies a percentage increase to employees' base compensation, which perpetuates and magnifies disparities in the compensation of female employees. Claimants contend that Sterling's companywide policy of prohibiting employees from discussing the amount of their compensation with each other concealed these disparities and thus prevented putative class members from discovering pay inequities, insulating Sterling from challenge.

According to Claimants, promotions into and within management at Sterling's stores have been made pursuant to Sterling's "Succession Planning" system, which operates consistently throughout the Company. Claimants contend that throughout the time period covered by this case, Sterling promoted men more frequently and more quickly than similarly-situated women, meaning that fewer women are promoted than men, and that those women who are promoted work and wait longer for promotions than similarly-situated men.

Claimants contend that there is a corporate culture of gender bias at Sterling, based upon evidence of numerous instances of inappropriate sexual conduct demeaning to women by executives and managers from the CEO down, including executives and managers who were involved in decisions regarding compensation and promotion, and evidence that a number of corporate decisionmakers held and communicated negative gender stereotypes. Claimants contend that Sterling affords its managers who make pay and promotion decisions discretion in interpreting the common standards governing those decisions, creating the opportunity for this gender-negative corporate culture to influence pay and promotion decisions throughout the Company. Claimants further contend that Sterling has a "dysfunctional" Human Resources department that has failed to curb or address ongoing discrimination.

CLAIMANTS' MOTION FOR CLASS CERTIFICATION

As noted above, Claimants seek certification of a single, nationwide class comprised of approximately 44,000 women who have worked in Sterling's retail stores as Sales Associates, Department Managers, or in any Assistant Manager or Store Manager position for the period from June 2, 2002, to the first day of trial.

Claimants propose a two-stage process for adjudication of their claims. In the first stage, the Arbitrator would determine "liability," *i.e.*, whether Claimants have established disparate impact or pattern and practice disparate treatment discrimination by Sterling. In this stage Claimants would present their evidence of class-wide discrimination, and Sterling would present those defenses that apply to the putative class as a whole and address Claimants' theories of class-wide discrimination. If Claimants prevail at this stage, they will have established entitlement to declaratory and injunctive relief, and will have established a rebuttable presumption that each class member was disfavored on account of her gender and therefore entitled to an award of back pay. Claimants propose that the Arbitrator also determine at this stage whether Sterling's conduct warrants an award of punitive damages. In the second stage, the Arbitrator would determine individual relief. In this stage, Sterling would have the opportunity to assert defenses with respect to individual claims, *i.e.*, demonstrate that a particular individual was not disfavored, or disfavored for a legitimate reason unrelated to her gender, as well as any defenses related to the calculation of monetary damages. The Arbitrator would then determine the amount of back pay owed to those class members found to be entitled to an award. Finally, the Arbitrator would determine the amount of punitive damages to be awarded, if any.

APPLICABLE RULES

Claimants' motion is governed by the AAA Supplementary Rules for Class Arbitrations, which provide that an arbitrator must consider the criteria enumerated in AAA Supplementary Rule 4 "and any law or agreement of the parties the arbitrator determines applies to the arbitration."

AAA Supplementary Rule 4(a) provides that "the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described" and that the arbitrator shall permit a representative to do so only if each of six conditions is met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately protect the interests of the class;
- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

AAA Supplementary Rule 4(b) provides:

An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

- (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
- (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
- (3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and

(4) the difficulties likely to be encountered in the management of a class arbitration.

AAA Supplementary Rule 4 essentially tracks the requirements of Fed. R. Civ. P. 23 (Rule 23). A class may be certified under Rule 23 only if Claimants meet the requirements of Rule 23(a) and the requirements of one of the provisions of Rule 23(b). In this case Claimants seek certification of their claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and certification of their claims for monetary damages pursuant to Rule 23(b)(3).

Rule 23(a) provides:

One or members of a class may sue or be sued as representative parties on behalf of all class members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

A class action may be maintained under Rule 23(b)(2) if:

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

A class action may be maintained under Rule 23(b)(3) if:

the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.⁴ The matters pertinent to these findings include:

⁴ Although under Rule 23, the predominance and superiority requirements apply only to claims certified under Rule 23(b)(3), the predominance and superiority requirements of AAA Supplementary Rule 4(b) must be met in all cases.

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

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

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

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

Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”⁵

Because the requirements of AAA Supplementary Rule 4 are substantially identical to Rule 23, and because the vast majority of the case law on class certification applies Rule 23, this Award will analyze Claimants' motion and Sterling's opposition pursuant to the requirements of Rule 23.

STERLING'S OPPOSITION TO CLASS CERTIFICATION

Sterling contends that Claimants have failed to meet the commonality, typicality and adequacy requirements of Rule 23(a), the “grounds that apply generally to the class” requirement of Rule 23(b)(2), as well as the predominance and superiority requirements of Rule 23(b)(3). Sterling also contends that the proposed class period is overbroad. Sterling further contends that Claimants' EPA claims may not be certified as an “opt-out” class, that Claimants have not met the “similarly situated” requirement for certification of their EPA claims as a collective action, and that a nationwide class cannot be certified under the EPA because the EPA applies only to discrimination within “establishments” that are defined as physical locations. Finally, Sterling contends that the Named Claimants have no standing to represent absent class members in this

⁵ AAA Supplementary Rule 4 does not contain a provision comparable to Rule 23(c)(4). For the reasons set forth below at pp. 110-111, I find that certification of a class arbitration with respect to particular issues is consistent with the AAA Supplementary Rules and therefore applies to this arbitration.

proceeding because absent class members did not agree to have an arbitrator decide whether to adjudicate their cases through the vehicle of a class arbitration.

SUMMARY OF AWARD

For the reasons set forth below, I find that the adjudication of Claimants' Title VII disparate impact claims with respect to declaratory and injunctive relief may be maintained as a class arbitration pursuant to AAA Supplementary Rule 4 and Rule 23(b)(2) and Rule 23(c)(4). Claimants' motion for class certification of their Title VII disparate impact claims with respect to monetary damages pursuant to AAA Supplementary Rule 4 and Rule 23(b)(3) is denied. Claimants' motion for class certification of their Title VII disparate treatment claims is denied. Claimant's motion for certification of a Rule 23 "opt-out" class for their EPA claims is denied. Sterling's contention that the Named Claimants lack standing to represent absent class members in this proceeding is rejected. I find that the appropriate class period for Claimants' Title VII compensation claims is July 22, 2004, to the date of trial, and that the appropriate class period for Claimants' Title VII promotion claims is December 7, 2004, to the date of trial.

EVIDENCE PERTAINING TO CLASS CERTIFICATION

The parties have submitted voluminous evidence and legal briefs with respect to the pending motions. The evidence includes thousands of documents produced by Sterling, extensive excerpts of testimony taken at dozens of depositions, declarations of current and former Sterling employees submitted by Claimants-- including the declarations of close to 200 putative class members, declarations of Sterling executives and employees submitted by Sterling, and the reports and testimony of seven experts.

The following facts are not materially in dispute, except as specifically noted:

Sterling's Corporate Structure and Field Operations

Sterling is a wholly-owned subsidiary of Signet Jewelers. Sterling currently owns nearly 1,700 stores in all 50 states, consisting of its Mall Division, which includes the national Kay Jewelers brand, and its free-standing Jared The Galleria of Jewelry ("Jared") stores.⁶ Operation and oversight of these stores is known as "field operations" and is concentrated under Senior Vice President of Operations ("SVPO"), Tryna Kochanek.⁷ Kochanek, who has held this position since 2000,⁸ has responsibility and oversight for three divisions, each overseen by a Divisional Vice President ("DVP"): the Mall Division, the Jared Division, and Operations Administration.⁹ DVPs Joseph Beck and Barry Fernholz oversee the Mall and Jared Divisions, respectively.¹⁰ They provide functionally the same oversight and are responsible for performance and training in their divisions.¹¹ DVP Bill Luth currently oversees Operations Administration and has done so since 2000.¹²

As of year-end 2012, fourteen Vice Presidents of Regional Operation ("VPROs") reported to Beck and Fernholz--eleven in the Mall Division and three in the Jared Division.¹³ Each Region contained between seven and nine Districts. Of these, 91 are Mall Districts,

⁶ 30(b)(6) Deposition of Tryna Kochanek (Oct. 25, 2012) (Kochanek Dep.) at 12:18-13:12; 70:9 (Claimants' Exhibit 8).

⁷ *Id.* at 11:18-19; 12:13-19; Organizational charts, SJI 1929-36, 1948-49 (Claimants' Exhibits 11 and 12) ("SJI" designates a document produced by Sterling, followed by the "Bates Number" assigned to an individual page); *see* Glossary of Sterling Executives (Claimants' Exhibit 13).

⁸ Kochanek Dep. at 11:23-25; 15:1-16 (Claimants' Exhibit 8).

⁹ *Id.* at 14:23-25.

¹⁰ *Id.* at 52:24-53:18.

¹¹ *Id.* at 54:3-56:12; 67:18-68:11; Deposition of Barry Fernholz (Feb. 6, 2013) (Fernholz Dep.) at 42:2-43:8 (Claimants' Exhibit 10).

¹² Kochanek Dep. at 53:16-18; 30(b)(6) Deposition of William Luth (Nov 12, 2012) (Luth I Dep.) at 11:5-8 (Claimants' Exhibit 14). Luth was deposed twice as a 30(b)(6) witness on Sterling's compensation and promotion policies and procedures and once in his individual capacity. These depositions are referred to as Luth I, II, and III.

¹³ Deposition of Joseph Beck (Beck Dep.) at 10:7-10 (Claimants' Exhibit 9); Fernholz Dep. at 27:1-6 (Claimants' Exhibit 10). Prior to February 2004, Sterling did not distinguish between Divisional and Regional Vice Presidents; instead Sterling employed ten Vice Presidents, each of whom oversaw a region and reported directly to Kochanek. Kochanek Dep. at 59:10-19 (Claimants' Exhibit 8).

containing between 11 and 15 stores, and 21 are Jared Districts, containing 10 or fewer stores.¹⁴ District Managers (“DMs”) report to the VPROs. The duties of DMs are the same across the Company.¹⁵

The offices of the SVPO, the three DVPs and the VPROs are all located at Sterling’s headquarters in Akron, Ohio, and these executives meet regularly regarding the oversight and performance of Sterling’s field operations.¹⁶ The DMs, with VPRO oversight, are largely responsible for determining compensation of Retail Sales Employees. DMs set starting pay rates for new Retail Sales Employees, determine merit increases, and set pay rates upon promotion, with VPRO oversight. DMs and VPROs have performed these responsibilities since at least 2002.¹⁷ In awarding promotions, DMs are charged with identifying, grooming, and recommending candidates for their VPROs’ review and approval. VPROs must approve all management-level promotions, subject to the final approval of the DVPs.¹⁸ Sterling reports that between January 1, 2002 and March 1, 2013, a total of 23 individuals have been VPROs, and 229 individuals have been DMs.¹⁹

¹⁴ Store Lists, SJI 181771-72; 1242081-91; 1255868 (too voluminous to submit as exhibits).

¹⁵ Luth I Dep. at 75:15-76:5 (Claimants’ Exhibit 14). All DMs share a single position description. Kochanek Dep. at. 161:23-162:21; 162:22-164:5 (Claimants’ Exhibit 8).

¹⁶ Kochanek Dep. At 73:1-15; 118:16-19 (Claimants’ Exhibit 8); Fernholz Dep. at 100:20-102:2, 105:2-7 (describing regular operations meetings that have taken place the entire time that Fernholz has been a DVP) (Claimants’ Exhibit 10); Beck Dep. at 15:4-16:9 (describing regular one-on-one meetings with VPROs and operations meetings of VPROs and DVPs) (Claimants’ Exhibit 9).

¹⁷ Luth I Dep at 230:16-22, 235:19-236:17 (merit pay ranges set by HR; DM determines percentage given to employees), 93:8-94:11 (VPROs oversee DMs and work to determine ranges for setting starting pay) (Claimants’ Exhibit 14); Kochanek Dep. at 94:22-95:6 (DMs set starting pay for sales employees), 96:23-98:2 (VPROs provide oversight for setting pay) (Claimants’ Exhibit 8); *see* SJI 291798-19 (email from DM to VPRO regarding pay for potential new hires); SJI 160099; SJI 183093-94; SJI 280041-42; SJI 586813 (emails between DMs and VPROs regarding pay upon promotion) (Claimants’ Exhibits 15-18).

¹⁸ Fernholz Dep. at 139:5-7 (Claimants’ Exhibit 10).

¹⁹ Declaration of William Luth (Luth Decl.) ¶ 3 (Respondent’s Exhibit 5).

In the stores, the highest-ranking employee is the Store Manager (SM); Jared GMs and Mall SMs have same duties.²⁰ Sterling's data reflects that between January 1, 2002 and March 1, 2013, a total of 5,150 individuals have been SMs.²¹ Below the SM is an Assistant Manager, whose duties are essentially the same in Mall and Jared stores.²² Jared stores employ a third tier of management-level employees, Diamond and Timepiece Department Managers. All Sterling stores have Sales Associates, whose duties are virtually identical in the Mall and Jared Divisions.²³ Sterling maintains uniform job descriptions for all Retail Sales Employee positions that are applicable companywide. Employees are allowed to move between stores within the same district, and across districts (movement between the Mall and Jared Divisions is permitted, but rare).²⁴

Currently, 34% of VPROs are women; 43% of DMs are women; 60% of SMs are women; 72% of Assistant Managers are women; 57% of Department Managers are women, and 73% of Sales Associates are women.²⁵

Human Resources

Sterling's Human Resources ("HR") department operates out of its corporate headquarters and is overseen by Steven Becker, Senior Vice President of HR.²⁶ HR contains a Training Division, responsible for promulgating uniform training for field operations throughout

²⁰ See Mall Stores Store Manager Job Description, SJI 2079 (Claimants' Exhibit 2); Jared General Store Manager Job Description, SJI 2099 (Claimants' Exhibit 3); Kochanek Dep. at 14:9-14; 168:1-178:1 (Claimants' Exhibit 8).

²¹ Luth Decl. ¶ 3 (Sterling's Exhibit 5).

²² See Jared Assistant General Manager Job Description, SJI 1597-98; Mall Assistant Store Manager Job Description, SJI 1614-16 (Claimants' Exhibits 24 and 25).

²³ See Jared Sales Associate Job Description, SJI 1606-07; Mall Sales Associate Job Description, SJI 1617-18 (Claimants' Exhibits 26 and 27).

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

²⁵ Report of Claimants' expert Dr. Louis R. Lanier (Lanier Report) at Table 2 (Claimants' Exhibit 41).

²⁶ 30(b)(6) Deposition of Steven Becker (Dec. 4, 2012) (Becker Dep.) at 6:5-20 (Claimants' Exhibit 33).

the Company.²⁷ Training is an integral part of Sterling’s corporate culture and is consistent across the nation throughout the field.²⁸ HR also contains an Employee Relations Division, overseen by Vice President of Employee Relations, Michael Lynch. Employee Relations “provid[es] employee relations support to the field organization,” including management and non-management employees.²⁹ Maryellen Mennett is the Director of Field HR. Under the direction of Lynch and Mennett, Regional HR Specialists provide HR services to employees in the field, including advice concerning personnel and HR policies, and receiving and investigating complaints. Each Regional HR Specialist is assigned to serve employees in one or more regions. These Regional HR Specialists follow a common set of guidelines for responding to and investigating employee complaints.³⁰ Throughout the proposed class period, Sterling’s EEO policies, Code of Conduct and Standards of Business Ethics, and Zero Tolerance Policy have prohibited discrimination and sexual harassment, and managers are trained at frequent intervals on these policies.³¹ The evidence pertaining to Claimants’ allegations of deficiencies in Sterling’s HR policies and practices is discussed below in the section on expert evidence.

Compensation Policies and Practices

For the entire period covered by this case, Sterling’s policies and practices governing compensation have applied companywide and uniformly to all Retail Sales Employees, including

²⁷ Kochanek Dep. 74:9-76:11 (Claimants’ Exhibit 8). Until 2012, training was housed under Luth in Operations Administration. *Id.*

²⁸ *Id.* at 146:21-151:8.

²⁹ Becker Dep. at 51:4-17 (Claimants’ Exhibit 33).

³⁰ *See, e.g.*, Instructions for Drafting Internal Investigation Summary, SJI 238039; Guidelines for Investigation Closure, SJI 628154; Steps to a Proper and Legal Investigation, SJI 704873-78; Investigation Procedures Refresher, SJI 59056-58 (Claimants’ Exhibits 34-37).

³¹ Consolidated Exhibit of Equal Employment Opportunity and Human Resources Policies (“EEO and HR Policies”) (Sterling’s Exhibit 24); Consolidated Exhibit of Training Materials (“Training Materials”) (Sterling’s Exhibit 28).

members of the putative class, in each of Sterling's stores.³² Under these policies and practices, Sterling's DMs are primarily responsible for making determinations about the compensation of Retail Sales Employees; however, DMs routinely consult with and receive input and recommendations from SMs.³³

Claimants challenge the following aspects of Sterling's compensation process:

- *Setting Starting Pay:* Throughout the period covered by this case, Sterling has directed DMs to set starting pay for newly hired Sales Associates using prior job experience, including prior management experience, as the touchstone. But Sterling has afforded its DMs considerable discretion in determining how to value prior job experience in setting starting pay rates. As a result, the process for setting starting pay rates is susceptible to the influence of bias. Even when Sterling identified particular types of experience to credit in setting starting pay rates, some, such as prior management experience, have no bearing on performance as a Sales Associate and should not have been considered in setting starting pay.
- *Annual Merit Increases:* Sterling's policy is to award annual merit increases based on the employee's performance. By formulating the amount of the merit increase as a percentage increase to an employee's base compensation, Sterling perpetuates, and in some cases magnifies, the prior disparities in base pay rates. Rather than correcting these disparities at the time of annual merit increases, through out-of-cycle adjustments, Sterling has consistently failed to address these wage disparities.
- *Compensation is Unrelated to Performance:* There are two measures of performance primarily used at Sterling. First, Sterling evaluates the performance of employees annually. These performance evaluations are used to set annual merit increases. Women consistently have received higher performance evaluations on average than men. Second, Sterling pays sales employees a fixed commission based on the amount of merchandise they sell. Women on average receive higher commissions than men who work in the same stores. Notwithstanding that female Retail Sales Employees outperform similarly-situated men, women have consistently received lower base rates, and accordingly lower merit increases.³⁴

³² See, e.g., Sterling Wage and Salary Administration, SJI 10885-86 and Compensation Administration Management Guidelines, SJI 10883-84 (Claimants' Exhibits 38 and 39).

³³ See, e.g., Business Process Overview, Merit Increases, SJI 1269912-17 (Claimants' Exhibit 40); Luth I Dep. at 93:8-94:11 (using wage engine, VPROs oversee DMs to set starting pay), 230:16-19 and 232:11-22 (percentages for merit pay increases signed off by DMs) (Claimants' Exhibit 14); Kochanek Dep. 89:14-92:22 (Claimants' Exhibit 8).

³⁴ Claimants' Memorandum in Support of Motion for Class Certification (Claimants' Memo) at 10.

Starting Pay

Virtually all new Retail Sales Employees are hired for the position of Sales Associate.

During the proposed class period, Sterling has implemented four major iterations of the process for setting starting pay rates: (i) a wage engine in 2002; (ii) a wage floor and wage ceiling in 2007; (iii) the Wage Rate Generator (“WRG”) system with three pay rates in 2009; and (iv) the WRG system with one pay rate in 2012.³⁵ In all four iterations, Sterling has directed DMs to set starting pay levels for Sales Associates based on the nature and amount of prior job experience candidates possess at the time of hire.³⁶

In the two iterations before 2009, Sterling directed its DMs to set starting pay for Sales Associates “with no applicable experience” “at the minimum rate assigned to their job.”³⁷ Higher starting pay rates could be awarded to new hires with prior job experience that the DMs regarded as relevant.³⁸ Generally, the iterations before 2009 were designed to ensure that the overall wages offered for starting pay fit within the budget for the district.³⁹ Sterling provided limited guidance as to what types of prior job experience warranted pay rates above the

³⁵ Specifically, the four time periods are the wage-engine only period (1/1/2003–8/29/2007), the wage-floor/wage-ceiling period (8/30/2007–7/12/2009), the WRG with three rates period (7/13/2009–1/4/2012), and the WRG with one rate period (1/5/2012–12/31/2012). Lanier Report at Table 8a (Claimants’ Exhibit 41).

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

³⁷ Compensation Administration Management Guidelines (Claimants’ Exhibit 39).

³⁸ *Id.*; Luth I Dep. at 196:13-17 (certain prior job experience could justify pay adjustment above base starting pay) (Claimants’ Exhibit 14).

³⁹ Kochanek Dep. at 94:3-95:20 (Claimants’ Exhibit 8).

minimum level, including whether or to what extent to credit prior job experience that did not involve sales.⁴⁰

In July 2009, Sterling instituted the third iteration: a computer-based algorithm called the Wage Rate Generator, which computed the starting pay rates that could be offered to new Sales Associates based upon the nature and amount of their prior job experience, prior sales volume, the location of the store, and the cost of living in the area.⁴¹ With respect to prior experience, the WRG components are retail sales experience, store management experience, and “other” management experience, volume of personal retail sales (broken down by jewelry and non-jewelry) and store volume for managers (also broken down by jewelry and non-jewelry).⁴² The WRG assigns weights to each of these components; prior retail sales experience, especially sales volume in jewelry, has the biggest impact on an applicant’s recommended rate.⁴³ There is evidence that Sterling’s managers had considerable discretion in determining what constituted retail sales experience.⁴⁴

Based upon the inputs by DMs, the WRG returned three starting pay options: a “recommended rate,” a “plus rate” and a “maximum rate.” On rare occasions, the DM could seek VPRO approval to exceed the “maximum rate.” In mid-2010, Sterling required DMs to obtain approval from their VPROs before offering either of the two higher rates. In the fourth

⁴⁰ See, e.g., Luth I Dep. at 197:15-198:6 (prior to WRG a school teacher might get some credit for prior job experience based on discretion of manager) (Claimants’ Exhibit 14).

⁴¹ Luth I Dep. at 154:18-155:17 (WRG provided a more sophisticated analysis of experience, store and geographic area, and store volume) (Claimants’ Exhibit 14); Beck Dep. at 33:15-24 (WRG is “same process” as prior iterations) (Claimants’ Exhibit 9).

⁴² The WRG does not distinguish between jewelry and non-jewelry prior experience unless the applicant provides verifiable information regarding sales volume.

⁴³ Report of Sterling’s expert Dr. Michael P. Ward (Ward Report) at Appendix A1-2 to A1-4.

⁴⁴ Deposition of William Frank Luth (Apr. 4, 2013) (Luth III Dep.) at 52:6-54:17; 57:22-64:4 (Claimants’ Exhibit 44); Claimants’ Exhibit 45.

iteration, the WRG was revised in January 2012 to return a single pay rate.⁴⁵ The inputs into the WRG formula and the weights associated with those inputs have remained unchanged.⁴⁶

At no time did Sterling conduct a job analysis of the Sales Associate position to determine and weight professionally and systematically the types of prior job experience that correlate most closely with successful performance.⁴⁷

Claimants' evidence of gender-based disparities in compensation is discussed below in the section on expert evidence.

Merit Increase Policies and Practices

Sterling's policy governing merit raises provides that pay adjustments may be made once each year based upon the results of documented performance in a written performance appraisal.⁴⁸ Sterling's merit increase process requires that DMs propose a merit increase based upon the employee's aggregate performance appraisal score.⁴⁹ The proposed merit increase must be approved by top executives at the Company before it becomes final.⁵⁰ Merit increases are computed by application of a companywide formula, increasing the base wage of employees by a percentage determined by the level of each employee's performance. Sterling generally does not use the merit increase process or any other established process to correct pay disparities between

⁴⁵ DMs may still request an exception from the VPRO, but these requests are rare. *See* Kochanek Dep. at 97:12-22 (Sterling Exhibit 2); Luth Dep. I at 155:18-158:15 (Sterling Exhibit 6) (beginning in second half of 2010, DMs had to confer with a VPRO to offer the "plus" or "max" rate provided by the WRG; in Fall 2011, DMs were no longer given this option).

⁴⁶ Ward Report at Appendix A 1-1.

⁴⁷ Luth II Dep. at 45:19-24, 170:2-171:12 (Claimants' Exhibit 29); Becker Dep. 19:3-6 (Claimants' Exhibit 33); Deposition of Sterling's Vice President of Employee Relations Michael Lynch (Jan. 23, 2013) (Lynch Dep.) at 44:17-25 (no knowledge of Uniform Guidelines) (Claimants' Exhibit 72).

⁴⁸ Business Process Overview, Merit Increases (all full-time and part-time employees, with at least 10 months of service at Sterling, are eligible to receive an increase once a year) (Claimants' Exhibit 40).

⁴⁹ *Id.* at SJI 1269914 (DMs propose merit increases; VPROs review and "appropriate changes are made.").

⁵⁰ Luth I Dep. at 232:11-234:3, 233:18-234:3, 234:25-235:7 (executive management team approves budgetary determinations, including aggregate merit increase amount) (Claimants' Exhibit 14).

comparably performing employees that are attributable to differences in starting pay.⁵¹

Accordingly, Sterling's policy for awarding annual merit increases can perpetuate any disparities adverse to women in starting pay rates. The statistical evidence with respect to merit pay is discussed below in the section on expert evidence.

Promotion Policies and Practices

Throughout the proposed class period, Sterling has used an approach known as "Succession Planning" or "Succession Management,"⁵² to make all promotions into and within management positions in its stores. "Succession Management is the ongoing, dynamic process of identifying talented employees then training and coaching them in order to prepare them for future, higher-level positions."⁵³ Sterling has consistently followed a policy of promoting internal candidates into and within management, rather than hiring candidates for management positions from outside the Company.⁵⁴

Sterling's promotion process begins with the DMs, who, with the assistance of SMs, are directed to identify, groom and recommend candidates for promotion, subject to approval by the VPROs and DVPs.⁵⁵ DMs identify candidates for promotion by meeting regularly with Retail

⁵¹ See Claimants' Memo at 14-16.

⁵² Luth II Dep. at 69:3-70:18 (Succession Planning is "is a strategy to understand candidates that would be considered promotion ready for any open vacancies in my market as a district manager") (Claimants' Exhibit 29).

⁵³ Succession Management District Manager Lesson Plan at SJI 32427 (Claimants' Exhibit 53).

⁵⁴ Luth II Dep. at 41:17-22, 70:16-18 ("Sterling strongly believes in promotion from within whenever appropriate," and this policy has been consistently in place for the past decade) (Claimants' Exhibit 29); Succession Management District Manager Lesson Plan, SJI 32416-67 at SJI 32421-22 (describing promote-from-within culture of Sterling as "corporate strategy") (Claimants' Exhibit 53).

⁵⁵ See Luth II Dep. 35:3-37:23 (VPRO approval of all promotions of Retail Sales Associates has been in place for at least the last decade); 142:18-145:1 (VPROs "partner with the district manager to have a firsthand understanding of the district manager's market and attempt to mentor, guide, manage, oversee the district manager's performance and how they're managing their own district and market"), 189:12-17 (DVPs finalize promotions "to ensure that the [regional] vice president and the district manager have taken the proper steps to validate the candidate and have verified from the procedural standpoint that all looks in order") (Claimants' Exhibit 29); Kochanek Dep. at 103 (describing SM participation in Succession Planning) (Claimants' Exhibit 8).

Sales Employees on a one-one basis, where they are expected initiate conversations about career paths and interest in promotion.⁵⁶ Under this policy it is a core responsibility of a DM to develop a succession plan, which DMs are required to regularly update and submit to VPROs, and which are monitored by DVPs.⁵⁷ This process results in the establishment of a ready stable of “promotables” who can fill current and future management needs. As vacancies arise, the DMs select and recommend a preferred candidate, subject to review and approval by the VPROs and DVPs.⁵⁸

Sterling provides training in Succession Planning that describes the process of identifying promotable candidates and grooming them for promotion.⁵⁹ Sterling directs the DMs to consider “Performance Standards” as well as seven “Mission Statement/Leadership Behaviors” in identifying the candidates groomed for promotion. Performance Standards pertain to sales metrics, which are also used in annual performance evaluations. Candidates for promotion must be performing at or above expectations in sales.⁶⁰ The seven Mission Statement/Leadership Behaviors are 1) customer 1st perspective; 2) rewards; 3) return on assets; 4) continuous improvement; 5) teamwork; 6) integrity; and 7) communication. In order to be considered

⁵⁶ Luth II Dep. at 59:23-61:10 (Sterling Exhibit 4); The Source Promotion/Transfer Policy (Sterling Exhibit 9).

⁵⁷ See Claimants’ Exhibits 56-60, 70. DMs also track candidates being groomed on centrally-developed forms. Luth II Dep. at 127:19-128:20, 129:19-130:12 (describing Career Path Summary form) (Claimants’ Exhibit 29); Deposition of VPRO David Everton (February 8, 2013) at 74:21-76:7 (as VPRO, he received regular “Projected and Potential” charts to track potential candidates for promotion into management) (Claimants’ Exhibit 62).

⁵⁸ *Id.* at 78:9-80:13 (DMs make recommendation of candidate to VPRO when vacancy arises).

⁵⁹ *E.g.*, Module 4, at SJI 28894 (Claimants’ Exhibit 55); Phase 2 DM Development Program Succession Management Leader’s Guide, SJI 35478-530 (Claimants’ Exhibit 67).

⁶⁰ Module 4 at SJI 28900 (Claimants’ Exhibit 55); Succession Management Lesson Plan, at SJI 32438 (“**The sales standard is a must-have**”) (emphasis in original) (Claimants’ Exhibit 53); Luth II Dep. at 154:3-6 (sales performance is “at the heart and is the cornerstone of whether someone should be qualified to move forward or not”), 154:20-155:2 (meeting daily sales goal is “cornerstone” of whether you are a suitable candidate for Succession Planning) (Claimants’ Exhibit 29).

promotable a manager must demonstrate five out of seven of these characteristics.⁶¹ Sterling has not conducted any studies to determine whether the Performance Standards or Mission Statement/Leadership /Behaviors correlate with successful performance in the jobs being filled.⁶²

It is Sterling's corporate policy not to post vacancies for management positions. Until 2007, Sterling had no formal mechanism for offering candidates for promotion formal notice and an opportunity to apply or register their interest in promotion. Before 2007, employees were expected to express their interest in promotion to their managers, which expression of interest may or may not have been recorded or communicated to other managers when vacancies arose.⁶³

In 2007, Sterling created a system for the registration of interest known as the Career Advancement Register ("CAR").⁶⁴ CAR allows employees to register interest, change their expression of interest, indicate to what extent they are available for relocation, and review minimum job requirements for various managerial positions.⁶⁵ Sterling requires that DMs or SMs meet one-on-one with each employee who registers in CAR to discuss his or her career development. Since January 1, 2008, Sterling has required registration in CAR for an employee to receive a promotion.⁶⁶ Based upon the CAR data, women are proportionally less interested in

⁶¹ Module 4, at SJI 28909 (Claimants' Exhibit 55); Phase 2 DM Development Program Succession Management Leader's Guide, SJI 35478-530 at 35496 (Claimants' Exhibit 67).

⁶² Luth II Dep. at 220:19-23 (Claimants' Exhibit 29).

⁶³ See Luth II Dep. at 64:6-65:13 (describing process for tracking employees' interest in promotion before 2007) (Claimants' Exhibit 29); Promotion/Transfer Policy (Claimants' Exhibit 54) at SJI 10882 ("In the field, employees should make their Store/Shop Manager and District or Regional Management aware of their desire to be considered for future vacancies/promotional opportunities").

⁶⁴ See CAR Powerpoint Presentation, SJI 723150-193 at SJI 723153-54 (describing the new CAR as a "uniform and consistent system for all Associates that wish to advance within the Company" and explaining that it is "[b]eing implemented to ensure all Associates are given fair, equitable, and objective consideration for advancement within the organization") (Claimants' Exhibit 71). see also Lynch Dep. at 212:18-215:16 ("It was my opinion that promoting individuals who had not registered could be discriminatory in nature and should not be tolerated.") (Claimants' Exhibit 72); Email from Lynch to field operations (Dec. 13, 2007) at SJI 286305 (failure to use CAR gives rise to liability risk) (Claimants' Exhibit 73).

⁶⁵ Luth Decl. ¶ 6 (Sterling Exhibit 5).

⁶⁶ *Id.*

promotion than men. Claimants' evidence that CAR is not a reliable indicator of women's interest in promotion because registration in CAR has been "manipulated," as well as Claimants' statistical evidence of gender-based disparities in promotions, is discussed below in the section on expert evidence.

Policy Against Discussing Compensation

Claimants contend that throughout the period covered by this case, Sterling has had a practice or unwritten policy prohibiting its employees from discussing their compensation with other employees. Although Sterling disavows such a policy,⁶⁷ Claimants have submitted numerous declarations reporting instances in which Sterling managers communicated to employees that it was Sterling's practice to prohibit discussion of pay throughout the Company and that discussing pay could lead to disciplinary action.⁶⁸

Sterling's Knowledge of Pay Disparities

Claimants have submitted several documents reflecting internal workforce analyses conducted by Sterling with respect to its compensation policies and practices.

In July 2006, Sterling Vice President of Employee relations Michael Lynch reported:

A comprehensive analysis by two consulting expert groups to assess our data and determine if we have any systemic issues is ongoing. The analysis of payroll data shows that female hourly sales employees on average are paid approximately .[]40 [cents] per hour less than male employees. **This equates to over 7 million annual affected hours.** Numerous models which looked at a spectrum of variables failed to alter the forty cent factor. The disparity begins at the time of hire and generally continues throughout the employee lifecycle.⁶⁹

⁶⁷ Kochanek Dep. at 194:6-195:2 (Claimants' Exhibit 8); Deposition of Maryellen Mennett (March 21, 2013) at 218:21-219:17 (Claimants' Exhibit 49).

⁶⁸ Claimants' Memo at 16-19.

⁶⁹ Compliance Management (July 2006) at SJI 1050046 (Claimants' Exhibit 209) (emphasis in original).

This document further notes that “Sterling will need to undertake a review of its compensation and promotional practices and make necessary adjustments to avoid sustained issues.”⁷⁰

An internal memo from 2007 entitled “Post-Merit Field Operations EEOC Analysis,” reports that “Male manager populations, on average earn * * * higher base salaries than female * * *. Both DM and SMGR populations show that Females scored higher performance scores, yet received lower dollar increases than males * * *. At the store level (excluding DMs), males earn, on average, 12.5% higher base pay wages. In addition this merit cycle shows that males will be increasing \$0.05/hour more than women.”⁷¹

Finally, Claimants contend that a 2010 “Merit Payout Alternative” spreadsheet reflects Sterling’s knowledge that although women generally received higher performance appraisals (“Merit Scores”), Sterling’s policy of setting merit pay increases as a percentage of base pay perpetuated disparities in compensation adverse to women.⁷² Sterling apparently disputes Claimants’ interpretation of this document, but has not offered any alternative explanation of the data.⁷³

Evidence of Behavior Demeaning to Women and Gender Stereotypes

Claimants have submitted extensive evidence of alleged improper sexual conduct and comments reflecting gender stereotypes by numerous executives and senior managers (including

⁷⁰ *Id.*, at SJI 1050048.

⁷¹ Claimants’ Exhibit 211 at SJI 1285226.

⁷² Claimants’ Exhibit 212 at SJI 01046514.

⁷³ Sterling Jewelers Inc.’s Memorandum of Law in Opposition to Claimants’ Motion for Class Certification (Sterling Opposition Memo) at 26 (“Claimants have offered no analysis of these worksheets or the purported qualifications of anyone interpreting them as experts. It is nothing more than counsel’s biased interpretation of a singular communication, lacking any factual context or explanation of the figures contained therein”).

Sterling's CEO and all three of the DVPs who have overseen store operations for most of the last decade) throughout the Company beginning in the early 1990s and continuing to the present. This evidence consists primarily of declarations and testimony by current and former male and female Sterling employees, as well as testimony from Sterling executives and senior managers. The conduct described in the declarations and testimony has occurred in settings that are public and private, ranging from banter in hallways and elevators to interactions within Sterling stores and at the mandatory annual meeting of all Sterling managers held in Orlando, Florida. It includes references to women in sexual and vulgar ways, groping and grabbing women, soliciting sexual relations with women (sometimes as a *quid pro quo* for employment benefits), and creating an environment at often-mandatory Company events in which women are expected to undress publicly, accede to sexual overtures and refrain from complaining about the treatment to which they have been subjected. In addition, the testimony and declarations submitted by Claimants describe numerous instances in which managers at all levels of the company and throughout the entire period covered by this action have made comments reflecting negative gender stereotypes, and have relied upon such stereotypes to justify biased pay and promotion decisions.⁷⁴ For the most part Sterling has not sought to refute this evidence; rather Sterling argues that it is inadmissible, irrelevant and insufficient to establish a corporate culture that demeans women.

Claimants' expert evidence regarding the existence at Sterling of a corporate culture that demeans women, and the effect of that culture on pay and promotion decisions, is discussed below.

⁷⁴ See Claimants' Memo at 33-43 (detailing evidence).

EXPERT REPORTS AND TESTIMONY

In support of the motion for class certification, Claimants have offered the reports and testimony of proposed experts Drs. Louis R. Lanier, Kathleen Lundquist and James Outtz. In opposition to the motion, Sterling has offered the reports and testimony of proposed experts Drs. Michael P. Ward, Eric M. Dunleavy and Kayo Sady, and Margaret S. Stockdale. Sterling has filed *Daubert* motions to exclude the reports and testimony of each of Claimants' experts. Claimants have filed *Daubert* motions to exclude the reports and testimony of Drs. Dunleavy and Sady and Dr. Stockdale.

The presentation of the expert evidence is somewhat complicated by the fact that the parties' respective experts often rely upon each other's analysis and findings, and by the sequential development of the expert evidence. Claimants' three proposed expert witnesses submitted initial reports, setting forth opinions that are in some respects based upon each other's analysis and findings. Sterling submitted three expert reports. In addition, in response to the reports of Sterling's experts, Claimants' experts submitted rebuttal reports that respond to and critique Sterling's experts. Significantly, the rebuttal reports of Drs. Lanier and Lundquist reflect further empirical and statistical analysis and contain additional findings that are addressed to Sterling's critique of their initial reports. All of the experts except Dr. Sady were deposed.⁷⁵ Finally, Dr. Ward has submitted a declaration that addresses Dr. Lundquist's rebuttal report and new analyses.

As a result of this sequential development of the record, the expert evidence is best understood and appreciated by first setting forth the initial analysis and opinions of Claimants' experts, followed by the critique by Sterling's experts, the rebuttal of Claimants' experts, and Dr.

⁷⁵ Dr. Sady was not deposed because Dr. Dunleavy had equal responsibility for writing the opinions in the report and because Sterling's counsel stipulated that Dr. Sady would not provide any additional opinions or materially different responses in a deposition than Dr. Dunleavy.

Ward's declaration.

Initial Reports of Claimants' Experts

Dr. Lanier's Initial Report

Dr. Lanier performed a statistical investigation into whether gender is related to the compensation and promotion practices at Sterling.⁷⁶ Dr. Lanier is a Senior Economist and Managing Director at Econ One Research, Inc., an economic consulting firm.⁷⁷ He holds a Ph.D. in Applied Economics and has significant experience in the area of labor economics.⁷⁸ Dr. Lanier has provided expert testimony in several class and collective actions.⁷⁹

Analysis of Compensation Disparities

Dr. Lanier conducted a detailed multiple regression analysis that isolated gender differences in regular base pay from the effects of other employee characteristics.⁸⁰ Dr. Lanier found that females who have worked as part-time and full-time Sales Associates, Department Managers, Assistant Managers, and Store Managers at Sterling during the years 2003 to 2012 received less regular base pay than male employees working in the same jobs and in the same stores, who had the same amounts of company and job tenure, same potential years spent at other companies after age 18, and the same levels of performance as measured by sales commissions and performance reviews.⁸¹ Gender-related pay disparities range from \$488 per year to \$1,308 per year and are all statistically significant at standard deviations ranging from 4.7 to 9.8.⁸² In

⁷⁶ Lanier Report ¶4 (Claimants' Exhibit 41).

⁷⁷ *Id.* ¶ 1.

⁷⁸ *Id.* ¶¶1-2.

⁷⁹ *Id.* ¶2.

⁸⁰ *Id.* ¶27 and Table 7.

⁸¹ *Id.*

⁸² *Id.*, Table 7. Roughly two or more standard deviations (a 0.5 level of statistical significance) are considered statistically and legally significant and may be sufficient to establish a *prima facie* case of

this analysis, Dr. Lanier allowed his control variables to interact in each Sterling District to control for the fact that DMs are responsible for setting pay rates in the Sterling stores.⁸³

Dr. Lanier examined whether male employees outperform female employees at Sterling, which might provide some justification for the pay disparities. Dr. Lanier found that female employees were more likely than male employees to receive higher performance ratings, a finding that is statistically significant at 15.6 standard deviations (meaning the probability that this relationship between gender and performance ratings occurred by chance is effectively zero).⁸⁴ Dr. Lanier also performed a multiple regression analysis to determine whether female employees in the same store and same jobs earned sales commissions that were greater on average than similarly-situated male employees.⁸⁵ Dr. Lanier found that women in full-time Sales Associate positions earned higher sales commissions than men on average (a statistically significant finding at 2.2 standard deviations) and that in other positions women performed equally well or better than men.⁸⁶

Dr. Lanier examined whether differences in the prior job experience of male and female employees could explain the disparities he observed at Sterling. To do so, Dr. Lanier worked with Dr. Lundquist and APTMetrics to analyze a random sample of the applications of over 5,000 male and female employees at Sterling during the years 2003 to 2012.⁸⁷ APT Metrics determined the amount of prior experience that each employee had in the six categories that Sterling currently uses in its WRG: jewelry sales, jewelry store management, jewelry other

discrimination. *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 301-11 & nn.14, 17 (1977).

⁸³ *Id.* ¶28.

⁸⁴ *Id.* ¶23.

⁸⁵ *Id.* ¶25 and Table 5.

⁸⁶ *Id.*

⁸⁷ *Id.* ¶30; Report of Claimants' Expert Dr. Kathleen Lundquist (Lundquist Report) at 30 (Claimants' Exhibit 46).

management, non-jewelry sales, non-jewelry store management, and non-jewelry other management.⁸⁸ Dr. Lanier then performed multiple regression analyses during the four different time frames when Sterling used different methodologies for setting starting pay for Sales Associates designed to measure whether differences in prior experience could explain the initial pay disparities between male and female Sales Associates at Sterling.⁸⁹ Controlling for the same job, same hire year, same district, and the same amounts and types of prior job experience as Sterling uses in its WRG, Dr. Lanier found that in the period January 1, 2003 to July 12, 2009, female employees are initially paid less than male employees on average at statistically significant levels and that these disparities cannot be explained by including the same types of experience that Sterling currently uses in its WRG.⁹⁰ In the period during which the WRG has been in use, July 13, 2009 to the present, Dr. Lanier found that female Sales Associates were paid lower starting pay than male Sales Associates, but that these disparities were not statistically significant.⁹¹

Dr. Lanier also considered whether Sterling's use of prior management experience in setting the pay of Sales Associates adversely affected female employees. In Tables 8b and 8c, Dr. Lanier shows that the statistical disparities increase in each of the four timeframes when prior non-jewelry management experience is removed from the regression analysis (Table 8b), and when all prior management experience is removed from the regression analysis (Table 8c).⁹²

⁸⁸ Lanier Report ¶¶30-33 and Table 8a (Claimants' Exhibit 41). In this analysis, neither Dr. Lundquist nor Dr. Lanier used actual data from the WRG, which Dr. Lundquist found unreliable, and which is limited to hires after July 2009.

⁸⁹ Lanier Report ¶31 and Table 8a.

⁹⁰ *Id.* ¶33 and Table 8a.

⁹¹ *Id.*

⁹² *Id.* ¶¶33-36 and Tables 8b and 8c.

Dr. Lanier also analyzed whether the recommended rate established by Sterling's WRG is an accurate predictor of an employee's first year sales productivity.⁹³ Using two separate measures of productivity, Dr. Lanier showed that the WRG is a poor predictor of an employee's first-year sales productivity. In fact, the WRG assigned a lower annual pay rate of between \$779 and \$1,172 to female employees, which are statistically significant at 5.2 and 6.6 standard deviations.⁹⁴

Having determined that Sterling sets initial pay rates for female Retail Sales Employees at rates that are statistically significantly lower than similarly situated males, Dr. Lanier analyzed whether Sterling used its merit review process to correct the initial pay disparities or whether the merit review process results in a continuation of the disparate pay of female employees.⁹⁵ Dr. Lanier found that the merit review process used by Sterling did not correct initial pay disparities; instead, the merit review process resulted in female associates who worked in the same job, same store, and with the same performance rating as male associates getting lower raises in pay compared to similarly-situated males working in Sales Associate and Store Manager positions and slightly larger raises than males in Department Managers and Assistant Manager positions.⁹⁶ Merit raises did not correct the pay disparities found in each of these positions.⁹⁷

Analysis of Promotion Disparities

Dr. Lanier analyzed whether Sterling's promotion practices have an adverse impact on female Retail Sales Employees. Dr. Lanier conducted a regression analysis designed to isolate the extent to which the likelihood of promotion correlates with gender.⁹⁸ In the regression, Dr.

⁹³ *Id.* ¶¶37-40 and Table 9.

⁹⁴ *Id.* ¶39.

⁹⁵ *Id.* ¶¶42-45.

⁹⁶ *Id.* ¶¶42-43.

⁹⁷ *Id.* ¶¶43-45.

⁹⁸ *Id.* ¶47 and Table 12a.

Lanier controlled for length of tenure within the Company and within a particular job; potential years spent not employed by Sterling after the age of 18; employee performance, as shown by commissions and performance review ratings; and store and year of employment. Controlling for these factors, Dr. Lanier determined that gender correlates with the probability of promotion at all levels within Sterling stores.⁹⁹ The likelihood of promotion from Sales Associate, Assistant Manager, and to a larger store for Store Managers, each show statistically significant disparities adverse to women, while the Department Manager to Assistant Manager and Store Manager to District Manager disparities are shy of statistical significance, though also negative.¹⁰⁰ In conducting this analysis, Dr. Lanier assumed that all male and female employees with a defined tenure were equally available and interested in promotion. Dr. Lanier chose not to use the available CAR data to define the pool of interested candidates, based upon evidence that the CAR system may have been manipulated in favor of pre-selected candidates. Specifically, Drs. Lanier and Lundquist noted that with respect to a large number of promotions made after CAR was implemented, employees had been registered in CAR for only a short amount of time,¹⁰¹ and that Sterling employees were directed to back-date CAR registrations to ensure they predated the date of their promotion, or to alter the promotion date in order to ensure it followed the date of registration in CAR.¹⁰² Nevertheless, Dr. Lanier also performed an analysis that found similar statistical disparities in the rate of promotion from Sales Associate and Assistant

⁹⁹ *Id.* ¶47-49.

¹⁰⁰ *Id.* ¶49 and Table 12a.

¹⁰¹ More than forty percent of the promoted employees in the CAR first registered less than a month before their promotion was dated. Lanier Report ¶52, Table 13 (Claimants' Exhibit 41).

¹⁰² See Divisional VP Administrative Asst. Manual, SJI 189687-95 at 189690-91 (Claimants' Exhibit 74); SJI 76416, 82175, 90858, 91681, 103755, 69115, 72859 (emails from DVPs' administrative assistant instructing VPRO that candidate must post in CAR before promotion can be finalized) (claimants' Exhibits 75-81); SJI 77464, 91618, 66234 (emails stating effective date of promotion must be changed such that it falls after date on which candidate posted in CAR) (Claimants' Exhibits 82-84); SJI 104915; 93094 (emails addressing need for candidate to post in CAR and subsequent adjustment to effective date) (Claimants' Exhibits 85-86).

Manager among employees who expressed interest in being promoted using the CAR data; the results for promotions from Store Manager to larger store and from Store Manager to District Manager were statistically insignificant.¹⁰³

Dr. Lanier also analyzed whether any disparity existed in the time it took for male and female employees to get promoted at Sterling.¹⁰⁴ Dr. Lanier found that female employees were employed with the Company longer than similarly-situated male employees when they received promotions and that female employees also spent more time in the job prior to promotion than similarly situated males.¹⁰⁵ In his promotion regressions, Dr. Lanier allowed his control variables to interact at the Region level to isolate the effects of these controls in each Region of Sterling because promotion decisions are controlled at the Region level by VPROs.¹⁰⁶

Extent of Disparities

Finally, Dr. Lanier also conducted a statistical analysis to determine whether the pay and promotion disparities that he observed were widespread in terms of the number of districts and regions where disparities were adverse to female employees and whether they occurred in each year in the 2003 to 2012 time period of his statistical study. Dr. Lanier found that the pay and promotion disparities are widespread.¹⁰⁷ For example, with respect to base pay for full-time Sales Associates, 71% of all Districts show adverse impacts on females, while 100% of the ten years of the available pay data show adverse impacts on females.¹⁰⁸ With respect to annual promotion rates for full-time Sales Associates, 89.5% of all Regions show adverse impacts on females, while 100% of the nine years of the available promotion data show adverse impacts on

¹⁰³ Lanier Report ¶50 and Table 12b (Claimants' Exhibit 41).

¹⁰⁴ *Id.* ¶¶54-56 and Tables 14a and 14b.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* ¶48.

¹⁰⁷ *Id.* ¶¶57-62 and Table 15.

¹⁰⁸ *Id.* ¶59.

females.¹⁰⁹

Dr. Lundquist's Initial Report

Dr. Lundquist is an Industrial/Organizational (IO) psychologist who, over more than 30 years, has advised employers, both private and governmental, on matters related to the selection, evaluation and compensation of employees, including the design of related human resource processes, the analysis of job contents and job requirements, and the validation of employee selections and compensation procedures.¹¹⁰ During her professional career she has performed consulting work for companies in many areas, including retail, has served as an expert witness on behalf of both plaintiffs and defendants in numerous cases and also as a court-appointed expert in several cases where she was charged with assuring that provisions of Consent Decrees were properly implemented.¹¹¹

Dr. Lundquist submitted a report that “analyzes the policies, procedures and decision-making processes relevant to compensation and promotion decisions at Sterling Jewelers in January 2003 through the present time frame.”¹¹² Specifically, Dr. Lundquist was “asked to examine the job-relatedness of the policies and procedures Sterling uses to assess and promote job candidates, and evaluate employees for compensation purposes; and to determine if the manner in which those policies are implemented permits biases to affect employment decision-making at Sterling.”¹¹³

Dr. Lundquist observed that “[n]o job analysis or other formal study was ever performed to identify the knowledge, skills, abilities and experiences relevant to successful job performance

¹⁰⁹ *Id.* ¶61.

¹¹⁰ Lundquist Report at 5; Attachment A (Curriculum Vitae) (Claimants' Exhibit 46).

¹¹¹ *Id.* at 5-6.

¹¹² *Id.* at 2.

¹¹³ *Id.*

at Sterling. Consequently, Sterling has not demonstrated the job relatedness of the factors it considered in setting starting salaries that resulted in pay discrepancies between men and women at the time of hire, which continued over the course of their employment. Nor has Sterling demonstrated the job-relatedness of the factors it considered in making promotion decisions, which resulted in women receiving proportionally fewer promotions.”¹¹⁴

Dr. Lundquist further concluded that “Sterling’s processes were executed in a manner that was unstructured and inconsistent, leading to unreliable and inconsistent evaluation of candidates. Managers were permitted to make decisions about compensation and promotion with insufficient guidance, ambiguous criteria, and without adequate oversight and monitoring to ensure the fairness of the decision making process. In essence, there was a centrally-mandated process that was poorly executed.”¹¹⁵ Dr. Lundquist specifically noted that internal Sterling documents reflect uncertainty and lack of consistency in the definition of what constitutes prior retail sales experience.¹¹⁶

Dr. Lundquist concluded that “the promotion and compensation decisions made for the retail jobs at Sterling lack sufficient reliability and validity to be considered job-related. Moreover, the lack of consistency and structure permitted measurement error to occur, including intentional and unintentional biases.”¹¹⁷

Dr. Lundquist opined that Sterling’s selection and compensation practices failed to meet basic professionally accepted standards. Sterling prepared no job analysis, did not conduct any validity study, and did no evaluation of whether its compensation system resulted in women

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 25-26.

¹¹⁷ *Id.* at 5.

receiving unequal pay or whether its promotion process had an adverse impact on women.¹¹⁸

Starting Pay

Dr. Lundquist conducted an evaluation of Sterling's compensation practices focusing on Sterling's use of prior work experience in setting starting salaries for Sales Associates. Dr. Lundquist analyzed and "coded" over 5,000 randomly-selected job applications for Sales Associates hired in the 2003-2012 time frame to investigate "gender differences in the types of job experience judged relevant to performance in the retail sales jobs at Sterling. The goal was to determine if gender differences in starting salary were a function of Sterling's failure to credit relevant job experience and/or the crediting of non-job-related experience such as management experience."¹¹⁹ For purposes of this analysis, Dr. Lundquist looked at categories of prior experience credited by the WRG, as well as other types of job experience she found relevant based upon Sterling's job descriptions, the Department of Labor's O*NET data and other research literature, including non-sales Direct Customer Service experience.¹²⁰

Dr. Lundquist observed that the WRG credits retail sales experience, store manager experience and other management experience in setting starting pay rates. Based upon an examination of the company job description for Sales Associate, the O*NET description for the job of Retail Salesperson, and other academic literature, Dr. Lundquist found that in the absence of a validation study, the decision to credit prior management experience and the decision to

¹¹⁸ *Id.* at 16-18.

¹¹⁹ *Id.* at 30-31.

¹²⁰ *Id.* at 31-32. As noted above, Dr. Lundquist relied on coding of applications for the entire proposed class period. She did not use or analyze the prior experience factors actually recorded in the WRG, in light of her finding that Sterling does not give DMs clear and consistent direction regarding how to evaluate and categorize prior experience, and that the evaluation and categorization of prior experience by DMs is "vulnerable" to the discriminatory exercise of discretion. *See id.* at 22-25. Dr. Lundquist also observed that that reported store volume was not consistently verified, and that the option to offer Plus and Maximum rates allowed DMs to set starting wages inconsistently or according to their biases. *Id.* at 23-24.

place a 5-year cap on the crediting of experience was “both arbitrary and not job-related.”¹²¹ Dr. Lundquist noted that an internal analysis conducted by Sterling in 2012 concluded that management experience did not translate into better job performance as a Sales Associate.¹²² Dr. Lundquist found that female applicants hired by Sterling were significantly less likely to have experience as store managers and had significantly fewer years of experience in store management than their male counterparts.¹²³ Dr. Lundquist found that because Sterling gave “strong consideration of management experience” when setting starting salaries of Sales Associates, the difference in prior management experience “undoubtedly had a negative impact on female employees’ initial pay rates.”¹²⁴ In addition, Dr. Lundquist opined that women were disadvantaged by the WRG because even though females had either similar or greater jewelry-specific sales experience than males, Sterling failed to capture jewelry-specific sales experience in its WRG algorithm unless documentation of the volume of such sales was provided.¹²⁵ Dr. Lundquist further reported that “[w]hile Males have significantly more experience in Active Selling in all time frames, Females have significantly more experience in Direct Customer Service than males in all time frames, a job-related factor that wasn’t credited by the WRG.”¹²⁶

Because the coding of applications requires interpretation and “judgment” as to the nature of an applicant’s prior experience, Dr. Lundquist conducted a “coder reliability” evaluation to verify that coders were consistently applying her rules for classification of 18 experience categories.¹²⁷ Dr. Lundquist selected 50 applications for review by ten coders each, randomly

¹²¹ *Id.* at 25.

¹²² *Id.* at 29.

¹²³ *Id.* at 36-37.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 37.

¹²⁷ See Ward Report at 18, n. 27 (setting forth the 18 categories)

chosen by “manually picking a few applications from each year.”¹²⁸ Dr. Lundquist used an intraclass correlation coefficient (ICC) “employing the one-way analysis of variance model for average measurements” to assess coder reliability, which showed consistent application of the rules by coders.¹²⁹

As noted above, Dr. Lundquist’s application coding data was provided to Dr. Lanier, who performed a statistical analysis with respect to the impact of consideration of prior management experience on female starting pay.¹³⁰

Merit Increases

With respect to merit increases, Dr. Lundquist noted that Sterling’s approach is “problematic because gender differences in starting salary tend to be perpetuated, and exacerbated, over time when increases are based exclusively on a percentage of base pay.”¹³¹ She observed that “[a] common organizational practice to maintain pay equity is to grant a high-performing employee with a relatively low salary a larger merit increase than a high performing employee with a relatively high salary.”¹³²

Promotions

With respect to promotions, Dr. Lundquist observed:

“While Sterling’s promotion procedures may seem reasonable on their face, to the extent that they have adverse impact, the characteristics evaluated would have to be shown to be job-related. In this case, the suitability of the characteristics assessed was never confirmed using a professionally-acceptable job analysis and validation process. Despite their impact on

¹²⁸ *Id.* at 18 and nn. 25 and 26.

¹²⁹ Lundquist Report at 32-33.

¹³⁰ Neither Dr. Lanier nor Dr. Lundquist performed any statistical analyses with respect to her other conclusions, such as the 5-year experience cap or failure to credit Direct Customer Service.

¹³¹ *Id.* at 38.

¹³² *Id.*

succession planning and promotion the rating factors included in Sterling's performance management system have never been validated."¹³³ In particular, Dr. Lundquist found that the "heavier emphasis on sales performance in comparison with other attributes makes the job-relatedness of the promotion criteria questionable when applied to the work performed in the managerial job."¹³⁴ Dr. Lundquist also found that the promotion decision-making process at Sterling is "highly subjective. No guidance is provided to decision makers to structure their final evaluation of candidates; in other words, no criteria are provided on how to evaluate candidate information in a job-related fashion, nor were decision makers instructed on what weight to give the various sources of information (e.g., performance appraisal, interviews, assessment results) provided about the candidates. Furthermore, monitoring of decision making for consistency and fairness is virtually non-existent. For these reasons the decision making process is unreliable and therefore vulnerable to non-job-related errors including both intentional and unintentional biases and manipulation."¹³⁵

Dr. Lundquist criticized the absence of posting of promotional opportunities, and opined that the CAR as a prerequisite for promotion is a "pretense," based upon the evidence described above that some employees did not register in CAR until after they had already been selected for promotion.¹³⁶

Dr. Lundquist concluded that:

"It is my professional opinion that the promotion and compensation decisions made for the retail sales and management jobs at Sterling lack sufficient reliability and validity to be considered job-related. Moreover, the lack of consistency and structure permitted measurement error to occur, including intentional or unintentional biases. Additionally, barriers to the

¹³³ *Id.* at 41-42.

¹³⁴ *Id.* at 42.

¹³⁵ *Id.* at 42-43.

¹³⁶ *Id.* at 43-44.

advancement and equitable compensation of female employees increased the likelihood of gender discrimination in promotions and compensation at Sterling.”¹³⁷

Human Resources Deficiencies

Dr. Lundquist found that Sterling’s HR managers lacked knowledge concerning professional standards and legal requirements.¹³⁸ In addition, Sterling’s HR managers did not undertake basic tasks routinely performed by HR managers at other companies and that are essential for assuring the fair and non-discriminatory application of personnel practices. For example, Sterling’s HR department failed to conduct comprehensive pay equity studies or an assessment of the job-relatedness of Sterling’s pay and promotion criteria—notwithstanding complaints of gender-based pay disparities. Dr. Lundquist also found that Sterling’s HR Department has failed to conduct adequate oversight with respect to the application of Sterling’s promotion and compensation practices, and has done nothing to ensure their consistent implementation.¹³⁹ Lastly, the HR Department failed to assure the application of minimum standards required for the operation of an effective system for the resolution of harassment and discrimination complaints, including the failure to ensure the confidentiality of the names of complainants, and the absence of any role for HR in determining disciplinary actions for issues such as harassment beyond making recommendations to the field, which can be freely ignored.¹⁴⁰

¹³⁷ *Id.* at 44.

¹³⁸ *Id.* at 17-18 (noting that Sterling’s senior HR managers testified that they had little or no familiarity with the Uniform Guidelines on Employee Selection Procedures).

¹³⁹ *Id.* at 15-18.

¹⁴⁰ *Id.* at 14-20.

Dr. Outtz's Initial Report

Dr. Outtz has worked as an I/O Psychologist for over 30 years. During that time he has served in a number of professional and governmental positions including several committees of the National Academy of Sciences.¹⁴¹ Recently, Dr. Outtz edited a volume on the measurement and minimization of the adverse impact of employment measures upon women and minorities.¹⁴² Throughout his professional career Dr. Outtz has consulted with private and governmental employers in the development of personnel practices.¹⁴³ On numerous occasions, Dr. Outtz has served as an expert witness for both plaintiffs and defendants.¹⁴⁴

Dr. Outtz's report addresses (a) whether the behavior and comments of Sterling executives and senior managers can establish workplace norms that guide the behavior of managers elsewhere in the organizational hierarchy;¹⁴⁵ (b) whether the record evidence describing the behavior of Sterling's executives and senior managers is sufficient to have established workplace norms guiding the behavior of managers elsewhere in the organizational hierarchy;¹⁴⁶ and (c) whether the record evidence indicates that the behavior and comments of senior managers toward women were capable of influencing the exercise of discretion adversely to women regarding compensation and promotion decisions made by managers, even though women held managerial positions at various levels, and even though Sterling had in place a written policy prohibiting sex discrimination and prohibiting managers from "fraternizing" with employees under their direct or indirect supervision.¹⁴⁷

¹⁴¹ Report of Claimants' expert Dr. James Outtz (Outtz Report) at Appendix 2 (Curriculum Vitae) (Claimants' Exhibit 103).

¹⁴² *Id.* at 2-3.

¹⁴³ *Id.* at 3.

¹⁴⁴ *Id.* at 4.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 10.

¹⁴⁷ *Id.* at 18.

Dr. Outtz's report is based on his review of the depositions of Sterling executives and managers, internal Sterling documents, and the declarations of over 200 current and former male and female Sterling employees, as well as his professional experience and relevant professional research. Dr. Outtz also interviewed ten of Claimants' declarants.

Dr. Outtz's report relies on research on "modeling" (the extent and manner in which subordinates imitate supervisor behavior), which Dr. Outtz contends demonstrates that that negative behavior of leaders of an organization will "trickle down" to influence lower-level managers to engage in similar behavior.¹⁴⁸ Dr. Outtz observes that Sterling has an explicit practice of "leading by example" that reinforces the pattern of lower-level managers modeling their actions upon the conduct of Sterling executives and senior managers.¹⁴⁹ Dr. Outtz finds that the conduct demeaning to women that is reflected in the record, including unwanted sex-related behavior engaged in by its CEO and other high-level managers, has been emulated by subordinates resulting in a "climate and culture at Sterling in which female employees and their work are devalued when compared to male employees."¹⁵⁰ Dr. Outtz opines that the devaluation of women resulting from the conduct of executives and senior managers can influence their value, as perceived by lower-level managers, both at the time of hire and as employees, and can adversely affect the way that these managers exercise their discretion in making compensation and promotion decisions.¹⁵¹

Dr. Outtz further concludes that the presence of women in managerial ranks cannot by itself overcome the discriminatory consequences of the devaluation of women resulting from the conduct of Sterling executives and senior managers. He notes that the failure of a company to

¹⁴⁸ *Id.* at 4-10.

¹⁴⁹ *Id.* at 12-13.

¹⁵⁰ *Id.* at 18. Dr. Outtz identifies sixteen VPROs alleged to have engaged in inappropriate sexual behavior.

¹⁵¹ *Id.* at 29.

take harassment and discrimination complaints seriously by investigating those complaints and disciplining offenders, has been shown by research to have substantially more of an impact on whether there is a non-discriminatory workplace than whether or not women occupy some managerial positions.¹⁵² Dr. Outtz acknowledges that Sterling has a policy prohibiting sex discrimination and prohibiting managers from fraternizing with employees under their direct or indirect supervision, but identifies several factors that undermine Sterling's official policies--including fear of retaliation, failure to maintain the confidentiality of complaints and failure to discipline managers, as reported in Claimants' declarations, and inadequate resources to handle complaints.¹⁵³

Dr. Outtz observes that Sterling senior managers and executives have significant discretion in setting compensation, and that certain factors used in selecting candidates for promotion are highly subjective, introducing opportunities for managers to exercise bias.¹⁵⁴ He concludes that the demeaning and devaluing comments and behavior of Sterling executives and senior managers "have influenced the exercise of discretion in pay and promotions."¹⁵⁵

¹⁵² *Id.* at 21-29.

¹⁵³ *Id.* at 24-28. Dr. Outtz's stated in his initial report that Sterling reported that only 8% percent of sexual harassment complaints received in 2006 were investigated. *Id.* at 28. However, the document cited by Dr. Outtz reflects that 8% is the percentage of all investigations conducted in 2006 that involved allegations of sexual harassment. Sterling Jewelers Inc.'s Reply in Support of its Motion to Exclude the Report and Testimony of Dr. James Outtz (Sterling's Outtz *Daubert* Reply) at 15. Dr. Outtz also based his opinion on the fact that Sterling employed only five Regional HR Specialists to handle thousands of calls each year. Outtz Report at 27.

¹⁵⁴ *Id.* at 29-38.

¹⁵⁵ *Id.* at 39.

Critique and Expert Evidence Presented by Sterling
and Claimants' Response

Compensation

Sterling's critique of Claimants' expert evidence pertaining to compensation is contained in the reports of Dr. Ward, Drs. Dunleavy and Sady, and Dr. Stockdale.

Dr. Lanier's statistical analysis and the conclusions of Dr. Lundquist are addressed by Dr. Ward. Dr. Ward has a Ph.D. in economics and works as a consultant specializing in economic and statistical research, including statistical studies of hiring, pay, promotion and termination practices. He has testified as an expert on economics and statistics in federal and state courts.¹⁵⁶

Dr. Ward conducted a number of statistical and other analyses of the work performed and conclusions reached by Drs. Lanier and Lundquist regarding compensation. He challenges their opinions regarding the job-relatedness of prior experience criteria used by Sterling in setting starting pay, including the validity of the WRG factors, on multiple grounds.

Dr. Ward acknowledges that the WRG leads to lower starting pay for women than for men.¹⁵⁷ Dr. Ward attributes this to the fact that women have less experience—including management experience, which Dr. Ward finds to be job-related—and lower pre-hire sales volume than men (a factor Claimants' experts did not consider).¹⁵⁸ He concludes that when these factors are fully accounted for, men and women receive the same initial pay.¹⁵⁹ Similarly, Dr. Ward concludes that men and women earn the same regular base pay "after adjusting for differences in pre-hire experience."¹⁶⁰

¹⁵⁶ Ward Report at 1-2.

¹⁵⁷ *Id.* at 7-8

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

With respect to prior managerial experience, Dr. Ward analyzed Dr. Lundquist's application coding data to determine the relationship between prior management experience and sales productivity. He concluded that actual first year sales production is significantly increased with more management experience.¹⁶¹

Dr. Ward also faults Drs. Lanier and Lundquist for failing to consider evidence of prior sales volume in their analyses. Analyzing the WRG data, Dr. Ward concluded that the most important factor in predicting subsequent sales productivity at Sterling is the volume of sales achieved by applicants before hire.¹⁶² With respect to Dr. Lundquist's observation that sales volume was not in fact "proven," Dr. Ward "found ample evidence that sales volumes are documented."¹⁶³

Dr. Ward also criticizes Dr. Lundquist's conclusions regarding coder reliability and consistency, arguing she should have examined separately for each type of experience, consistency should have been evaluated on a question-by-question basis, and concluding that calculating "match rates" on this basis reveals significant disagreement among coders.¹⁶⁴

With respect to Dr. Lanier's statistical analyses, Dr. Ward challenges Dr. Lanier's conclusion that the WRG is "a poor predictor of sales productivity." Dr. Ward found that "as the WRG wage goes up by one dollar, average annual sales increased by approximately \$32,207."¹⁶⁵

Finally, Dr. Ward contends that Dr. Lanier committed a number of methodological and data errors that call his conclusions into question.¹⁶⁶

¹⁶¹ *Id.* at 2. Dr. Ward also questions Dr. Lundquist's opinions regarding the five-year cap on experience and the failure to include Direct Customer Service experience. Analyzing Dr. Lundquist's data, Dr. Ward found that experience over five years had no significant impact on first year sales production and that Direct Customer Service experience is not associated with higher sales. *Id.*

¹⁶² *Id.* at 3, 7, 10-11.

¹⁶³ *Id.* at 3.

¹⁶⁴ *Id.* at 3-4, 18-20.

¹⁶⁵ *Id.* at 4, 6-7 and n.8.

Dr. Lundquist's report with respect to compensation is also addressed by Sterling's experts Drs. Dunleavy and Sady, each of whom has a Ph.D. in I/O Psychology. Drs. Dunleavy and Sady contend that Dr. Lundquist's use and analysis of application data and conclusions regarding job-relatedness are unscientific, unreliable and flawed.

First, Drs. Dunleavy and Sady contend that Dr. Lundquist used unreliable and unscientific methods in coding applications and made no scientific attempt to measure the accuracy of coding, resulting in significant coding errors, and that the sub-study designed to verify that data was consistently coded was flawed.¹⁶⁷

Second, Drs. Dunleavy and Sady criticize Dr. Lundquist's opinions regarding job-relatedness, contending that the research literature supports a link between managerial experience and sales productivity, and that Dr. Lundquist failed to evaluate all of the available and relevant information in O*NET.¹⁶⁸ Using an expanded universe of relevant worker characteristics, Sterling's experts conducted an analysis of worker characteristics necessary for two O*NET positions--Retail Salespersons (considered by Dr. Lundquist), as well as First-Line Supervisors of Retail Sales Workers, concluding that managerial experience is job-related for retail sales jobs.¹⁶⁹

Drs. Dunleavy and Sady also criticize Dr. Lundquist's conclusion that the WRG was inconsistently applied and therefore unreliable.¹⁷⁰ They state that the research literature on HR process structure "suggests that semi-structured tools with guardrails on content and process

¹⁶⁶ *Id.* at 5, Appendix 2.

¹⁶⁷ Report of Sterling experts Drs. Eric M. Dunleavy and Kayo Sady (Dunleavy/Sady Report) at 25-27.

¹⁶⁸ *Id.* at 12-18.

¹⁶⁹ *Id.* at 19. Drs. Dunleavy and Sady also point out that Dr. Lundquist's opinions regarding job-relatedness are contradicted by the statistical analysis of WRG data performed by Sterling's expert Dr. Ward. *Id.* at 18-19.

¹⁷⁰ Dunleavy/Sady Report at 19-24.

reduce measurement error and vulnerability to EEO bias.”¹⁷¹ They assert that the WRG process imposes structure on content and process features that reduces the likelihood of both measurement error and vulnerability to EEO bias, and observe that although Dr. Lundquist asserts that the WRG may be “vulnerable” to rating biases, there is no evidence in her report related to the extent to which bias actually occurred.¹⁷² With respect to job-relatedness, Drs. Dunleavy and Sady note that although the WRG was not based on a formal job analysis, “it was developed and refined by subject matter experts over an extended period of time involving multiple development stages and reviews,” using “internal job performance metrics to determine prior experience factors associated with sales performance.”¹⁷³

Finally, with respect to starting pay, Sterling offers the testimony of Dr. Stockdale. Dr. Stockdale holds a Ph.D. in I/O Psychology, is Professor and Chair of Psychology at Indiana University-Purdue University, has for over 25 years conducted both field and laboratory research on gender discrimination and sexual harassment, has authored numerous publications, and has previously testified as an expert witness in several cases involving allegations of sex discrimination.¹⁷⁴

¹⁷¹ *Id.* at 22.

¹⁷² *Id.* at 21-22.

¹⁷³ *Id.* at 24. Drs. Dunleavy and Sady also challenge Dr. Lundquist’s assertion that the WRG cap of five years of experience is problematic because it reduces job-relatedness and may increase adverse impact against women. They argue that use of an experience cap is not unreasonable because (1) applicant self-report data from applications may be less accurate for older experience; and (2) the strength of the relationship between years of experience and job performance may diminish over time, such that years of experience no longer correlates with productivity past a certain number of years. *Id.* at 25. They further note that Dr. Ward’s statistical analysis showed that the five-year experience cap impacts men and women about the same, and that experience beyond five years has no statistically significant impact on productivity. *Id.*

¹⁷⁴ Report of Sterling’s expert Dr. Margaret S. Stockdale (Stockdale Report) at 5-6 and Exhibit A (Curriculum Vitae).

Dr. Stockdale opines that that Sterling’s corporate practices, including the WRG, “provide minimal opportunity for managerial discretion in determining starting pay.”¹⁷⁵ Dr. Stockdale also discusses the literature on “gender role socialization,” as well as national occupational statistics, from which she concludes that men are likely to have more managerial experience than women, which provides an explanation for gender differences in starting pay.¹⁷⁶

Merit Pay

Regarding merit pay, Dr. Ward opines that “women receive higher unadjusted pay raises than men.”¹⁷⁷ He does not, however, directly address the conclusion of Claimants’ experts that the merit pay system perpetuates initial pay disparities that are based on the use of prior experience factors that Claimants contend are not job-related, and that the merit pay system fails to remedy compensation gaps between male and female employees with equal performance.

Promotion

Dr. Ward’s report contains an extensive critique of Dr. Lanier’s analysis of promotions, finding numerous data errors and anomalies.¹⁷⁸ Dr. Ward’s most significant objection to Dr. Lanier’s analysis is that Dr. Lanier largely ignored information contained in the CAR system with respect to interest in being promoted and willingness to relocate to receive a promotion. Dr. Ward concludes that if the pool of eligible candidates is limited to those who registered their interest and availability in CAR, the promotion rate for women equals or exceeds the promotion

¹⁷⁵ Stockdale Report at 7.

¹⁷⁶ *Id.*

¹⁷⁷ Ward Report at 5, 7.

¹⁷⁸ Dr. Ward finds that “Dr. Lanier’s data errors cause him to find promotional differences where there are none. Approximately 73% of sales employees are women and approximately 72% of Assistant Managers are women. There is no gender difference in promotion to this first level of management.” Ward Report at 7-8.

rate of men.¹⁷⁹ Accordingly, the critical difference between Dr. Lanier and Dr. Ward with respect to disparity in promotion rate is whether the pool of available candidates should be defined by those who registered their interest in CAR. Dr. Ward performed a number of analyses to determine whether the alleged improprieties in the administration of CAR disadvantaged women. Specifically, Dr. Ward addressed Dr. Lanier's concern that because there are many promotions from the CAR register that occur soon after, or even concurrently with registration, a promotional "tap on the shoulder" may have resulted in CAR registration. Dr. Ward concluded that if there are "taps," they are more often on women.¹⁸⁰

Dr. Ward also faults Dr. Lanier's analysis of disparities in the time it took for male and female employees to get promoted at Sterling. Specifically, Dr. Ward found that after accounting for the timing of expression of interest (as determined from the CAR data), "women are promoted slightly faster than men" (not statistically significant).¹⁸¹

Finally, with respect to Sterling's promotion practices, Sterling offers the expert opinion of Dr. Stockdale, who concludes that based upon "gender role socialization" and national occupational statistics, men are more interested in promotion than women, which is consistent with their proportionally greater representation in CAR.¹⁸² Dr. Stockdale also endorses Sterling's promotion practices and performance appraisal process, concluding that Sterling "relies heavily on objective, results-oriented criteria" that are "not vague and leave little room for interpretation."¹⁸³ Dr. Stockdale faults Dr. Outtz for "cherry-picking" Sterling's promotion

¹⁷⁹ CAR was introduced in April 2007. Dr. Ward opines that the conclusions reached from an analysis of the CAR period can be extrapolated to the full 2003-2012 period, based upon an analysis of all promotions in that period, which showed that the percent of promotions that go to women in the full period is very similar to the percentages in the CAR period. Ward Report at 36.

¹⁸⁰ *Id.* at 21-22.

¹⁸¹ *Id.* at 5, 21-22 and Table 5.

¹⁸² Stockdale Report at 7-8.

¹⁸³ *Id.* at 8.

criteria, and asserts that his analysis of Sterling's promotion practices is "not grounded in scientific methods nor in the established practices of I/O psychologists."¹⁸⁴

Extent of Disparities

With respect to Dr. Lanier's conclusion that gender differences in pay and promotion are widespread across districts (pay) or regions (promotion), Dr. Ward points out that Dr. Lanier offered no analysis to demonstrate whether or where the differences are statistically significant. According to Dr. Ward's analysis, the pay differentials identified by Dr. Lanier vary by district, and promotion shortfalls vary by region, sometimes favoring women and sometimes favoring men.¹⁸⁵

Compensation and Promotion: Claimants' Rebuttal

The critique by Sterling's experts regarding Claimants' analysis of compensation and promotion is addressed in the rebuttal reports of Drs. Lanier and Lundquist.

Dr. Lanier's rebuttal report begins by pointing out that he and Dr. Ward both observe the same gender-related pay gaps, and "agree that the pay difference between male and female employees begins with the assignment of initial pay on hire; that Sterling's system of merit pay raises perpetuates, rather than eliminate, the gender pay gaps that were created at hire; that pay changes associated with promotions to management also perpetuate the pay differences; and that females out performed males, on average, with respect to performance evaluation scores."¹⁸⁶ Their analyses differ based upon whether these gaps are justified by consideration of prior experience factors that Claimants contend are not job-related. As Dr. Ward testified, "[A]ll of

¹⁸⁴ *Id.*

¹⁸⁵ Ward Report at A2-19; Tables 20 and 21.

¹⁸⁶ Rebuttal Expert Report of Dr. Louis R. Lanier (Lanier Rebuttal Report) at 1.

the pay differences up the line that you see, all those gender pay differences, are due to starting pay.”¹⁸⁷

Dr. Lanier notes that Dr. Lundquist concludes in her rebuttal analyses that the only valid predictor of first-year sales is prior personal jewelry sales volume.¹⁸⁸ Dr. Lanier observes that the use of volume data in setting initial pay is optional for managers, even under the WRG, and that among applicants with prior sales experience, men are more likely to have recorded sales volume data than are women.¹⁸⁹ Dr. Lanier provides an analysis of the WRG timeframe showing that if only prior personal jewelry sales volumes are included, there are significant differences in starting pay, adverse to women for both part-time and full-time employees.¹⁹⁰

Dr. Lanier also faults Dr. Ward for relying on measures of employee sales performance without controlling for the store in which they work, despite Dr. Ward’s acknowledgement of the importance of stores at which employees work in affecting the volume of sales they are able to make.¹⁹¹

With respect to Dr. Ward’s criticism of his data errors, Dr. Lanier includes rebuttal analyses that use Dr. Ward’s data, and which for the most part do not materially change Dr. Lanier’s earlier findings and conclusions.¹⁹²

¹⁸⁷ *Id.* ¶5 (citing Ward Dep. at 244:18-21).

¹⁸⁸ *Id.* ¶10.

¹⁸⁹ Lanier Rebuttal Report at 8, n. 3.

¹⁹⁰ *Id.* ¶9.

¹⁹¹ *Id.* ¶¶2(d); 12.

¹⁹² *Id.* ¶2(f) and Tables B3 to B15.

Regarding promotions, Dr. Lanier criticizes Dr. Ward for overestimating the impact of an employees' expression of willingness to relocate in CAR, and generally reiterates concerns regarding the validity of CAR as a measure of female interest in promotion, noting that Dr. Ward provides no empirical analysis of promotions prior to CAR.¹⁹³

Dr. Lundquist's rebuttal report provides an analysis of Dr. Ward's statistical findings with respect to compensation, noting at the outset that none of Sterling's experts offers an opinion regarding gender differences in pay prior to the WRG period. Most importantly, Dr. Lundquist points out that Dr. Ward failed to control for store sales volume, *i.e.*, opportunity to sell, when analyzing the relationship between experience and sales productivity.¹⁹⁴ Dr. Lundquist reanalyzed Dr. Ward's data using a hierarchical regression analysis.¹⁹⁵ She concluded that, controlling for store volume, "the previous experience variable in the WRG with the most predictive power was jewelry Personal Sales volume, uniquely accounting for approximately 3% of the variance in annualized sales (squared semi-partial correlation of 0.028) for full-time employees and 1% for part-time employees."¹⁹⁶ Two other statistically significant WRG variables (non-jewelry personal sales volume for full-time employees and other management-jewelry volume for part-time employees) "were much less useful, each uniquely accounting for 0.1% of the variance in predicted sales performance."¹⁹⁷ She found that "Store Management experience and volumes do not predict sales performance and Other Management volume only predicts a very small percent of the variance in sales performance and only for part-time

¹⁹³ *Id.* ¶¶26-31,

¹⁹⁴ Lundquist Rebuttal Report at 15-16; Dr. Lundquist also faults Dr. Ward for failing to separately analyze full-time and part-time employees. *Id.* at 17-18.

¹⁹⁵ *Id.* at 17-20.

¹⁹⁶ *Id.* at 20 and Table 2.

¹⁹⁷ *Id.*

employees.”¹⁹⁸ She concluded that management experience has “minimal” value in predicting success as a sales associate, and should not have been credited in setting starting pay rates.¹⁹⁹

Dr. Lundquist also examined the pattern of gender differences for all of the experience and volume variables in the WRG. She found statistically significant gender differences in variables that are not predictive of job performance, *e.g.*, store management experience, which would disproportionately credit men for experience that is not predictive of success on the job.²⁰⁰

Dr. Lundquist also analyzed the reliability of the WRG process for setting starting salaries. She concluded that DMs failed to follow company guidelines for almost 24% of hires in the WRG timeframe.²⁰¹ Dr. Lundquist also examined the extent to which the DMs’ entry of experience data into the WRG was consistent with her coders’ entry of experience data, finding statistically significant differences in the coding of sales experience.²⁰² Dr. Lundquist also found inconsistencies in the verification of sales volume.²⁰³ Dr. Lundquist concluded that DMs “may have been manipulating their WRG entries to obtain the desired wage rate.”²⁰⁴ Dr. Lundquist further noted that men are more likely to have two or more WRG records than women, which she views as evidence that DMs are “shopping” for wages more frequently for men than for women.²⁰⁵ Dr. Lundquist concludes that the exceptions to guidelines and inconsistencies in the implementation of Sterling’s WRG process “undoubtedly compromised the accuracy and job-relatedness of the company’s starting pay decisions.”²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 19.

²⁰⁰ *Id.* at 21-22.

²⁰¹ *Id.* at 24-25.

²⁰² *Id.* at 26-27.

²⁰³ *Id.* at 27-28.

²⁰⁴ *Id.* at 27.

²⁰⁵ *Id.* at 25-26.

²⁰⁶ *Id.* at 28. Dr. Lundquist does not provide an analysis of whether the coding and verification inconsistencies adversely affected women.

Dr. Lundquist notes that Sterling's experts portray Sterling's processes as "formulaic" and "objective" without any investigation of their actual use, and that none of Sterling's experts can testify as to the consistency and reliability of the information entered into the WRG.²⁰⁷ Dr. Lundquist points out that Dr. Dunleavy's statement that the WRG process is "unequivocally" valid ignores the professional requirements for establishing validity, and that Dr. Dunleavy admitted that he did not attempt to review the job descriptions for the key positions in this case.²⁰⁸

Overall, Dr. Lundquist concludes that Sterling's experts have not presented evidence supporting the job relatedness of the WRG.

With respect to Sterling's critique of her applicant coding study, Dr. Lundquist contends that "the methods and principles used to code applications in this matter are regularly used by Industrial/Organizational Psychologists to evaluate applicants' training and experience in both research and practice."²⁰⁹ She notes that the coding procedure used in her study was similar to the Minimum Qualifications and Training & Evaluation assessments used routinely by employers to screen and evaluate applicants, and that the methods and principles used in her study are also consistent with the research methodology known as content analysis.²¹⁰ With respect to Dr. Ward's argument that Dr. Lundquist should have computed intraclass correlations

²⁰⁷ *Id.* at 3, 6, 7, 29-30 (Dunleavy testified that he did not examine and has no opinion about whether the actual compensation practices, *i.e.*, the information gathered and entered into the WRG, were implemented in a reliable or consistent manner, and that contrary to the statement in his report that the WRG was subject to internal audit, he was unable to identify any evidence that Sterling actually conducted internal audits of the WRG process; Dr. Stockdale testified that assessing the reliability of the information input to the WRG was outside the scope of her assignment; Dr. Ward testified that he did not study how managers code the inputs to the WRG).

²⁰⁸ *Id.* at 9-14 (*citing* SIOP Principles, and noting that Dr. Dunleavy relies on the correlations of Dr. Ward for evidence of validity "without meeting the basic requirements for research and documentation of validity evidence").

²⁰⁹ *Id.* at 31.

²¹⁰ *Id.* at 31-32 (*citing* authorities).

(ICCs) by experience category, rather than across all categories of coded experience, Dr. Lundquist explains that Dr. Ward's approach is contrary to her objective to represent the level of consistency in coders' overall judgments regarding the entirety of the applicants' experience as reflected on the application form, since it is Sterling's judgment across the various experience items that leads to an overall decision about an applicant's starting pay.²¹¹ She notes that Dr. Dunleavy reviewed her single measure ICCs and conceded that they were more than sufficient to indicate the reliability of the coding study.²¹² She further notes that Dr. Ward's suggested alternative (matched inter-coder values) is unsupported in either the research literature or professional practice, and observes that Dr. Stockdale uses ICCs to establish the consistency of her coders in content analyzing comments on Sterling's employee surveys.²¹³

In response to the new analyses conducted by Dr. Lundquist, Sterling has submitted a declaration by Dr. Ward.²¹⁴ With respect to the asserted flaws in his conclusion that WRG inputs are statistically important predictors of subsequent sales, Dr. Ward contends that "each and every statistical objection made by Dr. Lundquist is invalid."²¹⁵ With respect to Dr. Ward's asserted failure to control for store volume or "opportunity to sell," Dr. Ward argues that Dr. Lundquist's use of store volume "violates fundamental assumptions used in regression analysis," and fails to answer the question of whether new employees with more of the WRG inputs sell more than new employees with fewer of those inputs within the same store.²¹⁶ Dr. Ward evaluated the impact of

²¹¹ *Id.* at 32.

²¹² *Id.* at 33.

²¹³ *Id.* at 33-34.

²¹⁴ Declaration of Michael P. Ward, dated February 14, 2014 (Ward Declaration) (Exhibit 3 to Sterling's Reply in Support of its Motion to Strike the Report and Testimony of Dr. Lundquist.)

²¹⁵ Ward Declaration ¶3.

²¹⁶ *Id.* ¶¶ 9-10.

the WRG inputs within stores, concluding that the WRG inputs, including manager experience, remain statistically important predictors of subsequent sales.²¹⁷

Moreover, Dr. Ward contends that Dr. Lundquist's own regression shows that "prior store manager experience" and "other manager prior experience" are statistically significant predictors of subsequent sales. Specifically, Dr. Ward points out that Dr. Lundquist's claim that management experience factors are *not* statistically significant in explaining sales of full-time Sales Associates is based upon Dr. Lundquist's adoption of a higher standard for statistical significance than she uses in her prior reports: instead of two standard deviations, or a probability of less than 5%, Dr. Lundquist requires a probability of below 0.01. Using two standard deviations, Dr. Lundquist's analysis shows that both the "other management" and "store management" experience variables are statistically significant for full-time Sales Associates (standard deviations of 2.45 and 2.19, respectively).²¹⁸ Dr. Ward also faults Dr. Lundquist's use of "hierarchical regression," because by simply reversing the order of inclusion of the variables, the conclusion Dr. Lundquist attempts to draw about their relative importance changes completely (*e.g.*, if store manager experience is introduced first, it becomes statistically significant).²¹⁹

With respect to Dr. Lundquist's claim that Sterling's use of the WRG was inconsistent and that almost 24% of the hires were subject to "exceptions," Dr. Ward concludes that "this finding results almost entirely from Dr. Lundquist's lack of understanding of Sterling's policy and data practices," and that correcting the errors in her analysis reduces the "exception" rate to 3.5%.²²⁰ Moreover, Dr. Ward finds that these exceptions *advantaged* women by twelve cents per

²¹⁷ *Id.* ¶¶28-32.

²¹⁸ *Id.* ¶¶11-14.

²¹⁹ *Id.* ¶¶18-20.

²²⁰ *Id.* ¶4.

hour relative to men (statistically insignificant).²²¹ With respect to Dr. Lundquist's finding that men are more likely to have two or more WRG records than women (which she interprets as evidence that DMs are "shopping" for wages more frequently for men than for women), Dr. Ward found that this was explained entirely by the fact that men are more likely to be full-time and that men and women who are hired as full-time employees are equally likely to have two or more WRG records.²²²

Finally, Dr. Ward contends that his suggested method of verifying coder reliability by using match rates is in fact supported by I/O psychology research.²²³

Human Resources

The opinions of Dr. Lundquist and Dr. Outtz regarding the inadequacies of Sterling's Human Resources department are addressed by Sterling's expert, Dr. Stockdale.

Dr. Stockdale reviewed Sterling's policies, complaint investigation procedures and training programs and concluded that they are "consistent with advice provided by scholars and expert agencies such as the EEOC and OCR [U.S. Department of Education Office of Civil Rights]." ²²⁴ Dr. Stockdale asserts that Dr. Outtz "dismisses or ignores evidence that Sterling engages in strong human resource practices to curtail and to effectively respond to complaints of discrimination and harassment," including its training program for managers.²²⁵ Dr. Stockdale reviewed 46 specific complaints of unwanted sex-related behavior, as well as the workload of Regional HR Specialists and concluded that "Sterling devotes adequate resources to manage

²²¹ *Id.*

²²² *Id.* ¶5.

²²³ *Id.* ¶8 (citing authority).

²²⁴ Stockdale Report at 9, 53-60.

²²⁵ *Id.* at 8, 59.

complaints of unwanted sex-related behavior,” and that Sterling’s HR employees follow prescribed procedures in conducting investigations.²²⁶

Dr. Stockdale’s report with respect to HR is addressed in Dr. Outtz’s rebuttal report.

With respect to Sterling’s policies prohibiting sexual harassment and fraternization between managers and subordinate employees, Dr. Outtz asserts that “the mere existence of such policies does not in and of itself diminish the likelihood of Unwanted Sex-Related Behavior,” noting that Dr. Stockdale “points out in her published research that zero tolerance policies come across as tough sounding but may mask an inability to get to the root cause of sexual harassment or promote healthy workplaces,” but that she made no attempt to determine the effectiveness of the procedures used by Sterling.²²⁷ He contends, moreover, that the presence of such policies at Sterling “has not been shown to have had an appreciable effect on curbing Unwanted Sex-Related Behavior or its effects on other employees in the workplace.”²²⁸

Dr. Outtz notes that Dr. Stockdale’s opinion that Sterling’s complaint investigation process is “systematic and comprehensive” is based on a review of a sample of sexual harassment investigations selected and provided by Sterling’s counsel, that Dr. Stockdale had “no idea how many complaints were investigated at Sterling, or how representative [the sample was] of the universe of employee complaints,” that Dr. Stockdale reviewed none of Claimants’ declarations,²²⁹ and that Dr. Stockdale testified she had made no attempt to determine the effectiveness of Sterling’s investigative procedures.²³⁰

²²⁶ *Id.* at 9, 53-64 and Table E-1. Dr. Stockdale asserts that Dr. Outtz “follows no known scientific practice to arrive at his conclusion” that Sterling devotes inadequate resources to handling complaints of unwanted sex-based behavior and other “Level 3” complaints, which Dr. Outtz based on the “sheer volume of calls coming in and going out of that office.” *Id.* 61, 62-63.

²²⁷ Outtz Rebuttal Report at 7-8.

²²⁸ *Id.* at 7.

²²⁹ *Id.* at 12.

²³⁰ *Id.* at 8.

Gender-Negative Culture

The expert evidence of gender-negative culture presented by Dr. Outtz is addressed primarily by Dr. Stockdale. Sterling's critique also relies upon Dr. Outtz's deposition testimony.

Dr. Stockdale contends that Dr. Outtz's opinion that Sterling maintains an organizational culture that demeans and devalues women is not based on an accepted scientific method for measuring such a culture or climate.²³¹ Dr. Stockdale asserts that "[t]he scientifically appropriate method for assessing the psychological climate of a work environment is to use validated survey measures and sound survey research methods for collecting data from employees on their climate perceptions," such as the Organizational Tolerance for Sexual Harassment Inventory.²³² In particular, Dr. Stockdale states that the process by which Dr. Outtz arrived at his conclusion that "notwithstanding the presence of women in management and policies prohibiting sex discrimination and fraternization, an organizational climate, such as that at Sterling, facilitates Unwanted Sex-Related Behavior"²³³ "does not represent any scientific process that has ever been published in the scientific literature, presented at professional conferences, or used by practitioners of which I am aware."²³⁴

Dr. Stockdale specifically criticizes Dr. Outtz's reliance on Claimants' declarations²³⁵ and his failure to consider employee opinion surveys conducted by Sterling from 2004 through 2008; based upon Dr. Stockdale's analysis, the quantitative and qualitative data from these surveys "provides no evidence to substantiate a claim that Sterling perpetuates a climate hostile

²³¹ Stockdale Report at 8, 42, 45-49.

²³² *Id.* at 45-47.

²³³ Outtz Report at 29.

²³⁴ Stockdale Report at 52.

²³⁵ *Id.* at 49 (Dr. Outtz relied on selective declarations prepared by Complainants' attorneys of putative class members; he has "taken the worst examples of workplace mistreatment and generalized this to the whole company without any scientific basis for doing so").

or demeaning towards women.”²³⁶

Dr. Stockdale faults Dr. Outtz’s analysis of role modeling for failing to credit the positive role modeling emphasis communicated by Sterling executives through training material and other corporate communications.²³⁷ She further asserts that Dr. Outtz has misrepresented the literature on the “trickle-down” theory of modelling because the studies relied upon by Dr. Outtz are confined to supervisors and their immediate subordinates.²³⁸

Finally, Dr. Stockdale maintains that Dr. Outtz’s conclusion that a gender-negative cultural climate causes or results in discretionary pay and promotion decisions that adversely affect women has no basis in scientific literature.²³⁹

Sterling also argues that Dr. Outtz’s deposition testimony fails to establish a causal connection between the alleged gender-negative corporate culture and the pay and promotion decisions at issue in this case.

Specifically, Sterling cites the following testimony from Dr. Outtz’s deposition:

Q. So you cannot answer the question and you were not asked to answer the question of whether the supposed culture at Sterling affected 100 percent, 50 percent, 30 percent or 10 percent of the starting pay decisions at Sterling?

A. I was not asked to put a number on that and I did not address putting a number on that. What I have testified to is by virtue of this policy that was company-wide, I concluded that it was a factor in wherever these decision were made and, as you say, there were – how many thousands of them did you say were made?

Q. Thousands and thousands.

A. Within those thousands and thousands, if they considered that policy and used that factor which disadvantaged women, then it influenced their decision, and since they had discretion could have caused them to give lower pay to women.

Q. And the same with promotions, you cannot answer and you were not asked to answer whether this culture that you found at Sterling affected 5 percent, 50 percent, 90 percent, 100 percent of the promotions made during the class period?

²³⁶ *Id.* at 8, 50-52.

²³⁷ *Id.* at 8, 43-44.

²³⁸ *Id.* at 8, 44-45.

²³⁹ *Id.* at 9, 65-66.

A. I wasn't asked that question.²⁴⁰

Dr. Outtz testified that he was not asked to address how many male or female managers at Sterling were affected by the culture he found at Sterling,²⁴¹ and testified that the culture at Sterling can, but also may not influence compensation decisions.²⁴²

Dr. Outtz further testified:

A. You keep asking me about quantifying things. The kinds of phenomenon [sic] that are at issue and I was asked an opinion about in this case typically are not quantifiable, nor is it required to quantify them as to the exact number of people who did something. That's not knowable. At the end of the day one can measure—I wasn't asked to do this, but one can measure the effect of whatever this phenomenon is on differences in compensation or pay or whatever. That becomes the question where there is some quantity. But in my opinion quantifying how many of these managers actually thought about this or how many of them actually intended to do so or which ones intended to do so based on this phenomenon is not something that is quantifiable typically in my profession, no attempt would be made to quantify it nor would it be relevant to try to quantify it.²⁴³

Finally, Dr. Outtz testified:

Q. So, in other words, someone has to tell me what's causing supposed disparities and you are not the guy who can tell me that, right?

A. I'm not the guy who can tell you anything, number one. And number two, what I have testified to is that someone would look at the ultimate effect of this in terms of differences by gender. That would typically be a statistician. In my profession in the social sciences for any phenomenon, even in the research, the researcher is not going to then parse out which individuals in their minds did certain things. That's not really knowable, nor is it relevant, needed to be known.²⁴⁴

In his rebuttal report, Dr. Outtz reiterates his opinion that the evidence in the record of behavior and comments about women and women employees attributed to executives and senior managers at Sterling is "sufficient to have established workplace norms for guiding the behavior

²⁴⁰ Deposition of Dr. James Laurence Outtz (August 28, 2013) (Exhibit 1 to Sterling's Outtz *Daubert* Motion) (Outtz Dep.) at 57:24 – 159:3.

²⁴¹ *Id.* at 159:10-21

²⁴² *Id.* at 229:12-15.

²⁴³ *Id.* at 266:15 – 267:10.

²⁴⁴ *Id.* at 268:10-24.

of managers elsewhere in the organizational hierarchy.”²⁴⁵ He points out that Dr. Stockdale has published an article on sexual harassment that acknowledges the influence of behavior by leaders of an organization on those in lower positions, and that she acknowledged in her deposition that leaders are role models whose actions have a guiding influence on members of an organization.²⁴⁶ Dr. Outtz notes that Dr. Stockdale’s evidence of positive behavior consists solely of training materials and written policies--which she herself has concluded do not, by themselves, have an appreciable effect on curbing unwanted sex-related behavior-- and that in forming her opinions, Dr. Stockdale failed to interview a single Sterling manager or employee, and did not review any of the Claimants’ declarations.²⁴⁷ Dr. Outtz also asserts that the employee surveys analyzed by Dr. Stockdale “provided no information about sexual harassment and were not formulated to elicit the kind of information normally sought in instruments accepted as appropriate measures of identifying workplace tolerance for sexual harassment.”²⁴⁸

With respect to Dr. Stockdale’s critique of his methodology, Dr. Outtz states that the examination of the declarations provided by Claimants and by Sterling, the deposition transcripts of Sterling upper management, review of Sterling’s policies and procedures, and application of relevant literature in I/O psychology to the evidence “are methods that I commonly and have seen used by I/O psychologists who have served as expert witnesses in the cases in which I have been involved over the past 30 years.”²⁴⁹

Finally, Dr. Outtz concludes that “[i]t is more likely than not that the Unwanted Sex Related Behavior that demeans and devalues women is modeled from Sterling’s executives

²⁴⁵ Rebuttal Report at 3-4.

²⁴⁶ *Id.* at 2-3.

²⁴⁷ *Id.* at 4-5.

²⁴⁸ *Id.* at 13.

²⁴⁹ *Id.* at 12. Dr. Outtz does not reference any professional literature supporting his methodology or provide citations to cases in which his methodology has been accepted.

down, influenced pay and promotion decisions to women's detriment at Sterling and would be consistent with any gender disparities in pay and promotion at Sterling."²⁵⁰

DAUBERT MOTIONS

Rule 702 of the Federal Rules of Evidence governs admission of expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The admissibility of expert evidence is governed by the Supreme Court's decision in *Daubert*,²⁵¹ which requires that trial courts conduct a "rigorous" analysis of both the relevance and reliability of proposed expert testimony before admitting or considering such testimony. In *Wal-Mart Stores, Inc. v. Dukes (Wal-Mart)*, the Supreme Court suggested that a *Daubert* analysis of proffered expert testimony is appropriate at the class certification stage,²⁵² and since that decision, courts in the Second Circuit have concluded that a *Daubert* analysis is required.²⁵³

Daubert requires the court to make "a preliminary assessment of whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."²⁵⁴ The *Daubert* inquiry has been described as "flexible," and *Daubert* gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert

²⁵⁰ *Id.* at 9.

²⁵¹ 509 US 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 US 137 (1999).

²⁵² 131 S.Ct. 2541, 2553-54 (2011).

²⁵³ *See, e.g., Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012); *Floyd v. City of New York*, 283 F.R.D. 153, 166-67 (S.D.N.Y. 2012).

²⁵⁴ *Daubert*, 509 U.S. at 592-93.

testimony that will assist the trier of fact.²⁵⁵ When considering motions to exclude expert testimony, courts must bear in mind that “[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence,” not exclusion of expert testimony via *Daubert* motions.²⁵⁶ In view of liberal thrust of Federal Rules of Evidence and the presumption of admissibility of expert testimony, doubts about usefulness of expert testimony should be resolved in favor of admissibility,²⁵⁷ and only serious flaws in reasoning or methodology will warrant exclusion.²⁵⁸ Generally, “[d]isputes as to the strength of [an expert’s] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility of his testimony.”²⁵⁹ At the same time, however, “[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered,²⁶⁰ and “when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.”²⁶¹ Where the judge is the trier of fact, a court has greater flexibility in satisfying its gatekeeping function.²⁶²

Dr. Lanier

Sterling does not object to the acceptance of Dr. Lanier as a qualified expert in labor economics. Sterling’s *Daubert* motion to exclude Dr. Lanier’s reports and testimony is based primarily on its contentions that Dr. Lanier’s report incorrectly applied his statistical

²⁵⁵ *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256 (2d Cir. 2002).

²⁵⁶ *Daubert* 509 U.S. at 596.

²⁵⁷ *Canino v. H.R.P., Inc.*, 105 F. Supp. 2d 21, 28 (N.D.N.Y. 2000).

²⁵⁸ *EEOC v. Bloomberg L.P.* 2010 U.S. Dist. LEXIS 92511 at *17 (S.D.N.Y. August 31, 2010).

²⁵⁹ *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995).

²⁶⁰ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

²⁶¹ *Amorgianos*, 303 F.3d at 266.

²⁶² See, e.g., *Bank of N.Y. Mellon Trust Co. v. Solstice ABS CBO II, Ltd.*, 910 F.Supp.2d 629, 639 (S.D.N.Y. 2012).

methodology, incorporated false factual assumptions, and relied on an incomplete and inaccurate database created by Claimants' expert Dr. Lundquist.²⁶³

Sterling first faults Dr. Lanier's analysis because it "fails to control for significant non-discriminatory factors that account for the purported disparity he observed, namely applicants' sales productivity in their prior jobs, or, in the case of a manager, the sales volume of the store they managed."²⁶⁴

Second, Sterling faults Dr. Lanier's analysis because he relied on Dr. Lundquist's "seriously flawed" database (addressed in Sterling's motion to exclude the report and testimony of Dr. Lundquist), in particular Dr. Lundquist's failure to consider prior sales volume.²⁶⁵

Third, Sterling contends that Dr. Lanier's analysis of starting pay and first year sales should be excluded because of its flawed methodology. Sterling asserts that Dr. Lanier "erroneously ran the regression in reverse, thus arriving at meaningless and unsupported conclusions."²⁶⁶

Fourth, Sterling contends that Dr. Lanier's promotion analyses are unreliable, essentially because he excludes a majority of promotions that took place at Sterling during the relevant time period, based upon concerns regarding the validity of CAR, as well as other asserted methodological errors that are detailed in Dr. Ward's report—in which Dr. Ward concludes (based upon CAR data) that women interested in and available for promotion have been promoted at the same rate as men.²⁶⁷

²⁶³ Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. Louis Lanier (Sterling's Lanier *Daubert* Motion) at 1.

²⁶⁴ *Id.* at 8.

²⁶⁵ *Id.* at 12.

²⁶⁶ *Id.* at 14.

²⁶⁷ *Id.* at 19-21.

Fifth, Sterling contends that Dr. Lanier’s “doubts” regarding CAR are unfounded and not grounded in any scientific analysis.²⁶⁸ Sterling notes that the source of Dr. Lanier’s concern is reflected in his Table 13, which shows that 42.3 percent of promotions took place within one month of the candidate registering in CAR, which suggested to Dr. Lanier that promoted individuals might have been selected for management and then instructed to register in CAR, and thus that CAR does not reveal true interest in promotion. Sterling points out that Dr. Lanier did not examine the effect of this phenomenon on women, but that an analysis conducted by Dr. Ward shows that there were significantly more women than men who were promoted within short time periods after registration.²⁶⁹

Sixth, Sterling contends that Dr. Lanier’s merit pay analyses are incorrect and rely on faulty assumptions.²⁷⁰ Sterling contends that Dr. Lanier incorrectly calculated average merit pay, and that, properly calculated, women sales associates receive higher merit pay as compared to men, which is consistent with Dr. Lanier’s finding that women receive, on average, higher performance ratings. Sterling further contends that Dr. Lanier’s analyses failed to account for an important characteristic of Sterling’s merit pay system, the “percent to pay” benchmark, which acts as a cap on pay for higher paid sales associates even if they meet their goal.²⁷¹

Finally, Sterling asserts that Dr. Lanier’s Table 15, which analyzes base pay and promotions by region and by district, is irrelevant because it fails to control for any significant non-discriminatory variables, including the prior experience in the Lundquist database.²⁷²

²⁶⁸ *Id.* at 21-23.

²⁶⁹ *Id.* at 23.

²⁷⁰ *Id.* at 24.

²⁷¹ *Id.* at 25.

²⁷² *Id.* at 26.

Claimants oppose Sterling's motion, relying in part on the rebuttal report of Dr. Lanier, which includes the results of additional statistical studies conducted by him that are described above.

With respect to Dr. Lanier's failure to consider prior sales volume, Claimants note that there is no prior sales volume data for 2003 to 2008, and that there is only prior sales volume data for 2009-2012 for about 29% of employees, and that the reliability of WRG inputs is questionable.²⁷³ In any event, Dr. Lanier analyzed the relationship between the WRG generated wage rates and actual sales volume (Table 9), finding that women were paid less than men who had the same level of sales, or the same ratio of sales to sales goal, indicating that the WRG is a poor predictor of productivity.²⁷⁴ Claimants further contend that Dr. Lanier properly relied on Dr. Lundquist's applicant study, for which Dr. Lundquist used appropriate coding methodology and which permitted Dr. Lanier to consider separately the impact of prior jewelry sales experience and prior non-jewelry sales experience. Claimants assert that Sterling's characterization of Dr. Lanier's analysis in Table 9 as a "reverse regression" is "simply incorrect," and that it is in fact Dr. Ward who conducted a reverse regression.²⁷⁵ With respect to Dr. Lanier's promotion analysis, Claimants argue that Dr. Lanier properly excluded individuals with missing evaluation data to ensure he was comparing similarly situated individuals.²⁷⁶ Nonetheless, Dr. Lanier re-ran his promotion analyses including the omitted individuals and obtained results similar to his original report.²⁷⁷ With respect to CAR, Claimants note that Dr. Lanier reasonably considered evidence that cast doubt on the reliability of CAR as an accurate

²⁷³ Opposition to Motion to Strike Expert Report of Dr. Louis Lanier (Claimants' Lanier *Daubert* Response) at 5-8.

²⁷⁴ *Id.* at 8.

²⁷⁵ Claimants' Lanier *Daubert* Response at 9-11.

²⁷⁶ *Id.* at 12.

²⁷⁷ *Id.* at 13.

measure of interest in promotion, *e.g.*, patterns of registration suggesting that employees were first selected for promotion and then told to register in CAR to make the promotion permissible.²⁷⁸ With respect to Dr. Lanier's merit pay analysis, Claimants note that although Drs. Lanier and Ward used a different methodology to exclude from consideration individuals who were not eligible for a merit increase, they reached the same conclusion: there are no statistically significant differences with respect to merit increases, if performance evaluations are considered.²⁷⁹ Finally, Claimants contend that Sterling has not shown that correction of any of the other purported errors in Dr. Lanier's report would yield different results.²⁸⁰

In reply, Sterling argues that Dr. Lanier's rebuttal report concedes that his initial starting pay analysis failed to control for a significant non-discriminatory factor affecting pay (personal jewelry sales volume), and that by using WRG data in his rebuttal analysis, Dr. Lanier has acknowledged the insufficiency of the data used in his initial analysis.²⁸¹ Sterling argues that Dr. Lanier's revised starting pay analysis is unreliable because he disregarded all of the WRG components other than personal jewelry sales volume, in particular prior managerial experience, which Dr. Ward shows is highly correlated and predictive of future sales.²⁸² Sterling continues to maintain that Dr. Lanier's analysis of starting pay and sales (Lanier Report, Table 9) uses a flawed methodology leading to unreliable results.²⁸³

²⁷⁸ *Id.* at 13-14.

²⁷⁹ Claimants also state that Dr. Lanier re-ran his primary analyses, taking Dr. Ward's critiques into account and reached the same conclusions. Claimants' Lanier *Daubert* Response at 15-16. However, Sterling points out that there is no revised version of that analysis in Dr. Lanier's Rebuttal Report. Sterling Jewelers Inc.'s Reply Memorandum in Support of Its Motion to Exclude the Reports and Testimony of Dr. Louis Lanier (Sterling's Lanier *Daubert* Reply) at 13, n.44.

²⁸⁰ Claimants' Lanier *Daubert* Response at 16-17.

²⁸¹ Sterling's Lanier *Daubert* Reply at 18-19.

²⁸² *Id.* at 7-8.

²⁸³ *Id.* at 9-11.

With respect to merit pay, Sterling contends that its criticisms of Dr. Lanier’s initial report “stand un rebutted,” and that Dr. Lanier’s rebuttal analysis, which concludes that merit pay increases do not result in equal overall pay for equally productive men and women, confuses employee performance ratings with employee sales.²⁸⁴

With respect to promotions, Sterling asserts that Dr. Lanier has abandoned his initial promotions analysis thereby conceding that the analysis lacked probative value, and that Dr. Lanier fails to identify any scientific basis for his “doubts” regarding CAR.²⁸⁵ Sterling contends that there is no evidence that women are discouraged from expressing their interest in promotion through CAR, and that the fact that women comprise 73 percent of Sales Associates and 72 percent of Assistant Managers “belies the notion that women are somehow discouraged from promotion.”²⁸⁶

Applying the general principles governing *Daubert* motions set forth above, I find that none of the deficiencies asserted by Sterling requires the exclusion of Dr. Lanier’s reports or testimony. Reliability “is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced,” and statisticians are afforded substantial latitude in employing regression analysis, including the choice of variable to include.²⁸⁷ I find that each of Sterling’s criticisms goes to the probative value rather than admissibility of Dr. Lanier’s report and testimony, and that Sterling’s critique is best addressed through cross-examination rather than exclusion. Sterling’s motion to exclude the reports and testimony of Dr. Lanier is therefore denied.

²⁸⁴ *Id.* at 14-15.

²⁸⁵ *Id.* at 19-20.

²⁸⁶ *Id.* at 20.

²⁸⁷ *Manpower, Inc. v. Insurance Company of Pennsylvania*, 732 F.3d 796, 806-809 (7th Cir. 2013).

Dr. Lundquist

Sterling does not object to the acceptance of Dr. Lundquist as a qualified expert in Industrial/Organizational Psychology and Psychometrics. Sterling's *Daubert* motion to exclude Dr. Lundquist's reports and testimony faults her methodology and conclusions on multiple grounds, many of which are set forth above.

With respect to Dr. Lundquist's initial report, Sterling first contends that Dr. Lundquist's coding study is fundamentally flawed and unreliable. At the outset, Sterling faults Dr. Lundquist's failure to use WRG data (available after July 2009), as opposed to job applications, which frequently contain ambiguous or vague information with respect to prior experience. Sterling contends that Dr. Lundquist's coders had to use default rules and their personal judgments about the applicant's prior experience, and that the WRG data is more reliable because DMs had the opportunity to clarify such information in an interview or other follow-up. Sterling also faults Dr. Lundquist's failure to measure or test the accuracy of the coding against actual known results (*e.g.*, by interviewing a representative sample of applicants), and asserts that the methodology used by Dr. Lundquist to test consistency of coding among the coders was highly flawed and resulted in a misleading assessment of coder reliability (providing examples of inaccuracies and inconsistent coding by Dr. Lundquist's team).²⁸⁸ Sterling further faults Dr. Lundquist's failure to account for prior sales volume (available from the WRG data, but not job applications), which she concedes is a reasonable factor for Sterling to consider, and which Dr. Ward determined is statistically the most important determinative factor for starting base pay.²⁸⁹

²⁸⁸ Sterling's Motion to Exclude the Report and Testimony of Dr. Kathleen Lundquist (Sterling's Lundquist *Daubert* Motion) at 18-25. Sterling cites several cases in which courts have excluded expert testimony based upon unreliable coding. *Id.* at 22-25. I find that these cases are distinguishable for substantially the reasons set forth in Claimants' Opposition to Motion to Strike Expert Report of Dr. Kathleen Lundquist (Claimants' Lundquist *Daubert* Response) at 27-28.

²⁸⁹ Sterling's Lundquist *Daubert* Motion at 13. Dr. Lundquist did not consider prior sales volume in her

Sterling next contends that Dr. Lundquist's opinions about the job-relatedness of various prior experience factors, particularly prior management experience, are unreliable. Sterling faults Dr. Lundquist's failure to perform a job analysis, her failure to analyze all of the relevant and available O*NET data, her failure to perform any empirical or statistical study to determine job-relatedness, and the inclusion of "sales support" as a job-related factor, which Sterling argues includes important elements of managerial experience. Sterling also points out that Dr. Lundquist's conclusions are contradicted by Dr. Ward's statistical analyses, which show that prior managerial experience is highly correlated with sales at a statistically significant level, and that Dr. Lundquist's customer service fields are not related to the sales productivity of Sterling employees, and that the five-year experience cap is not adverse to women.²⁹⁰

In rebuttal, Dr. Lundquist asserts that the methods and principles used to code applications in her applicant study "are regularly used by Industrial/Organizational Psychologists to evaluate applicants' training and experience in both research and practice."²⁹¹ Dr. Lundquist provides a detailed explanation of her approach to testing inter-coder consistency, as well as a critique of Dr. Ward's suggested approach,²⁹² noting that Dr. Ward is concededly not an expert on coding, and that Sterling's expert Dr. Stockdale used the same technique in her report to

initial report because she concluded that prior sales volume was not consistently documented and verified by Sterling's DMs. Dr. Ward notes that Dr. Lundquist did not analyze the WRG data to test this opinion. Dr. Ward analyzed 7,000 applications reporting prior sales volume and determined that this factor was consistently verified by Sterling's managers and that there is ample documentation in the WRG database to confirm the legitimacy of this verification process. *Id.* at 13, n.47.

²⁹⁰ *Id.* at 29. Sterling also argues that Dr. Lundquist's opinions improperly encroach on factual determinations reserved for the arbitrator and lack a scientific basis. Specifically, Sterling contends that Dr. Lundquist makes improper lay findings of fact and credibility determinations regarding Sterling's HR Department without any purported scientific basis, and that Dr. Lundquist makes improper lay findings of fact and unreasonable extrapolations regarding Sterling's Career Advancement Registry. This argument is rejected for substantially the reasons set forth in Claimants' Lundquist *Daubert* Response at 29-34.

²⁹¹ Lundquist Rebuttal Report at 31 (citing authorities).

²⁹² *Id.* at 31-34.

assess the reliability of the coding of employee survey comments.²⁹³

With respect to Sterling's critique of Dr. Lundquist's failure to use WRG data, Dr. Lundquist conducted several additional studies, using a hierarchical multiple regression, in which she analyzes the same WRG data used by Dr. Ward (including prior experience and prior sales volume).²⁹⁴ Dr. Lundquist also controlled for store volume, which she contends that Dr. Ward improperly failed to consider. She concludes in her rebuttal report that "other management" and "store management" are not predictive of annual sales and should not have been used in the WRG. With respect to prior sales volume, she concludes that only "personal sales jewelry volume" and "personal non-jewelry sales volume" had statistically significant relationships with the performance of full-time Sales Associates and that the variable with the most predictive power was "personal sales jewelry volume."²⁹⁵ Dr. Lundquist found significant gender differences in variables that are not predictive of job performance, which would cause compensation to be affected differentially for men and women on the basis of invalid experience factors.²⁹⁶

In reply, Sterling identifies numerous asserted flaws in Dr. Lundquist's analysis of WRG data. Sterling asserts that (1) in order to show that the correlation of managerial experience variables with future sales is not statistically significant, Dr. Lundquist "moves the goal post" as to what counts for statistical significance;²⁹⁷ (2) Dr. Lundquist's use of store volume as a control

²⁹³ *Id.* at 40-41.

²⁹⁴ Dr. Lundquist continues to contend that the WRG data are not reliable due to inconsistent inputs and because the DMs' failure to follow WRG procedures, which compromised the accuracy and job-relatedness of the company's starting pay decisions. Lundquist Rebuttal Report at 3-4; 23-30.

²⁹⁵ *Id.* at 17-20.

²⁹⁶ *Id.* at 21.

²⁹⁷ Sterling Jewelers Inc.'s Reply to Claimants' Response to Sterling's Motion to Exclude the Report and Testimony of Dr. Kathleen Lundquist (Sterling's Lundquist *Daubert* Reply) at 11. In her initial report, Dr. Lundquist used two standard deviations as the standard for statistical significance. "Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 [5%]

measure violates the basic tenets of statistical regression analysis; (3) Dr. Lundquist's use of "hierarchical regression" is misleading because it produces different results depending on the order of variables; and (4) Dr. Lundquist provides no valid rationale for examining full-time and part-time employees separately.²⁹⁸

Overall, Sterling raises a number of significant questions regarding Dr. Lundquist's approach and conclusions that may well diminish the probative value of Dr. Lundquist's testimony. I find, however, that Sterling's criticism of Dr. Lundquist's application of recognized methodologies (application coding and regression analysis) clearly goes to the weight to be given to Dr. Lundquist's opinions, as opposed to their admissibility. *McCulloch*, 61 F.3d at 1044.

Dr. Outtz

Sterling contends that Dr. Outtz's report and testimony should be excluded because (1) his opinions and conclusions cannot assist the trier of fact; (2) he is not qualified to offer the types of opinions and testimony he has put forth; and (3) his analysis is "wholly unreliable."²⁹⁹

Sterling asserts that Dr. Outtz's opinions and conclusions cannot assist the trier of fact because he cannot testify that the modeling he describes impacted any pay or promotion decision at Sterling, and because he cannot establish a link between alleged sexual harassment and pay or

that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." *Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (citations omitted). In her rebuttal report, Dr. Lundquist uses a standard deviation value corresponding to the likelihood that the same or greater differential would occur by chance less than 1% of the time (1 out of 100) with respect to her conclusion that managerial experience does not predict future sales. Sterling's Lundquist *Daubert* Reply at 11. Dr. Lundquist's rationale for using a different measure was that the sample size in this case was very large. Lundquist Rebuttal Report at 21, n.11; Sterling's Lundquist *Daubert* Reply, Exhibit 4 (Lundquist Dep. II at 153:15-23).

²⁹⁸ Sterling's Lundquist *Daubert* Reply at 15. Sterling also faults Dr. Lundquist's assessment of the reliability or consistency of WRG inputs, which Sterling contends is based on misunderstandings of company policy and speculation and cannot assist the arbitrator because Dr. Lundquist fails to identify any deviation from procedure or inconsistency that disadvantaged female applicants. *Id.* at 16-20. This critique raises some issues that may well affect the probative value of Dr. Lundquist's conclusions, but which do not warrant exclusion of her testimony.

²⁹⁹ Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. James Outtz (Sterling's Outtz *Daubert* Motion) at 2.

promotion decisions. Specifically, Sterling argues that Dr. Outtz's inability to quantify the impact of the allegedly gender-negative culture at Sterling requires exclusion of his report and testimony based upon the ruling in *Wal-Mart* with respect to the testimony of sociologist Dr. William Bielby, which the Court found was not sufficient, by itself, to establish commonality, because Dr. Bielby could not say what percentage of employment decisions was determined by stereotyped thinking.³⁰⁰ Here, however, Claimants do not rely solely on the testimony of Dr. Outtz. Moreover, following *Wal-Mart*, similar testimony was found to be relevant in *Ellis v. Costco*, by providing support for the claim that Costco operated under a common, companywide promotion system.³⁰¹ I therefore find that Dr. Outtz's testimony may be of assistance to the trier of fact, and that his inability to link the allegedly gender-negative culture to specific pay or promotion decisions goes to the probative value rather than the admissibility of his opinions.

Sterling asserts that Dr. Outtz has "no expertise in the fields of gender discrimination, workplace behavior, workplace norms, modeling of workplace behavior, or the effects of workplace behavior on tangible employment decisions such as pay or promotion."³⁰² Specifically, Sterling notes that Dr. Outtz has never published any works pertaining to sexual harassment, and that prior to his retention in this case, Dr. Outtz had "never been asked to address whether manager or executive behavior established workplace norms that guided behavior elsewhere in the company."³⁰³

An expert must stay within the reasonable confines of his subject area, and cannot render expert opinion on an entirely different field or discipline.³⁰⁴ At the same time, "[l]iberality and

³⁰⁰ *Wal-Mart*, 131 S.Ct. at 2553-54.

³⁰¹ 2012 U.S. Dist. LEXIS 13718 at *89 (N.D. Ca. September 25, 2012).

³⁰² Sterling's Outtz *Daubert* Motion at 13.

³⁰³ *Id.* at 14.

³⁰⁴ *Lappe v. Am. Honda Motor Co., Inc.*, 857 F.Supp. 222, 227 (N.D.N.Y. 1994), *aff'd sub nom.*, *Lappe v. Honda Motor Co. Ltd. of Japan*, 101 F.3d 682 (2d Cir. 1996).

flexibility in evaluating qualifications should be the rule; the proposed expert should not be required to satisfy an overly narrow test of his own qualifications,” and a lack of specialization affects the weight of the opinion, not its admissibility.³⁰⁵ Dr. Outtz received his Ph.D. in Industrial/Organizational Psychology from the University of Maryland in 1976, and is a “Fellow” of the Society for Industrial and Organizational Psychology (SIOP), the American Psychological Association, and the American Educational Research Association. He has been qualified as an expert in ten cases involving gender discrimination claims and over 60 cases involving discrimination claims, including in the case of *Velez v. Novartis*, a class action gender discrimination case brought in the Southern District of New York by female sales associates involving disparate pay, failure to promote, and sexual harassment claims; in that case the court found Dr. Outtz qualified as an expert in the “field of employment practices and procedures relating to hiring, development, evaluation and promotion of employees.”³⁰⁶ Additionally, Dr. Outtz has provided expert opinions on organizational culture and modeling of behavior by executives and managers in several cases, including *McReynolds v. Merrill, Lynch, Fenner, Pierce and Smith* and *Gutierrez v. Johnson & Johnson*.³⁰⁷ Based upon these credentials and this experience, I find that Dr. Outtz’s report and testimony in this case fall within the “reasonable confines” of his expertise, and that any deficiencies in his qualifications go to the probative value and not the admissibility of his expert opinion.

Finally, Sterling asserts that Dr. Outtz’s opinions and testimony should be excluded because they are unreliable. Sterling contends that Dr. Outtz drew unsupported inferences from insufficient sampling, failed to apply any scientific methodology to his analysis, and ignored

³⁰⁵ *Id.*; *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 457, 458-458 (law does not require a narrow specialty; objections to qualifications go to the weight not the admissibility of expert’s testimony, and are more properly explored on cross-examination).

³⁰⁶ *Velez v. Novartis*, 2010 US Dist. LEXIS 95010 at *19 (S.D.N.Y. February 25, 2010).

³⁰⁷ Outtz Report at Appendix 2; Outtz Rebuttal Report at 11.

non-conforming evidence that contradicted his theory, and that his modeling theory is not supported by any scientific literature.³⁰⁸

Sterling notes that the declarations of 193 female declarants that form the cornerstone of Dr. Outtz's opinions and conclusions represent 0.44 percent of the entire putative class of 44,000 women. In addition, Sterling asserts that Dr. Outtz did not apply any recognized methodology (scientific or otherwise) to his examination of the declarations—all of which he found to be credible, without using any methodology to verify their accuracy. Moreover, in selecting the ten declarants that he interviewed, Dr. Outtz picked those who presented the strongest evidence in favor of Claimants.³⁰⁹

Sterling further contends that Dr. Outtz's testimony and report are unreliable because he ignored evidence in the record that failed to fit his theory. As noted above, Dr. Outtz discounted the relevance of a 2006 third-party employee satisfaction survey because it did not specifically address sexual harassment. Sterling contends, however, that the survey reflects positive attitudes on items that would have captured concerns about a hostile or demeaning work environment conducted by a third-party vendor. Sterling also faults Dr. Outtz for not requesting other employee satisfaction surveys. Sterling also criticizes Dr. Outtz's failure to acknowledge the effect of women in managerial positions on his conclusion that managers model unwanted sex-related behavior at higher managerial levels, given that 43.2 percent of DMs and 32.4 percent of VPROs were women, and noting that Dr. Outtz conceded at his deposition that women would be less likely than men to model unwanted sex-related behavior.³¹⁰

³⁰⁸ Sterling's Outtz *Daubert* Motion at 14-15.

³⁰⁹ *Id.* at 15-19.

³¹⁰ *Id.* at 19-23.

Sterling also argues the Dr. Outtz drew unsupported inferences regarding Sterling's HR function and failed to apply any scientific methodology to his analysis. With respect to Dr. Outtz's conclusion that Sterling was unresponsive to sexual harassment complaints, Sterling notes that Dr. Outtz relied on nine declarations out of a putative class of 44,000 women, and admitted that he did not review any of the documents produced in this matter that reflect Sterling's investigations of complaints or the discipline that occurred following those investigations.³¹¹

In sum, Sterling contends that Dr. Outtz's conclusions are based on a flawed analysis because no survey was conducted, no random sampling of the Sterling employee population was performed to assess their perceptions of the organizational climate, and no systematic sampling of company records was conducted to examine how the company handles sexual harassment grievances, conducts training or otherwise monitors compliance with its policies on sexual harassment and discrimination.³¹²

Sterling further asserts that the scientific literature on which Dr. Outtz relies does not support his theory of modeling. Sterling notes that critical to Dr. Outtz's theory is his contention that alleged unwanted sex-related behavior occurs at the highest levels of the company and permeates down through multiple levels in the organization throughout the relevant period. Sterling points out that the studies to which Dr. Outtz cites focus exclusively on the relationships between supervisors and subordinates who deal directly with each other, and that none of the studies concludes that the behavior of leaders influenced the climate toward an entire class of employees. Moreover, Sterling asserts that none of the studies deals with unwanted sex-related behavior, and thus that no study establishes any connection between unwanted sex-related

³¹¹ *Id.* at 25-26.

³¹² *Id.* at 27.

behavior and pay and promotion decisions. According to Sterling, there is no scientific study establishing that a culture that is tolerant of sexual harassment or of gender inequity generally causes discrimination in pay or promotion.³¹³

In response to Sterling's critique, Claimants challenge Sterling's characterization of the record on numerous points. For example, Claimants deny that Dr. Outtz relied almost exclusively on Claimants' declarations in forming his opinions, pointing out that Dr. Outtz also reviewed the deposition transcripts of fourteen Sterling executives, numerous internal Sterling documents, and approximately 600 declarations of employees on behalf of Sterling.³¹⁴ Claimants argue that Sterling has provided no authority for its contention that Dr. Outtz was required to conduct any random or statistical sampling because he reviewed and analyzed all of Claimants' declarations, and point out that Dr. Outtz verified the accuracy of the declarations by assessing the extent to which the declarants provided first-hand accounts, the degree of detail contained in the declarations and by comparing the information provided with the testimony of Sterling's witnesses.³¹⁵ Claimants point out that Dr. Outtz addressed the effect of women in managerial positions at length in his initial report.³¹⁶ With respect to Sterling's complaint that Dr. Outtz failed to request additional employee satisfaction surveys, Claimants point out that the 2006 survey (which Dr. Outtz reviewed) was the only survey for which there was data on gender.³¹⁷ With respect to Dr. Outtz's failure to systematically assess Sterling's investigation of sexual harassment complaints, Claimants note that Sterling successfully moved to preclude

³¹³ *Id.* at 27-30.

³¹⁴ Response in Opposition to Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. James Outtz (Claimants' Outtz *Daubert* Response) at 10-11.

³¹⁵ *Id.* at 11-12.

³¹⁶ *Id.* at 19.

³¹⁷ *Id.* at 18-19.

discovery of this evidence.³¹⁸ Finally, Claimants dispute Sterling's characterization of the studies relied upon by Dr. Outtz, pointing out that he in fact cites to scientific literature that shows that the prevalence of unwanted sex-related behavior, together with the climate and culture that facilitate it, derogates and devalues women, and citing cases permitting expert testimony similar to that offered by Dr. Outtz.³¹⁹ Claimants acknowledge that Dr. Outtz's opinions may in some respects be considered a "new theory," but argue that Rule 702 permits the admissibility of new theories provided they are based on reliable methodology.³²⁰

On balance, I find that Sterling has raised some significant concerns regarding Dr. Outtz's methodology and the reliability of Dr. Outtz's report and testimony. However, as Claimants' response demonstrates, certain aspects of the record, and Sterling's characterization of Dr. Outtz's opinions are sharply disputed. Under these circumstances, and applying the general principles governing *Daubert* motions set forth above, I find that the deficiencies identified by Sterling go to the probative value rather than the admissibility of Dr. Outtz's report and testimony.

For all of the above reasons, Sterling's motion to exclude the report and testimony of Dr. Outtz is denied.

Dr. Stockdale

Claimants do not challenge Dr. Stockdale's qualifications as an expert in I/O Psychology. They assert, however, that her report and testimony should be excluded because they cannot assist the trier of fact and because her opinions and conclusions are unreliable.

Claimants contend that Dr. Stockdale's opinions on gender role socialization are irrelevant because the statistics she cites in her report are not related to the demographics at

³¹⁸ *Id.* at 5.

³¹⁹ *Id.* at 20-21.

³²⁰ *Id.* at 21, n. 103.

Sterling or the positions at issue in this case (noting that the literature pertains largely to top management positions in unrelated fields).³²¹ Claimants also fault Dr. Stockdale's reliance on documents selected by Sterling's counsel without conducting any independent analyses.³²² For example, Dr. Stockdale did not interview any Sterling managers and did not investigate or attempt to determine how Sterling's policies and procedures are implemented *in practice*.³²³ Nor did Dr. Stockdale review any of Claimants' declarations.³²⁴ Claimants further fault Dr. Stockdale for simply accepting the conclusions of Sterling's other experts, including the assertion that the algorithm elements of the WRG are "job relevant," and "that gender differences in starting pay are fully accounted for by gender differences in prior experience, particularly management experience."³²⁵ Dr. Stockdale acknowledged that she did not have detailed knowledge of the wage engine, which was used for much of the class period prior to the introduction of the WRG.³²⁶ Claimants further assert that the professional literature on which Dr. Stockdale relies does not support her opinions, and that her own prior work conflicts with her critique of Dr. Outtz's modeling analysis.³²⁷

Finally, Claimants contend that Dr. Stockdale's methodologies are unreliable, citing her reliance on 46 investigation files selected by counsel, rather than a random sample of the full universe of investigation files, and noting that her conclusion that Sterling's personnel procedures were "routinely followed" is inconsistent with a Sterling memo (not reviewed by Dr. Stockdale) in which a consultant concluded that Sterling's HR employees "may have taken a less

³²¹ Claimants' Motion to Strike the Report and Testimony of Dr. Margaret Stockdale (Claimants' Stockdale *Daubert* Motion) at 3-6.

³²² *Id.* at 7.

³²³ *Id.* at 8.

³²⁴ *Id.*

³²⁵ *Id.* at 7.

³²⁶ *Id.* at 9.

³²⁷ *Id.* at 11-15

than robust approach to the internal investigation process.”³²⁸

In response, Sterling states that it “has not offered Dr. Stockdale’s report as a comprehensive study of its pay and promotion practices,” but to “identify deficiencies in the opinions and testimony of Dr. Outtz.”³²⁹ Sterling nonetheless proceeds to argue for the admissibility of all of Dr. Stockdale’s opinions. However, based upon the limited purpose for which Sterling offers Dr. Stockdale, I find that Opinions Nos. 3, 5, and 6,³³⁰ which broadly endorse Sterling’s pay and promotion practices, should be excluded. This addresses a number of Claimants’ objections. I find that Dr. Stockdale’s critique of Dr. Outtz’s modeling theory may assist the trier of fact and is reliable and therefore admissible, as is her critique of Dr. Outtz’s conclusions regarding Sterling’s HR Department. The other deficiencies in her critique of Dr. Outtz identified by Claimants, including her reliance on limited data, go to the weight rather than the admissibility of her testimony. Similarly, the asserted deficiencies in Dr. Stockdale’s application of gender socialization theory with respect to female interest in promotions go to the probative value rather than to the admissibility of her conclusions.

Applying the general principles governing *Daubert* motions set forth above, I find that the deficiencies asserted Claimants go to the probative value rather than the admissibility of Dr. Stockdale’s report and testimony, except that Opinions 3, 5 and 6 are excluded.

For all of the above reasons, Sterling’s motion to exclude the report and testimony of Dr. Stockdale is granted in part and denied in part.

³²⁸ *Id.* at 15-17 (citing Exhibit 8 to Claimants’ Stockdale *Daubert* Motion).

³²⁹ Sterling Jewelers Inc.’s Opposition to Claimants’ Motion to Strike the Report and Testimony of Dr. Margaret Stockdale (Sterling’s Stockdale *Daubert* Response) at 2.

³³⁰ Stockdale Report at 7-8.

Drs. Dunleavy and Sady

Claimants contend that the report of Drs. Dunleavy and Sady and the testimony of Dr. Dunleavy should be excluded under *Daubert*. Claimants challenge the qualifications of these proposed experts and argue that their report and testimony are unreliable.

Drs. Dunleavy and Sady each have an M.A. and Ph.D. in Industrial/Organizational Psychology. Neither has testified as an expert before.

Dr. Sady received his Ph.D. in 2012. He is an adjunct professor at University of Maryland, Baltimore County, where he teaches statistics. He has presented a number of papers on employment-related topics to various professional meetings, but appears not to have published any scholarly work in peer-reviewed journals, and has no discernible specialization. Based upon his limited experience and relative lack of expertise in the subjects of his report, I find that Dr. Sady is not sufficiently qualified to testify as an expert in this matter.

By contrast, Dr. Dunleavy received his Ph.D. in 2004 and has published extensively, with a concentration in the area of selection procedures, validation, and adverse impact. Dr. Dunleavy has also served on several committees relating to his field, including the SIOP Professional Practice Committee and the SIOP task force responsible for discussing contemporary selection practices with the EEOC. I therefore find that Dr. Dunleavy is qualified to testify with respect to job-relatedness and the reliability of selection processes, which are subjects clearly within the “reasonable confines” of his expertise.

Claimants contend that the opinions and conclusions contained in the report with respect to the WRG are inadmissible based upon Dr. Dunleavy’s lack of knowledge about the development and implementation of the WRG, and the failure to use any scientific or

independent methodology for assessing the reliability or job-relatedness of the WRG.³³¹

Claimants point out that at his deposition, Dr. Dunleavy did not know how Sterling developed the WRG, how Sterling decided on the factors to include in the WRG, how Sterling's DMs calculated years of experience, or how Sterling managers count retail sales experience.³³² Although the report claims that "productivity metrics" entered into the WRG were required to be verified and were "subject to internal audit," Dr. Dunleavy admitted in his deposition that he does not know whether Sterling ever conducted any verification or internal audits of the WRG inputs, and does not know what kind of documentation was required in order to prove prior sales volume.³³³ Claimants further note that Dr. Dunleavy concededly did not examine whether Sterling's compensation procedures were implemented in a reliable manner, and did not recall whether he reviewed an internal Sterling document (listed on Appendix A to his report) reporting that out of 65 new hires processed through the WRG, only 25 were processed properly.³³⁴ These asserted deficiencies are troubling, and may well limit the probative value of Dr. Dunleavy's opinions regarding reliability. I find, however, that they are best addressed by cross-examination as opposed to exclusion.

Claimants also fault Drs. Dunleavy and Sady for relying on Dr. Ward's analysis to support their conclusions, without independently verifying his work or conducting independent

³³¹ Claimants' Motion to Exclude the Report and Testimony of Drs. Eric Dunleavy and Kayo Sady (Claimants' Dunleavy/Sady *Daubert* Motion) at 1, 4-8. Claimants also maintain that the experts' opinions on job-relatedness of prior management experience based upon O*NET and research literature are unreliable because they are "completely divorced from the facts of this case," noting that Drs. Dunleavy and Sady did not review the job descriptions for the positions at issue in this case. Reply in Support of Claimants' Motion to Exclude the Report and Testimony of Drs. Eric Dunleavy and Kayo Sady (Claimants' Dunleavy/Sady *Daubert* Reply) at 5. The debate between the experts regarding which O*NET data are relevant is plainly a matter for cross-examination and not a basis for exclusion.

³³² Claimants' Dunleavy/Sady *Daubert* Motion at 4-5.

³³³ *Id.* at 6.

³³⁴ *Id.* at 8, 10.

studies.³³⁵ I disagree. Although Dr. Dunleavy observes that his conclusions are confirmed by Dr. Ward's studies, Dr. Dunleavy's analysis of job-relatedness and reliability is based primarily on his interpretation of O*NET data, and application of the scientific literature on HR process structure, and does not "merely parrot" Dr. Ward's conclusions.³³⁶ Nor is this a situation in which an expert has done no more than repeat information provided by a party.³³⁷

For all of the above reasons, Claimants' motion to strike the report and testimony of Dr. Dunleavy is denied; the motion to strike any testimony by Dr. Sady is granted.

CLASS CERTIFICATION ANALYSIS: TITLE VII

I turn first to whether Claimants have met the requirements for class certification with respect to their claims under Title VII.³³⁸

Claimants' Theories of Liability

As noted above, Claimants assert two theories of liability under Title VII: disparate impact and pattern and practice disparate treatment.

Disparate Impact

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."³³⁹ Proof of discriminatory motive or intent is not required.³⁴⁰ "[T]he necessary premise of the disparate impact approach is that some

³³⁵ *Id.* at 7.

³³⁶ *Cf. Eberli v. Cirrus Design Corp.*, 615 F.Supp.2d 1357, 1364 (S.D. Fla. 2009).

³³⁷ *Cf. Auther v. Oshkosh Corp.*, 2013 U.S. Dist. LEXIS 132600 at *9-14 (W.D.N.Y. September 16, 2013) and *Arista Records LLC v. Usenet com, Inc.*, 608 F.Supp.2d 409, 424-426 (S.D.N.Y. 2009).

³³⁸ Because class certification of Claimants' EPA claims raises a number of distinct issues, the request for class certification of EPA claims is discussed separately at pp. 113-115.

³³⁹ *Int'l Bhd. of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 335 n.15 (1977).

³⁴⁰ *Id.*

employment practices, adopted without a deliberately discriminatory motive may in operation be functionally equivalent to intentional discrimination”³⁴¹ “[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.”³⁴²

The following description of the proof typically presented in disparate impact cases is closely adapted from the decision of the Second Circuit in *Robinson v. Metro-North Commuter R.R.*³⁴³

Disparate impact claims involve three stages of proof. The first is the *prima facie* showing of disparate impact. It requires plaintiffs to establish by a preponderance of the evidence that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. To make this showing, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. Allegations solely of a bottom line racial imbalance in the work force are insufficient.

Statistical proof almost always occupies center stage in a *prima facie* showing of a disparate impact claim. Statistical proof can alone make out a *prima facie* case. The statistics must reveal that the disparity is substantial or significant and the statistics must be of a kind and

³⁴¹ *Watson v. Fort Worth Bank & Trust (Watson)*, 487 U.S. 977, 997 (1988).

³⁴² *Watson*, 487 U.S. at 991; *Wal-Mart*, 131 S.Ct. at 2254. The Court held in *Watson* that “disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.” *Watson*, 487 U.S. at 990. “If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.” *Watson*, 487 U.S. at 990-991 (internal citation omitted).

³⁴³ 267 F.3d 147 (2d Cir. 2001) (internal citations omitted).

degree sufficient to reveal a causal relationship between the challenged practice and the disparity. Moreover, a plaintiff must show that each individual challenged employment practice has a significantly disparate impact.

If the plaintiffs succeed in their *prima facie* showing, the burden of persuasion then shifts to the employer to demonstrate one of two things. The first option is to challenge the plaintiffs' statistical proof. This may be done by introducing evidence to show that either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity. To successfully contest the plaintiffs' statistical evidence, however, the employer has to convince the factfinder that its numerical picture is more accurate, valid, or reliable than the plaintiffs' evidence. If the employer is able to do so, it prevails and the case ends.

Assuming the employer is unable to successfully contest the plaintiffs' statistics, a second route is for the employer to demonstrate that the challenged practice or policy is job related for the position in question and consistent with business necessity. If the employer fails to demonstrate a business justification for the policy or practice, then the plaintiffs prevail. If the employer succeeds in establishing a business justification, however, the disparate impact claim proceeds to a third stage. At this third stage, the burden of persuasion shifts back to the plaintiffs to establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect.

Should the plaintiffs succeed in establishing a Title VII disparate impact violation, the court may order declaratory and prospective class-wide injunctive relief. However, in order for an employee to obtain individual relief (*e.g.*, back pay), an individual inquiry is generally required in which each class member must show that he or she was among those adversely affected by the challenged policy or practice. If this showing is made, the class member is

entitled to individual relief unless the employer in turn can establish by a preponderance of the evidence that a legitimate non-discriminatory reason existed for the particular adverse action.

Disparate Treatment

Disparate treatment occurs “when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff’s race, color, religion, sex, or national origin.”³⁴⁴ In a disparate treatment case, “the plaintiff is required to prove that the defendant had a discriminatory intent or motive.”³⁴⁵ One method of proving disparate treatment is to show that an employer engaged in a pattern and practice of discrimination. Pattern-or-practice disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals. To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant’s “standard operating procedure.”³⁴⁶

The following description of the proof typically presented in disparate treatment cases is closely adapted from the decision of the Second Circuit in *Robinson*.³⁴⁷

Generally, a pattern-or-practice suit is divided into two phases: liability and remedial. At the liability stage, the plaintiffs must produce sufficient evidence to establish a *prima facie* case of a policy, pattern, or practice of intentional discrimination against the protected group.

Plaintiffs have typically depended upon two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant’s past treatment of the protected group, and (2) testimony

³⁴⁴ *Watson*, 487 U.S. at 985–86.

³⁴⁵ *Id.* at 986.

³⁴⁶ *Teamsters*, 431 U.S. at 336.

³⁴⁷ 267 F.3d 147 (2d Cir. 2001) (internal citations omitted).

from protected class members detailing specific instances of discrimination. If the plaintiffs satisfy this *prima facie* requirement, the burden of production then shifts to the employer to defeat plaintiffs' *prima facie* case by demonstrating that the plaintiffs' proof is either inaccurate or insignificant.

Three basic avenues of attack are open to the defendant challenging the plaintiffs' statistics, namely assault on the source, accuracy, or probative force. The defendant can present its own statistical summary treatment of the protected class and try to convince the fact finder that these numbers present a more accurate, complete, or relevant picture than the plaintiffs' statistical showing. Or the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination.

Once the defendant introduces evidence satisfying this burden of production, the trier of fact then must consider the evidence introduced by both sides to determine whether the plaintiffs have established by a preponderance of the evidence that the defendant engaged in a pattern or practice of intentional discrimination. Should the plaintiffs prove a pattern or practice of discrimination, the court may proceed to fashion class-wide declaratory and/or injunctive relief. If individual relief such as back pay, front pay, or compensatory recovery is sought in addition to class-wide equitable relief, the court must conduct a "remedial" phase. Class members enter this second phase with a presumption in their favor that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The effect of the presumption from the liability stage is to substantially lessen each class member's evidentiary burden relative to that which would be required if the employee were proceeding separately with an individual disparate treatment claim under the framework

established in *McDonnell Douglas Corp. v. Green*.³⁴⁸ Rather than having to make out a *prima facie* case of discrimination and prove that the employer's asserted business justification is merely a pretext for discrimination, a class member at the remedial stage of a pattern-or-practice claim need only show that he or she suffered an adverse employment decision and therefore was a potential victim of the proved class-wide discrimination. The burden of persuasion then shifts to the employer to demonstrate that the individual was subjected to the adverse employment decision for lawful reasons. If the employer is unable to establish a lawful reason for an adverse employment action, the employee is entitled to individualized equitable relief, which may include back pay and front pay. Class members who seek compensatory damages in addition to individualized equitable relief must then prove that the discrimination caused them emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or other nonpecuniary losses.

Requirements of Rule 23 and Supplementary Rules 4(a) and 4(b)

Numerosity

Rule 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable; AAA Supplementary Rule 4(a)(1) requires that “the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable.” Sterling acknowledges that Claimants have met the requirement of numerosity.

Commonality

Rule 23(a)(2) and AAA Supplementary Rule 4(a)(2) require that “there are questions of law or fact common to the class.”

³⁴⁸ 411 U.S. 792 (1973).

The Supreme Court's recent decision in *Wal-Mart*³⁴⁹ sets forth the standards for proof of commonality in employment discrimination cases.

In *Wal-Mart*, plaintiffs sought certification of a class comprising a million and a half current and former female employees of Wal-Mart, asserting violation of Title VII with respect to pay and promotion, based upon disparate impact and disparate treatment, seeking injunctive and declaratory relief, back pay and punitive damages. The Court held that because plaintiffs had failed to provide "convincing proof of a companywide discriminatory pay and promotion policy," they had not established the existence of any common question.³⁵⁰ As set forth in the Court's opinion, the *Wal-Mart* plaintiffs alleged that local managers exercised discretion over pay and promotions "disproportionately in favor of men, leading to an unlawful disparate impact on female employees," and that "because Wal-Mart is aware of this effect, its refusal to cabin its manager's authority amounts to disparate treatment."³⁵¹ According to the Court, plaintiffs claimed that "the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees," and that the basic theory of plaintiffs' case is that "a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."³⁵²

The Court described pay and promotion decisionmaking at Wal-Mart as follows:

Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

³⁴⁹ 131 S.Ct. 2541 (2011),

³⁵⁰ *Id.* at 2556-2557.

³⁵¹ *Id.* at 2548.

³⁵² *Id.* (*emphasis in original*).

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as “support managers,” which is the first step on the path to management. Admission to Wal-Mart’s management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year’s tenure in the applicant’s current position and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee’s superiors after prescribed objective factors are satisfied.³⁵³

According to the Court, with respect to the commonality requirement, plaintiffs “relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart’s female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of Wal-Mart’s “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination.³⁵⁴ The Court noted that plaintiffs “do not allege that Wal-Mart has any express corporate policy against the advancement of women.”³⁵⁵ The Court held that commonality requires plaintiffs to demonstrate that class members have “suffered the same injury.”³⁵⁶ “Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. ‘What matters to class certification * * * is not the raising of common “questions”—even in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.

³⁵³ *Id.* at 2547 (internal citations omitted).

³⁵⁴ *Id.* at 2549.

³⁵⁵ *Id.* at 2548.

³⁵⁶ *Id.* at 2551 (quoting *General Telephone Co. of Southwest v. Falcon (Falcon)*, 457 U.S. 147, 157 (1982)).

Dissimilarities within the proposed class are what have the potential to impede the generation of common answers’.”³⁵⁷ The Court noted that in resolving an individual’s Title VII claim, “the crux of the inquiry is ‘the reason for a particular employment decision’.”³⁵⁸ The Court therefore held that in order to meet the commonality requirement, plaintiffs must provide some “glue” holding together the reasons for the multiple employment decisions at issue, so that an “examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.”³⁵⁹

The Court held that its opinion in *General Telephone Co. of Southwest v. Falcon* (*Falcon*)³⁶⁰ “describes how the commonality issue must be approached,”³⁶¹ noting

the conceptually “wide gap” between an individual claim and the existence of a class of persons who have suffered the same injury as that individual. The *Falcon* Court suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.”

Id. (internal citations omitted).³⁶²

In *Wal-Mart*, the Court found that “[t]he first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary

³⁵⁷ *Id.* (quoting Nagreda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131-132 (2009)).

³⁵⁸ *Id.* at 2552 (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

³⁵⁹ *Id.* at 2552, 2556 (internal quotation marks omitted) (emphasis in original).

³⁶⁰ 457 U.S. 147 (1982).

³⁶¹ *Id.* at 2553.

³⁶² *Id.*

decisionmaking is to avoid evaluating employees under a common standard.”³⁶³ With respect to the second manner of bridging the gap, the Court held that significant proof that Wal-Mart operated under a general policy of discrimination “is entirely absent.”³⁶⁴ Noting that Wal-Mart’s announced policy forbids sex discrimination, and that “the company imposes penalties for denials of equal employment opportunity,” the Court found that the only evidence of a “general policy of discrimination” produced by plaintiffs was the testimony of their sociological expert, Dr. Bielby.³⁶⁵ The Court found Dr. Bielby’s testimony “worlds away” from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”³⁶⁶ The Court observed that Dr. Bielby could not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart,” and “could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking”—which the Court found to be “the essential question on which [plaintiffs’] theory of commonality depends.”³⁶⁷ The Court concluded that “[t]he only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy’ of allowing discretion by local supervisors over employment matters,” which “on its face” is “just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business—on that we have said ‘should itself raise no inference of discriminatory conduct’.”³⁶⁸ The Court acknowledged that “in appropriate cases,”

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 2554.

³⁶⁷ *Id.* at 2553-2554.

³⁶⁸ *Id.* at 2554 (quoting *Watson*, 487 U.S. at 990).

giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory.³⁶⁹ The Court noted, however, that:

[T]he recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements * * *. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.³⁷⁰

The Court held that the *Wal-Mart* plaintiffs “have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby’s social frameworks analysis that we have rejected.”³⁷¹ The Court observed that “[i]t is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”³⁷² The Court held that plaintiffs’ statistical and anecdotal evidence “falls well short” of showing a common mode of exercising discretion.³⁷³

With respect to plaintiffs’ statistical evidence, the Court observed that:

“[I]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.” A regional pay disparity, for example, 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 the plaintiffs’ theory of commonality depends.³⁷⁴

³⁶⁹ *Id.* (citing *Watson*, 487 U.S. at 990-991).

³⁷⁰ *Id.* (internal citations omitted).

³⁷¹ *Id.* at 2554-2555.

³⁷² *Id.* at 2555.

³⁷³ *Id.*

³⁷⁴ *Id.* (internal citations omitted).

The Court further held that even if plaintiffs’ statistical proof established a pay or promotion disparity in all of Wal-Mart’s stores, “that would still not demonstrate that commonality of issue exists.”³⁷⁵ The Court observed that “[s]ome managers will claim that the availability of women, or qualified women, or interested women, in their stores’ area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex neutral, performance-based criteria—whose nature and effects will differ from store to store.”³⁷⁶ The Court noted that in *Watson*, “the plurality opinion conditioned its holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is *not enough*,” and that the plaintiff “must begin by identifying the specific employment practice that is challenged.”³⁷⁷ The Court held that “other than the bare existence of delegated discretion,” the *Wal-Mart* plaintiffs had “identified no ‘specific employment practice’—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”³⁷⁸ Finally, the Court held that plaintiffs’ anecdotal evidence “suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory.” The Court noted that plaintiffs filed just one affidavit for every 12,500 class members—relating to only some 235 out of Wal-Mart’s 3,400 stores. “More than half of these reports are concentrated in only six States * * *; half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart’s operations at all.”³⁷⁹ In sum, the Court concluded that because plaintiffs provided “no convincing proof of a companywide

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 2555.

³⁷⁷ *Id.* (quoting *Watson*, 487 U.S. at 994 and citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 645, 656 (1989)).

³⁷⁸ *Id.* at 2555-2556.

³⁷⁹ *Id.* at 2556.

discriminatory pay and promotion policy, * * * they have not established the existence of any common question.”³⁸⁰

Application of *Wal-Mart* to This Case

Sterling argues that “Claimants’ Motion contains all of the deficiencies identified by the Supreme Court in *Wal-Mart*, and thus fails to demonstrate the requisite commonality to bind this proposed class together.”³⁸¹ I disagree.

This case may be distinguished from *Wal-Mart* in several significant respects. Most importantly, as opposed to alleging the “bare existence of delegated discretion,” Claimants have identified specific uniform companywide pay and promotion policies and procedures, for each of which Claimants have proffered expert testimony that, if persuasive, demonstrates a statistically significant adverse impact on women. All of the pay and promotion decisions at issue in this arbitration were made pursuant to these specified policies and procedures. In addition, Claimants’ statistical evidence shows disparities at the district or regional level at which pay and promotion decisions are made, as opposed to reliance on national statistics.

At the same time, to the extent Claimants allege a general policy of discrimination or contend that pay and promotion disparities were caused by a the exercise of discretion “tainted” by a “corporate culture” of gender bias, Claimants’ proof suffers from several of the deficiencies identified in *Wal-Mart*.

Specifically, with respect to individual instances of alleged discrimination, Claimants have submitted statements from less than one-half of 1% of the proposed class. Over half of Claimants’ declarations are clustered in eight states; there are five or fewer declarants in thirteen

³⁸⁰ *Id.* at 2556-2557.

³⁸¹ Sterling Opp. Memo at 7 and Sterling Exhibit 1 (Chart Comparing Allegations and Class Theories between *Wal-Mart Stores, Inc. v. Dukes* and *Jock, et al. v. Sterling Jewelers Inc.*).

states and no declarants in fifteen states. Moreover, like Dr. Bielby, Claimants' expert Dr. Outtz could not quantify the causal effect of a gender-biased corporate culture on pay and promotion decisions at Sterling.

For the reasons set forth below, I find that Claimants' have demonstrated commonality with respect to their claims for declaratory and injunctive relief based upon a theory of disparate impact, but have failed to demonstrate commonality with respect to their claims of disparate treatment.

Disparate Impact

With respect to disparate impact, the central questions are whether the specific policies and procedures identified by Claimants have a significant disparate impact, *i.e.*, whether there are significant disparities that have been caused by the challenged policies and procedures, and if so, whether the challenged policies and procedures are job-related for the position in question and consistent with business necessity. Classwide adjudication of these questions will produce answers common to the class that are "apt to drive the resolution of the litigation" with respect to all class members, even though individual issues may remain to be resolved in "remedial" proceedings.

Following *Wal-Mart*, courts have grappled with satisfaction of the commonality requirement in the context of employment policies and practices that permit or delegate the exercise of discretion in employment decisions, several of which have found requisite commonality in the context of a claim of disparate impact.

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (McReynolds)*,³⁸² the Seventh Circuit reversed an order denying class certification with respect to certain employment

³⁸² 672 F.3d 482 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 338 (2012).

practices alleged to have an adverse impact on 700 African-American brokers.³⁸³ In that case the Court found that Merrill Lynch employs 15,000 brokers working in 600 branch offices, supervised by branch managers and 135 “Complex Directors.” The company has a “teaming” policy that permits brokers in the same office to form teams. The teams are formed by brokers, and once formed a team decides whom to admit as a new member. Complex Directors and branch-office managers do not select the team’s members. The company also has a policy regarding “account distributions,” which are transfers of customers’ accounts when a broker leaves Merrill Lynch and his clients’ accounts must be transferred to other brokers. Accounts are transferred within a branch office, and the brokers in that office compete for the accounts. The company establishes criteria for deciding who will win the competition, including the competing brokers’ records of revenue generated for the company and of the number and investments of clients retained.

The Court noted that Complex Directors and branch managers have a measure of discretion to veto teams and to supplement the company’s criteria for distributions, and that “to the extent these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is indeed like Wal-Mart. But the exercise of that discretion is influenced by the two company-wide policies at issue: authorization to brokers, rather than managers to form and staff teams; and basing account distributions on the past success of the brokers who are competing for the transfers.” The Court observed that “team participation and account distribution can affect a broker’s compensation, as well as a broker’s

³⁸³The plaintiffs in *McReynolds* initially sought class certification pursuant to Rule 23(b)(3) based upon both disparate impact and disparate treatment. The district court denied certification on both theories prior to the decision in *Wal-Mart*. Following *Wal-Mart*, plaintiffs renewed their request for class certification based solely upon disparate impact, which was again denied. Plaintiffs appealed this denial to the Seventh Circuit, and in oral argument effectively withdrew their request for class certification pursuant to Rule 26(b)(3), and sought certification based upon Rule 26(b)(2) and Rule 23(c)(4). *McReynolds*, 672 F.3d at 483-484.

performance evaluation, which under company policy influences the broker's pay and promotion. The plaintiffs argue that these company-wide policies exacerbate racial discrimination by brokers."³⁸⁴

The Court held that whether the teaming policy and its "spiral effect" on account distribution causes racial discrimination and is not justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination.³⁸⁵ The Court observed that in the absence of a company-wide policy on teaming and account distribution but "instead delegation to local management of the decision whether to allow teaming and the criteria for account distribution, there would be racial discrimination by brokers or local managers like the discrimination alleged in *Wal-Mart*. But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect * * * of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis."³⁸⁶

Notably, while the policies at issue in *McReynolds* permitted the exercise of discretion, which plaintiffs contended contributed to discrimination, the Seventh Circuit found dispositive that the discretion was exercised "within a framework established by the company."³⁸⁷ This framework distinguished the case from the delegation of discretion challenged in *Wal-Mart*. The policies at issue in *McReynolds*, one which permitted brokers to form teams pursuant to criteria of their choice and the other which permitted the allocation of departing brokers' accounts pursuant to criteria of the remaining brokers' choice, constituted discrete personnel policies that

³⁸⁴ *McReynolds*, 672 F.3d at 489.

³⁸⁵ *Id.* at 489-490.

³⁸⁶ *Id.* at 490.

³⁸⁷ *Id.* at 488.

permitted those administering them broad discretion in how to implement them.³⁸⁸ The Seventh Circuit concluded that challenges to these policies presented questions about their adverse effect that could generate answers common to the class.³⁸⁹ The Court therefore found that “[t]he practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis” and certified a class pursuant to Rule 23(b)(2) and Rule 24(c), which provides that “when appropriate, an action may be brought or maintained as a class action with respect to particular issues.”³⁹⁰

The Court observed that:

“Obviously a single proceeding, while it might result in an injunction, could not resolve class members’ claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700 members. But at least it wouldn’t be necessary in each of those trials to determine whether the challenged practices were unlawful.”³⁹¹

In *Ellis v. Costco (Costco)*,³⁹² the U.S. District Court for the Northern District of California certified a class of 700 employees challenging certain policies and practices with respect to promotion, finding that plaintiffs had satisfied the commonality requirement under both pattern or practice and disparate impact theories of liability. The challenged promotion policies in *Costco* included a promotion-from-within preference, a practice against posting management job vacancies, and the absence of a formal application process for promotions to assistant general manager and general manager positions.³⁹³ Importantly, with respect to

³⁸⁸ *Id.* at 488-489.

³⁸⁹ *Id.* at 490-491.

³⁹⁰ *Id.* at 491.

³⁹¹ *Id.* at 490-491.

³⁹² *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), *appeal dismissed*, 657 F.3d 970 (9th Cir. 2013).

³⁹³ *See id.* at 511.

disparate impact, the *Costco* court noted that “[b]ecause the question under this theory is whether [d]efendant’s policies and practices have a discriminatory impact on the [c]lass as a whole without regard to intent, the *Dukes*-identified problem of decentralized and discretionary individual managers’ decisions presents less of a hurdle to certification if the plaintiffs identify *specific companywide employment practices* responsible for the disparate impact.”³⁹⁴ Like *McReynolds*, the *Costco* court found that the exercise of discretion in decisions made pursuant to discrete company policies satisfied the commonality requirement of Rule 23.³⁹⁵

I find that Claimants have satisfied the commonality requirement for their Title VII claims challenging Sterling’s compensation and promotion policies under a disparate impact theory of liability with respect to declaratory and injunctive relief. Claimants challenge discrete employment policies to which all members of the proposed class have been subject, and which Claimants’ expert evidence demonstrates have resulted in significant pay and promotion disparities adverse to women. Claimants challenge: 1) the use of certain prior experience criteria, including prior management experience and non-jewelry sales volume, in setting starting pay rates for Sales Associates; 2) Sterling’s policy for awarding merit increases as a percentage of base pay; and 3) Sterling’s Succession Planning process. As in *McReynolds*, to the extent decisionmakers exercise some discretion in the implementation of these policies, they do so “within a framework established by the company.”³⁹⁶ And like the plaintiffs in *McReynolds*, Claimants’ challenge presents questions regarding adverse effect that will be addressed by class-wide proof regarding the lawfulness of the identified policies and procedures which could generate answers common to the class. Specifically, both Claimants and Sterling will offer

³⁹⁴ *Id.* at 531 (citing *Wal-Mart*, 131 S. Ct. at 2554) (emphasis in original).

³⁹⁵ *Id.* at 518; See also *Moore v. Napolitano*, No. 00-953(RWR/DAR), 2013 WL 659111, at *14-15 (D.D.C. Feb. 25, 2013); *Calibuso v. Bank of America, Corp.*, 893 F. Supp.2d 374, 390 (E.D.N.Y. 2012).

³⁹⁶ *McReynolds*, 672 F.3d at 488.

statistical evidence regarding whether the challenged policies and procedures have an adverse effect on women—including whether CAR is the appropriate labor pool with respect to promotion-- and statistical and other expert evidence regarding whether the prior experience factors and promotional system challenged by Claimants are job-related. The answers to these questions will determine whether Claimants are entitled to class-wide declaratory and injunctive relief “in one stroke”—notwithstanding the need for further proceedings to adjudicate individual claims for monetary damages.

It is unnecessary to address the commonality requirement with respect to monetary relief, because, for the reasons set forth below, Claimants cannot meet the predominance, superiority and manageability requirements of AAA Supplementary Rule 4(b) or Rule 23(b)(3).

Disparate Treatment

The requirement of proof of intent and problem of decentralized and individualized exercise of discretion identified in *Wal-Mart* present substantial hurdles for the establishment of commonality for a large nationwide class based upon disparate treatment. As noted above, in order to meet the commonality requirement for their Title VII claims alleging a pattern or practice of discrimination in the compensation and promotion decisions, Claimants must provide “significant proof” that Sterling “operated under a general policy of discrimination.”³⁹⁷

The *Wal-Mart* Court provided scant guidance as to what constitutes “significant proof,” apart from its apparent acknowledgment that the evidence adduced in *Teamsters* satisfied this standard. It did, however, state definitively what was *not* sufficient.

With respect to statistical evidence, the Court held that even if plaintiffs’ statistical proof established a pay or promotion disparity in *all* of Wal-Mart’s stores, “that would still not

³⁹⁷ *Wal-Mart*, 131 S.Ct. at 2553.

demonstrate that commonality of issue exists.”³⁹⁸ With respect to anecdotal evidence of discrimination, the Court held that one affidavit for every 12,500 class members, relating to only some 235 out of Wal-Mart’s 3,400 stores, and concentrated in only six states was insufficient “to raise any inference that all the individual, discretionary personnel decisions are discriminatory.”³⁹⁹ With respect to evidence of a corporate culture that rendered the exercise of discretion “vulnerable” to gender discrimination, the Court held that Dr. Bielby’s testimony was insufficient to prove that Wal-Mart “operated under a general policy of discrimination,”⁴⁰⁰ because he was unable to answer the “essential question” of causation, *i.e.*, to provide the necessary “glue” to establish that the common reason for pay and promotion disparities was intentional gender discrimination.⁴⁰¹

Claimants contend that the evidence in this case may be distinguished from that offered in *Wal-Mart* in several respects.

First, in contrast to the nation-wide statistics offered in *Wal-Mart*, Claimants’ statistical evidence of the widespread nature of the disparities in compensation and promotion is provided at levels of the Company consistent with the levels at which the decisions were made.

Second, Claimants have offered evidence that bias, stereotyping and sexually demeaning conduct occurs among those managers and executives responsible for setting pay and making promotions, including examples of bias and stereotyping in the highest ranks of the company. Claimants note that the *Costco* court found this type of evidence sufficient to support a finding of commonality for the pattern or practice claims in that case, based in part on expert testimony that

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 2556.

⁴⁰⁰ *Id.* at 2554.

⁴⁰¹ *Id.* at 2553-2554.; *see EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 U.S. Dist. LEXIS 92511, at *53-54 (S.D.N.Y. Aug. 31, 2010) (where expert was unable to conclude that employer’s managers were intentionally stereotyping female employees, testimony would not support EEOC’s allegations that intentional discrimination had occurred).

“Costco’s culture fosters and reinforces stereotyped thinking, which allows gender bias to infuse from the top down.”⁴⁰²

Third, Claimants’ have offered evidence that Sterling continued to use employment practices that it knew had a disparate impact on women,⁴⁰³ as well as evidence of deficiencies in Sterling’s HR function.

I find that while the evidence in this case may be in some respects stronger than the evidence presented in *Wal-Mart*, it fails to provide significant proof that Sterling operated under a general policy of discrimination.

The critical element in Claimants’ claim of intentional discrimination is the existence and influence of a corporate culture demeaning to women. The lynchpin in Claimants’ proof of this element is the proposed expert testimony of Dr. Outtz. Simply put, without this testimony, Claimants cannot provide the necessary “glue” to establish that the common reason for pay and promotion disparities is intentional gender discrimination.

As noted above, Dr. Outtz cannot answer the “essential question” of what percent of the employment decisions at Sterling are determined by a gender-discriminatory corporate culture. At best, Dr. Outtz demonstrates that the sexual misbehavior and biased remarks by Sterling’s executives is *capable* of influencing the managers who make the compensation and promotion decisions challenged by Claimants. More importantly, however, I find that Dr. Outtz’s conclusions are not supported by a reliable methodology that is recognized and accepted in the scientific or professional literature in his field, and therefore lack sufficient probative value to establish commonality.

⁴⁰² *Costco*, 285 F.R.D. at 520.

⁴⁰³ See *United States v. City of New York*, 2013 WL 1955782, *14 (2d Cir. May 14, 2013) (intent can be inferred from continued use of employment practices known to have a disparate impact).

As set forth above, Dr. Outtz's opinion that there is a corporate culture at Sterling that is demeaning to women is based in significant part on his review of declarations provided by Claimants' counsel. Dr. Outtz did not utilize any recognized methodology to determine whether these declarants constituted a representative sample of current and former Sterling employees. Dr. Outtz apparently read approximately 600 declarations provided by Sterling that reflect a very different view of Sterling's corporate culture with respect to the treatment of women. His decision to disregard this evidence, without any explanation, at a minimum calls his objectivity into question. None of the professional literature relied upon by Dr. Outtz supports his conclusion that "modelling" of improper sexual behavior by male corporate executives caused hundreds of lower level managers to intentionally discriminate against women in thousands of pay and promotion decisions. Moreover, Dr. Outtz's opinion that corporate culture at Sterling influenced pay and promotion decisions despite significant representation of women in management positions, which is based on a handful of declarations regarding alleged tolerance of sexual misconduct by Sterling's HR department, and unsupported conclusions regarding enforcement of Sterling's sex discrimination and harassment policies, is neither scientific nor credible.

For the above reasons, I find that Claimants have failed to provide "convincing proof of a companywide discriminatory pay and promotion policy" and have therefore not established the existence of any common question" with respect to their claims of disparate treatment.⁴⁰⁴

Typicality

Rule 23(a)(3) and AAA Supplementary Rule 4(a)(3) require that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

⁴⁰⁴ *Wal-Mart*, 131 S.Ct. at 2556-2557.

"The commonality and typicality requirements tend to merge into one another, so that similar considerations animate analysis of Rules 23(a)(2) and (3)."⁴⁰⁵ The typicality requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."⁴⁰⁶ Typicality is not defeated by "minor variations in the fact patterns underlying individual claims," as long as the wrong is alleged to have occurred in the same general-fashion.⁴⁰⁷ The purpose of the typicality requirement is "to ensure that a class representative has 'the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'"⁴⁰⁸ "The primary criterion for determining typicality is the forthrightness and vigor with which the representative party can be expected to assert the interests of the members of the class."⁴⁰⁹ A claim may be asserted on behalf of a class as long as at least one of the named claimants has been subject to each of the practices from which the proposed class seeks relief.⁴¹⁰

Sterling asserts that Claimants cannot satisfy the typicality requirement because their claims are subject to "unique" defenses. Essentially, Sterling argues that it will show that the Named Claimants were not disfavored or were disfavored for individual reasons unrelated to gender, such as job performance and individual prior experience. It is well-established that

⁴⁰⁵ *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (citing *Falcon*, 457 U.S. at 157 n. 13).

⁴⁰⁶ *Robinson*, 267 F.3d at 155 (internal citation omitted).

⁴⁰⁷ *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); see also *Caridad*, 191 F.3d at 293 (the typicality requirement "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class").

⁴⁰⁸ *In re NYSE*, 260 F.R.D. 55, 2009 WL 1683349, at *15 (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997)).

⁴⁰⁹ *Latino Officers Ass'n v. City of New York*, 209 F.R.D. 79, 89-90 (S.D.N.Y. 2002) (internal citation and quotation marks omitted).

⁴¹⁰ *Charrons v. Pinnacle Group NY LLC*, 269 F.R.D.221, 233 (S.D.N.Y. 2010).

typicality is absent where the named plaintiffs are "subject to unique defenses which threaten to become the focus of the litigation."⁴¹¹ However, the unique defenses doctrine is limited to cases in which a full defense is available against an individual plaintiff's action and "those unique defenses threaten to become focus of the litigation."⁴¹² A class representative need not prove that "she is immune from any possible defense."⁴¹³ Instead, she must establish "that she is not subject to a defense that is not "typical" of the defenses defendant may raise against other members of the proposed class."⁴¹⁴

As set forth above, and explained in more detail below, I have determined that this case may proceed as a class action solely with respect to Claimants' disparate impact claims for declaratory and injunctive relief, based upon Rule 23(b)(2) and Rule 23(c)(4).

The well-established principle that "[t]ypicality is determined by the nature of the claims brought by the class representatives, not by the particular fact patterns from which they arose," is "particularly true with respect to * * * (b)(2) certification."⁴¹⁵ This is because "where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them * * * [there is] no need for *individualized* determinations of the propriety of injunctive relief."⁴¹⁶

Here, there can be no question that the Named Claimants' claims of disparate impact

⁴¹¹ *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000).

⁴¹² *Id.* at 59 (citing *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

⁴¹³ *See Casida v. Sears Holding Corp.*, 2012 U.S. Dist. LEXIS 111599 (E.D. Cal. August 8,, 2012), at *38 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

⁴¹⁴ *See id.* at *39-40 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), and citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984-85 (9th Cir. 2011)).

⁴¹⁵ *Brown v. Kelly*, 244 F.R.D. 222, 232 (S.D.N.Y. 2007).

⁴¹⁶ *Id.* (emphasis in original; internal quotations and citation omitted); *accord Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (noting that "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims," and that "[a]ctions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold").

arise from the same course of conduct as the claims of the class: Sterling’s companywide pay and promotion policies. Sterling’s defenses to the issues certified will be common to all members of the proposed class, *i.e.*, that the challenged policies and procedures do not have an adverse impact and/or are job-related. If Claimants succeed with respect to the certified claims, the “unique defenses” identified by Sterling will be litigated in subsequent proceedings. There is therefore no danger that individual defenses will become the focus of this class arbitration.⁴¹⁷

I therefore find that Claimants have met the typicality requirements of Rule 23(a)(3) and AAA Supplementary Rule 4(a)(3) with respect to their disparate impact claims for declaratory and injunctive relief.

Adequacy

Rule 23(a)(4) and AAA Supplementary Rule 4(a)(4) require that the named representatives “will fairly and adequately protect the interests of the class.” Rule 23(a)(4) is satisfied where the proposed class representatives (1) have an interest in “vigorously pursuing the claims of the class,” and (2) do not have interests “antagonistic to the interests of other class members.”⁴¹⁸

⁴¹⁷ In any event, courts have held that employers cannot defeat typicality by asserting fact-specific defenses that discrimination did not cause an adverse employment action. *See, e.g., Duling v. Gristede’s Operating Corp.*, 267 F.R.D. 86, 97 (S.D.N.Y. 2010) (defendants in Title VII cases cannot defeat typicality by claiming that unique factors other than discrimination explain the experiences of named plaintiffs); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 267-68 (S.D.N.Y. 2007) (claiming that something other than discrimination explains the named plaintiffs’ experience” cannot defeat typicality because “[t]he question presented by each plaintiff’s claim is undoubtedly typical of the class, whether or not defendants are eventually able to prove that the answer to that question is unique to each plaintiff”); *Costco*, 285 F.R.D. at 534-35 (unique defenses did not defeat typicality because they were either specific examples of defenses typical to the entire class or “merely alternative explanations for alleged discrimination” and not likely to become a “major focus” of the litigation, especially when compared to the common and typical class-wide issues.).

⁴¹⁸ *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); *Baffa*, 222 F.3d at 60.

Sterling asserts that Claimants have not satisfied the adequacy requirement because there are conflicts between Named Claimants and absent class members, and because Claimants have abandoned class claims for compensatory damages.

Sterling points out that the Named Claimants include individuals who supervised other putative class members. Specifically, Sterling asserts that decisions on pay and promotions are made on a collaborative basis between SMs and DMs, and that female SMs therefore played a role in the pay and promotion decisions challenged by Claimants. Sterling contends that supervisors cannot adequately represent those they supervise.⁴¹⁹ Sterling further observes that some Named Claimants no longer work for Sterling and that former employees cannot adequately represent current employees because they have no (or a lessened) interest in injunctive relief for the class.⁴²⁰

Neither of these objections has merit. In this case, Claimants contend that all of the members of putative class have been similarly harmed by Sterling's compensation and promotion systems. Both current and former employees have an interest in establishing the unlawfulness of Sterling's practices, which is a necessary predicate for injunctive relief as well as back pay. The fact that some class members hold different positions within a company does not create a class conflict,⁴²¹ and in any event the record reflects that only DMs, VPROs, and

⁴¹⁹ *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011) (inadequate class representatives found where the named plaintiffs "have authority within the company with regard to the compensation of some, and maybe many, of the unnamed class members and, as worrisome, over male employees in the same job categories as the class members").

⁴²⁰ *See Slader v. Pearle Vision, Inc.*, No. 00 Civ. 2797 (JSR), 2000 U.S. Dist. LEXIS 16453, at *2 (S.D.N.Y. Nov. 14, 2000) (class representatives inadequate where the relief they seek conflicts with relief sought by others in the class because "a former employee's primary interest necessarily centers on recovering back pay, while a current employee may well be far more interested in obtaining injunctive relief").

⁴²¹ *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 958-59 (9th Cir. 2003) (explaining that there was no "substantive issue" for a conflict of interest where several members of the class were supervised by other employee class members because the mere fact that the employees could have "potentially conflicting interests" was not sufficient to deny class certification); *Latino Officers Ass'n City of N.Y. v. City of New*

DVPs had the actual authority to make the pay and promotion decisions at issue in this case. The interests of the Named Claimants are therefore not antagonistic to those of absent class members.

Claimants' First Amended Complaint expressly sought an award of compensatory damages for the class. However during the deposition of Claimant Dawn Souto-Coons, Claimants entered into a stipulation on the record (which the parties formalized in a signed Stipulation) stating that that none of the Named Claimants is seeking an award of compensatory damages in this Arbitration. Sterling suggests that the abandonment of their compensatory damages claims was a strategic decision to avoid cross-examination on these claims and/or to enhance the chances of certification of a nationwide class, which was made more difficult by the intervening *Wal-Mart* decision, especially with respect to monetary relief. Sterling argues that the failure to seek compensatory damages renders the Named Claimants inadequate representatives. As discussed below, I find that Claimants have not met the requirements for class certification with respect to monetary relief. It is therefore unnecessary to address Sterling's contention that Claimants have failed to satisfy the requirements of Rule 26(a)(4) based upon their failure to seek compensatory damages.

York, 209 F.R.D. 79, 90 (S.D.N.Y. 2002) (finding no fundamental conflict in a class of police officers that had class representatives who were in supervisory and non-supervisory positions); *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, No. 98-CV-99C, 2008 WL 343011, at *5 (W.D.N.Y. Feb. 6, 2008) (holding that it was not necessary for each class member or representative to hold "identical" positions to be adequate class representatives). The adequacy requirement merely requires a showing that the class representatives were employees who suffered the same alleged discrimination as suffered by other class members. *See Velez*, 244 F.R.D. at 269 (quoting *Hnot v. Willis Grp. Holdings Ltd*, 228 F.R.D. 476, 485 (S.D.N.Y. 2005) ("Even if one female officer supervised another, it is still possible, as plaintiffs allege, that they all suffered from gender discrimination by the key decisionmakers."); *Hnot*, 228 F.R.D. at 486 ("If supervisory employees and supervisees all are subject to discrimination, all have an equal interest in remedying the discrimination, and the named plaintiffs can still be expected to litigate the case with ardor. A potential for conflict need not defeat class certification.")).

For the above reasons, I find that Claimants have satisfied the adequacy requirement of Rule 23(a)(4) and AAA Supplementary Rule 4(a)(4) with respect to their claims for declaratory and injunctive relief based upon disparate impact.

Adequacy of Counsel

AAA Supplementary Rule 4(a)(5) requires that “counsel selected to represent the class will fairly and adequately protect the interests of the class.” Sterling does not challenge the adequacy of class counsel, which is a prominent, highly-experienced employment discrimination law firm that I find will fairly and adequately protect the interests of the class. I therefore find that Claimants have met the requirement of adequacy of counsel.

Similar Arbitration Clause

AAA Supplementary Rule 4(a)(6) requires that “each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.” The parties have stipulated to satisfaction of this requirement.⁴²²

AAA Supplementary Rule 4(b)

AAA Supplementary Rule 4(b) provides that “[a]n arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.”

Because I have determined that Claimants have not met the commonality requirement of AAA Supplementary Rule 4(a) or Rule 23(a) with respect to their pattern and practice disparate

⁴²² See Stipulation Regarding Versions of RESOLVE Program Agreement (Feb. 14, 2013) (Claimants’ Exhibit 104).

treatment claim, I address the requirements of AAA Supplementary Rule 4(b) solely with respect to Claimants' disparate impact claim.

The predominance requirement is meant to “tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation,”⁴²³ and is intended to “ensure[] that the class will be certified only when it would ‘achieve economies of time, effort and expense, and promote * * * uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.’”⁴²⁴

I find that questions of law or fact common to class members predominate over any questions affecting only individual members with respect to those “Stage I” issues that pertain to Claimants' request for declaratory and injunctive relief. The proof pertaining to disparate impact—primarily expert statistical evidence, as well as fact and expert evidence pertaining to Sterling's operations and the job-relatedness of Sterling's pay and promotion criteria and practices--will indisputably be common to the class. Indeed, Sterling has not identified any individual issues with respect to the lawfulness of Sterling's compensation and promotion practices challenged by Claimants.

I find, however, that common questions do not predominate with respect to those “Stage II” issues that pertain to monetary relief. The facts pertaining to each Claimant's eligibility will vary depending on their individual employment history, and the facts pertaining to similarly-situated males during their employment. These issues cannot be fairly adjudicated on a representative basis.⁴²⁵

⁴²³ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

⁴²⁴ *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007) (quoting *Amchem*, 521 U.S. at 615).

⁴²⁵ Nor can Claimants meet the other requirements of AAA Supplementary Rule 4(b) and Rule 23(b)(3) with respect to monetary relief. Of course, in the event Claimants prevail in Stage I, it remains open to

With respect to the superiority requirement, the alternative method of adjudicating Claimants' disparate impact claims is through individual, single-Claimant arbitrations. With respect to Claimants' request for declaratory and injunctive relief, each arbitrator would be required to hear evidence and determine whether Sterling's compensation and promotion practices are lawful. The determination of this issue in a single proceeding is clearly more efficient. Moreover, a class arbitration will promote uniformity in decisions. A class arbitration is also superior because it provides for inclusion of members who would otherwise be unable to afford independent representation.⁴²⁶ In addition, broad systemic remedies are generally not available in non-class cases.⁴²⁷ I also note that traditional limitations on discovery in arbitration could preclude the development of company-wide evidence necessary to prove systemic discrimination. Finally, a class arbitration is superior to individual proceedings because without a class proceeding and the attendant class-wide notice, many putative class members would never know that Sterling may have engaged in unlawful employment practices.⁴²⁸ I therefore find that the adjudication of Claimants' disparate impact claims with respect to declaratory and injunctive relief in a single arbitration is superior to individual arbitrations.

With respect to the specific matters set forth in AAA Supplementary Rule 4(b)(1)-(4), I find:

(1) The members of the proposed class are unlikely to have any interest in individually controlling the prosecution of Claimants' claims for declaratory and injunctive relief. To the

the Arbitrator to employ appropriate case management techniques to reduce the number of individualized hearings that may be required.

⁴²⁶ *Amchem*, 521 U.S. at 617; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *United States v. City of New York*, 276 F.R.D. 22, 49 (E.D.N.Y. 2011).

⁴²⁷ *See, e.g., Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

⁴²⁸ *See, e.g., In re Nassau County Strip Search Cases (Nassau)*, 461 F.3d 219, 229 (2d Cir. 2006).

extent a putative class member wishes to do so, she will be afforded an opportunity to opt out of the class arbitration.

(2) Apart from the EEOC action, there appear to be no other proceedings concerning this controversy already commenced by members of the class.

(3) No negative consequences to class members in concentrating the determination of Claimants' disparate impact claims for declaratory and injunctive relief in a single arbitral forum have been identified by counsel.

(4) There are no difficulties likely to be encountered in the management of a class arbitration of Claimants' disparate impact claims for declaratory and injunctive relief. Sterling's expressed concerns regarding manageability pertain solely to the adjudication of Claimants' entitlement to monetary relief; Sterling has not identified any difficulties that could be encountered in a class arbitration of Claimants' disparate impact claims for declaratory and injunctive relief.

Rule 23(c)(4)

As set forth above, Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” AAA Supplementary Rule 4 does not contain a provision comparable to Rule 23(c)(4). However, Supplementary Rule 4(a) provides that the arbitrator must consider not only the criteria enumerated in Supplementary Rule 4, but also, “any law or agreement of the parties the arbitrator determines applies to the arbitration.” The AAA has stated that it intended its formulation of the Supplementary Rules to “hew closely to Federal Rule 23.”⁴²⁹ I therefore find that certification of a class arbitration with respect to particular issues is consistent with the AAA Supplementary

⁴²⁹Brief for Am. Arbitration Ass'n as *Amicus Curiae* for Neither Party in *Stolt-Nielsen*, 129 S.Ct. 2703, 2009 WL 2896309, at *17-18 (September 4, 2009).

Rules and applicable in this arbitration, as long as the requirements of Supplementary Rules 4(a) and 4(b) are satisfied.

Courts in the Second Circuit and elsewhere have used Rule 23(c)(4) to certify class claims for declaratory and injunctive relief in employment discrimination cases before and after the *Wal-Mart* decision, in order to efficiently manage complex litigation and narrow issues for adjudication.⁴³⁰

Sterling argues that issue certification “would not meaningfully advance any substantive outcome” and should be denied because an injunction would not provide “final relief” to all class members. I disagree. If Claimants are successful, a declaratory judgment will relieve all class members of the obligation to prove the unlawfulness of the challenged pay and promotion practices in individual arbitrations and current employees will benefit from the elimination of unlawful practices.⁴³¹

As the Seventh Circuit observed in *McReynolds*,

Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700 members. *But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.*⁴³²

⁴³⁰ See, e.g., *Gulino v. Board of Education*, 555 Fed. Appx. 37 (2d Cir. 2014); *McReynolds*, 672 F.3d 482 (7th Cir. 2012); *Robinson*, 267 F.3d 147 (2d Cir. 2001); *Houser v. Pritzker*, No. 10 CV 3105-FM, 2014 WL 2967446 (S.D.N.Y. July 1, 2014); see also *Nassau*, 461 F.3d at 226-227 (“courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)”).

⁴³¹ Because of the potentially limited applicability of *res judicata* and collateral estoppel in arbitration, it is possible that every Claimant would be required to prove this element of liability in individual arbitrations. Of course, if Sterling successfully defends the challenged pay and promotion practices, thousands of individual arbitrations may be avoided.

⁴³² *McReynolds*, 672 F.3d at 490-491 (emphasis added).

For the reasons set forth above, I find that Claimants' have satisfied the requirements of Supplementary Rules 4(a) and 4(b) with respect to their Title VII claims based upon a disparate impact theory of liability for purposes of declaratory and injunctive relief, and find that this arbitration may be appropriately maintained as a class arbitration with respect to the following issues:

- (1) Whether Sterling's compensation practices have a disparate impact on women;
- (2) Whether Sterling's promotion practices have a disparate impact on women, including whether CAR is an appropriate and reliable indicator of interest in promotion;
- (3) If Sterling's compensation practices have a disparate impact on women, whether Sterling can establish that one of the statutory affirmative defenses justifies the disparity in pay; and
- (4) If Sterling's promotional practices have a disparate impact on women, whether Sterling's practices were job-related for the position in question and justified by business necessity.

TITLE VII CLASS PERIOD

Title VII sets a 300-day limitation period for discrimination claims filed with a local agency. 42 U.S.C. § 2000e-5. For the claims alleging discrimination in compensation brought under Title VII, the class relies upon the EEOC charge of Named Claimant Laryssa Jock filed on May 18, 2005. Therefore, the starting point for class membership of women asserting compensation claims under Title VII begins July 22, 2004. For the claims alleging discrimination in promotions brought under Title VII, the class relies upon the EEOC charge of Named Claimant Dawn Souto-Coons, filed on October 3, 2005. The commencement of the class period for the promotion claims is therefore December 7, 2004.

As noted above, Claimants propose of a class period beginning on June 2, 2002. This proposal is based upon their claims under the EPA, which provides for a three-year statute of limitations for willful violations. *See* 29 U.S.C. § 255(a). Claimants contend that Jock's EEOC charge, which Sterling received on June 2, 2005, tolls the statute of limitations for the claims of the putative class under the EPA. Claimants further contend that because the EPA limitations period is broader the Title VII limitations period, the "appropriate" class period for both Title VII and EPA compensation claims is June 2, 2002 to the present.

For the reasons set forth below in the discussion of Claimants' EPA claims, I find that Jock's EEOC charge does not toll the statute of limitations for claims of the putative EPA class, and that Claimants' collective claims under the EPA must proceed on an "opt-in" basis. Moreover, Claimants have provided no authority for broadening the Title VII class period based upon the simultaneous assertion of EPA claims. I therefore find that the starting point of the class period for women asserting compensation claims under Title VII is July 22, 2004, and that the starting point of the class period for women asserting promotion claims under Title VII is December 7, 2004.

EQUAL PAY ACT

The EPA incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA") found in 29 U.S.C. § 216(b).⁴³³ Accordingly, the EPA permits representative

⁴³³ *See* Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56-57 (codified as amended at 29 U.S.C. § 206(d)). The EPA provides: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly-situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

claimants to bring claims on behalf of similarly-situated persons. Section 216(b) requires that each potential plaintiff file a written consent to “opt in” to the action.⁴³⁴

In this case, Claimants have not sought to proceed in accordance with Section 216(b). Rather, they seek certification of an “opt-out” class in accordance with Fed. R. Civ. P 23 and AAA Supplementary Rules for Class Arbitrations. In addition, Claimants contend that Jock’s EEOC charge tolls the statute of limitations for the claims of the putative class under the EPA. Claimants acknowledge that this approach has been uniformly rejected by the courts. They argue, however, that an opt-out EPA class and tolling is permitted here because this case is proceeding in arbitration under the AAA Supplementary Rules for class Arbitrations, which only provide for certification of an opt-out class.

Claimants rely on *Long John Silver’s Rests., Inc. v. Cole* (*Long John Silver’s*), in which the arbitrator permitted FLSA claims to proceed as an opt-out class, based upon his finding the by agreeing to arbitrate pursuant to the AAA rules, “the parties’ contract * * * superseded the FLSA’s procedural requirements.”⁴³⁵ The district court declined to vacate the arbitrator’s decision. On appeal, the Fourth Circuit held that Congress intended that “the ‘opt-in’ procedure should apply in arbitration as in court proceedings,” but did not expressly preclude waiver in the parties’ agreement by adoption of an alternate procedure.⁴³⁶ Because the arbitrator’s interpretation of the arbitration agreement was subject to “extremely limited” judicial review, the Fourth Circuit affirmed the district court.⁴³⁷ The decision in *Long John Silver’s* is therefore

⁴³⁴ *Id.*; see also *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 WL 2574742, at *8-9 (S.D.N.Y. June 29, 2012).

⁴³⁵ 514 F.3d 345, 352-53 (4th Cir.), *cert. denied*, 555 U.S. 815 (2008). See also *Johnson v. Morton’s Rest. Group, Inc.*, AAA No. 111600153105 (AAA 2007, Golick, Roberta, Arb.), at 19, n.28 (Claimants’ Exhibit 5); *Bryant v. Joel Antunes, LLC*, AAA No. 1116001178305 (AAA 2007, Pratt, George C., Arb.), at 2 (Claimants’ Exhibit 6).

⁴³⁶ *Long John Silver’s*, 514 F.3d at 351 (emphasis added).

⁴³⁷ *Id.* at 349-52.

limited to the arbitrator's interpretation of the parties' arbitration agreement in that case. The question presented here is whether Sterling, by electing AAA arbitration and the application of the AAA Rules, effectively waived its right to insist upon compliance with the "opt-in" requirement of Section 216(b).

All versions of the RESOLVE Arbitration Agreements provide that the "agreement shall be governed by and interpreted in accordance with the laws of Ohio." Ohio law generally provides that waiver is a voluntary relinquishment of a known right.⁴³⁸ "As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy."⁴³⁹ The party asserting a waiver must prove a clear, unequivocal, decisive act by the other party demonstrating a purpose to waive the known right.⁴⁴⁰

Notably, nothing in the AAA Supplemental Rules suggests that its procedures were intended to effect a waiver of statutory opt-in requirements. Under these circumstances, I find that Sterling's incorporation of the AAA Rules cannot constitute a voluntary and intentional waiver of the EPA requirement. Claimants' motion for certification of an opt-out EPA class is therefore denied, without prejudice to their right to seek certification of an opt-in EPA class.

STANDING

Sterling asserts that Claimants' motion for class certification must be denied on the ground that the Named Claimants have "no standing" to represent absent class members, who,

⁴³⁸ *State ex rel. Board of County Commissioners of Athens County v. Board of Directors of the Gallia*, 75 Ohio St. 3d 611, 616 (1996); see also *Miller v. Lindsay-Green, Inc.*, 2005 Ohio 6366, 2005 Ohio App. LEXIS 5696 (Ohio Court of Appeals) (waiver is defined as a voluntary relinquishment of a known right with the intent to do so with full knowledge of all the facts).

⁴³⁹ *Id.* (citations omitted.)

⁴⁴⁰ *Miller v. Lindsay-Green, Inc.*, at P70.

according to Sterling, have not consented to allow the arbitrator to determine whether the RESOLVE arbitration agreement authorizes class arbitration.

This argument is based solely upon the concurring opinion of Justice Alito in the Supreme Court's ruling in *Oxford Health Plans LLC v. Sutter*.⁴⁴¹ In *Sutter*, the parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he concluded that the arbitration clause unambiguously evinced an intention to allow class arbitration. Oxford moved to vacate the arbitrator's decision, on the ground that the arbitrator "exceeded his powers," relying upon the Supreme Court's decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*⁴⁴² Oxford's motion was denied by the District Court, which was affirmed by the Third Circuit. The Supreme Court affirmed the decision of the Third Circuit, holding that because the parties bargained for the arbitrator's construction of their agreement, the arbitral decision construing the contract must be upheld, regardless of whether the court disagreed with the arbitrator's contract interpretation.⁴⁴³

In his concurring opinion, Justice Alito noted that "absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't."⁴⁴⁴ Justice Alito opined that "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination,"⁴⁴⁵ and that "[c]lass arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'"⁴⁴⁶ Justice

⁴⁴¹ 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring).

⁴⁴² 130 S. Ct. 1758 (2010).

⁴⁴³ 133 S.Ct. at 2066.

⁴⁴⁴ *Id.* at 2071

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 2072 (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-547 (1974)).

Alito concluded that the distribution of opt-out notices “does not cure this fundamental flaw in the class arbitration proceeding in this case,” and that “at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator’s decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.”⁴⁴⁷

I find that the consent/collateral attack concern expressed by Justice Alito (and by Sterling) has no application in this case because here the absent class members have clearly consented to the authority of the arbitrator to determine whether the RESOLVE arbitration agreement permits class arbitration. It is undisputed that each of the absent class members signed the RESOLVE arbitration agreement, which clearly provides for the application of the AAA Rules. The AAA Supplementary Rules for Class Arbitrations, which “apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (‘AAA’) where a party submits a dispute to arbitration on behalf of or against a class or purported class,”⁴⁴⁸ provide that the arbitrator shall determine “whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”⁴⁴⁹ Accordingly, by signing the RESOLVE arbitration agreement, each of the absent class members agreed that the arbitrator would determine whether the RESOLVE arbitration agreement permits class arbitration.⁴⁵⁰ Sterling’s “standing” objection is therefore rejected.

⁴⁴⁷ *Id.* at 2071-2072 (emphasis in original).

⁴⁴⁸ AAA Supplementary Rule 1.

⁴⁴⁹ AAA Supplementary Rule 3.

⁴⁵⁰ *See, e.g., Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 635-636 (5th Cir. 2012).

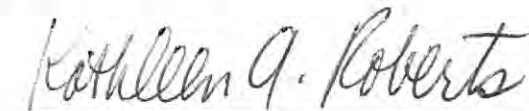
SUMMARY OF AWARD

For the reasons set forth above, I find that the adjudication of Claimants' Title VII disparate impact claims with respect to declaratory and injunctive relief may be maintained as a class action pursuant to AAA Supplementary Rule 4 and Rules 23(b)(2) and 23(c)(4). Claimants' motion for class certification of their Title VII disparate impact claims with respect to monetary damages pursuant to AAA Supplementary Rule 4 and Rule 23(b)(3) is denied. Claimants' motion for class certification of their Title VII disparate treatment claims is denied. Claimant's motion for certification of a Rule 23 "opt-out" class for their EPA claims is denied. Sterling's contention that the Named Claimants lack standing to represent absent class members in this proceeding is rejected. I find that the appropriate class period for Claimants' Title VII compensation claims is July 22, 2004, to the date of trial, and that the appropriate class period for Claimants' Title VII promotion claims is December 7, 2004, to the date of trial.

NOTICE

Counsel are requested to submit a proposed form of opt-out notice consistent with this Class Certification Award pursuant to AAA Supplementary Rules 5 and 6.

SO ORDERED:



KATHLEEN A. ROBERTS
ARBITRATOR
February 2, 2015

10-3247-cv
Jock et al. v. Sterling Jewelers Inc.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2010

(Argued: February 9, 2011

Decided: July 1, 2011)

Docket No. 10-3247-cv

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL,
GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH,
MARIE WOLF, DAWN SOUTO-COONS, and all others similarly situated,

Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,

Plaintiffs-Counter-Defendants,

— v. —

STERLING JEWELERS INC.

Defendant-Counter-Claimant-Appellee.

Before:

WINTER, POOLER, and HALL, *Circuit Judges.*

Plaintiffs, a group of retail sales employees of defendant Sterling Jewelers, Inc.'s national jewelry chain stores, appeal from an order of the United States District Court for the Southern

District of New York (Rakoff, *J.*) vacating an arbitration award on the ground that the arbitrator had exceeded her authority in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010). We hold that the district court, rather than examining whether the arbitrator had exceeded her authority under the precedent of this circuit, improperly substituted its own interpretation of the parties' arbitration agreement for that of the arbitrator's to conclude that the arbitrator had reached an incorrect determination that the parties' arbitration agreement did not prohibit class arbitration. We, therefore, reverse the judgment of the district court vacating the arbitration award and remand with instructions to confirm the award.

REVERSED AND REMANDED.

Judge Winter dissents in a separate opinion.

JOSEPH M. SELLERS, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC, (Jenny R. Yang and Kalpana Kotagal, Cohen, Milstein, Sellers & Toll PLLC, Thomas Warren, Thomas A. Warren Law Offices, P.L., and Sam Smith, Burr & Smith, LLP *on the brief*) for *Plaintiffs-Counter-Defendants-Appellants*.

GERALD L. MAATMAN, JR., Seyfarth Shaw LLP, New York, NY, (David Bennet Ross and Daniel B. Klein, Seyfarth Shaw LLP, and Stephen S. Zashin, Zashin & Rich Co., L.P.A., *on the brief*) for *Defendant-Counter-Claimant-Appellee*.

HALL, *Circuit Judge*:

Plaintiffs, a group of retail sales employees of defendant Sterling Jewelers, Inc.'s national jewelry chain stores, appeal from an order of the United States District Court for the Southern District of New York (Rakoff, *J.*) vacating an arbitration award on the ground that the arbitrator

had exceeded her authority in light of the Supreme Court’s decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010). The issue presented by this appeal is whether a district court has the authority to vacate an arbitration award where it believes that the arbitrator improperly interpreted the terms of an arbitration agreement. Because the district court did not undertake the appropriate inquiry—whether, based on the parties’ submissions or the arbitration agreement, the arbitrator had the authority to reach an issue, not whether the arbitrator decided the issue correctly—and instead substituted its own legal analysis for that of the arbitrator’s, we reverse the judgment of the district court. Because we find that the arbitrator acted within her authority to reach an issue properly submitted to her by the parties and reached her decision by analyzing the terms of the agreement in light of applicable law, the award should not have been vacated. We remand with instructions to confirm the award.

I. Background

In May 2005, plaintiff Laryssa Jock filed a discrimination suit with the Equal Employment Opportunity Commission (“EEOC”) against her employer Sterling Jewelers, Inc. (“Sterling”), alleging that she and other female workers were being paid less because of their gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d). Eighteen other female employees filed charges against Sterling before the EEOC. Jock and the other employees simultaneously initiated dispute resolution procedures pursuant to their employment contract, which mandated a three-step alternative dispute resolution program, known as RESOLVE. Step One of the RESOLVE program requires the employee to notify Sterling of her complaint in writing, and include references to any supporting evidence. Sterling then makes a determination with respect to the

merits of the complaint. If the employee is dissatisfied with Sterling's determination, she may then initiate Step Two, which calls for referring the claim to a mediator or a panel of employees, both of which are determined by Sterling. If the employee remains dissatisfied, in Step Three she may request arbitration, which is to be conducted in accordance with the rules of the American Arbitration Association ("AAA"). Agreeing to the RESOLVE dispute resolution process is a mandatory condition of employment.

In January 2008, the EEOC issued its letter of determination, finding reasonable cause to believe that Sterling had violated Title VII and the Equal Pay Act. According to its letter, the EEOC's "investigation determined that [Sterling] subjected [plaintiffs-appellants] and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation." The letter goes on to state that "[s]tatistical analysis of pay and promotion data . . . reveals that [Sterling] promoted male employees at a statistically significant, higher rate than similarly situated female employees and that [Sterling] compensated male employees at a statistically significant, higher rate than similarly situated female employees."

Following the EEOC's determination, in March 2008, Jock and the other plaintiffs-appellants (collectively, the "plaintiffs") filed a class action suit in the United States District Court for the Southern District of New York on behalf of themselves and others similarly situated, and asserting claims under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act, alleging that Sterling's discriminatory promotion and compensation policies denied promotional opportunities to qualified female employees and paid female employees less than male employees performing the same work. That same month, the plaintiffs filed a class

arbitration complaint with the AAA, making the same allegations and challenging the same practices. After Sterling addressed several of the plaintiffs' concerns, they moved to stay their federal court litigation in favor of the arbitration. In September 2008, the EEOC filed a parallel action against Sterling in the United States District Court for the Western District of New York.

III. Procedural History

On June 18, 2008, over Sterling's objection, the district court granted the plaintiffs' motion to refer the matter to arbitration and stay the litigation. The parties submitted to the arbitrator the question whether the RESOLVE agreement permitted or prohibited class arbitration. In its clause construction brief, Sterling asked the arbitrator to "find . . . [t]hat RESOLVE does not allow for class arbitration." The plaintiffs conversely asked the arbitrator to "find that the RESOLVE Arbitration Agreements at issue permit class arbitration." On June 1, 2009, the arbitrator found in favor of the plaintiffs, issuing a "Clause Construction Award" (the "award") holding that the RESOLVE arbitration agreements "cannot be construed to prohibit class arbitration." In undertaking her analysis, the arbitrator began by quoting the language of the arbitration provision at issue:

I hereby utilize the Sterling RESOLVE program to pursue any dispute, claim, or controversy ("claim") against Sterling . . . regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a [sic] appropriate court, including but not limited to, claims under . . . Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991, . . . the Fair Labor Standards Act. . . I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program.

The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

The arbitrator noted that there was no express prohibition on the pursuit of class claims and that “indeed, there is no mention of class claims.” The arbitrator stated that “[u]nder Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.” Construing the agreement in accordance with Ohio law, as required by the terms of the agreement, the arbitrator determined she would not read into the agreement an intent to prohibit class claims because “[t]he law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract.” (quoting *Montgomery v. Bd. of Educ. of Liberty Township, Union Cty.*, 102 Ohio St. 189, 193 (1921)).

In other words, the arbitrator construed the absence of an express prohibition on class claims against the contract’s drafter, Sterling. Noting that the issue of intent was “problematic in the context of a contract of adhesion,” the arbitrator held that “[b]ecause this contract was drafted by Sterling and was not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed.” In her analysis of the agreement, the arbitrator noted that Sterling acknowledged it had deliberately chosen not to revise the RESOLVE contract despite several arbitral decisions permitting class claims in the absence of an express prohibition. She reasoned that to read a prohibition on class arbitration into the terms of the agreement “would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract.” (citing *Montgomery*, 102 Ohio St. at 193). Noting that the agreement expressly gave the arbitrator the

“power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction,” the arbitrator determined that merely agreeing to the RESOLVE step process could not constitute a waiver of the employee’s right to participate in a collective action. Finally, she concluded that “[t]he RESOLVE arbitration agreements cannot be construed to prohibit class arbitration,” which thus permitted the plaintiffs to proceed with an effort to pursue their claims on a class-wide basis. The arbitrator allowed the parties to move in the district court to confirm or vacate that determination.

On June 30, 2009, Sterling moved in the district court case to vacate the arbitration award. On August 31, 2009, the district court denied the motion to vacate the award, laying out its reasoning in an opinion dated December 28, 2009. In that opinion, the district court decided as a preliminary matter that the motion was ripe for consideration despite the fact that the arbitrator had not yet certified a class. It went on to hold that the arbitrator had not exceeded her powers by reaching the issue whether the arbitration agreements prohibited class certification and that the decision was not made in manifest disregard of the law, citing the Second Circuit’s decision in *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 548 F.3d 85, 99 (2d Cir. 2008). The court declined to stay its order pending the outcome of the Supreme Court’s decision in *Stolt-Nielsen*.

On January 26, 2010, Sterling appealed the district court’s order denying its motion to vacate the award or, in the alternative, stay the arbitration. Three months later, the Supreme Court issued its decision in *Stolt-Nielsen*, and on May 13, 2010, Sterling moved pursuant to Federal Rules of Civil Procedure 62.1 and 60(b) in the district court for relief from its December

28, 2009 order. The appeal to this court was held in abeyance pending the outcome of the district court's decision on that motion.

On July 27, 2010, the district court issued a ruling holding that, if jurisdiction was restored to it, it would reconsider its December 28, 2009 order and vacate the arbitrator's award that permitted the plaintiffs to pursue class certification. *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010). The district court concluded that in light of the Supreme Court's decision in *Stolt-Nielsen v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), "the arbitrator's construction of the RESOLVE agreements as permitting class certification was in excess of her powers and therefore cannot be upheld." *Jock*, 725 F. Supp. 2d at 448. The district court first held that the arbitrator's approach—determining whether there was any indication of an intent to preclude class arbitration—"was plainly incompatible with the Supreme Court's subsequent pronouncements in *Stolt-Nielsen*." *Id.* Then, addressing the issue whether the record "evinced the parties' shared intent to permit class arbitration," the court found the record devoid of any indication that the parties intended to permit arbitration of class claims. *Id.* Although the district court conceded that *Stolt-Nielsen* "does not foreclose the possibility that parties may reach an 'implicit'—rather than express—'agreement to authorize class-action arbitration,'" it held that "the record here provides no support for such an implied agreement." *Id.* at 449 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775). In so ruling, the district court determined that *Stolt-Nielsen* was not distinguishable on the facts. *Id.* at 449-50.

On August 3, 2010, this court issued a limited remand of the appeal to permit the district court to rule on the pending Rule 60(b) motion. Six days later, the district court officially

granted Sterling's motion to vacate the arbitrator's award permitting class arbitration to proceed. Plaintiffs timely appealed that ruling.

III. Discussion

Appellate jurisdiction is based on the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(E) (“An appeal may be taken from . . . an order . . . vacating an award.”). “In considering a challenge to a district court's decision to vacate a portion of an arbitration award, we review its legal rulings *de novo* and its findings of fact for clear error.” *ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009).

A. Supreme Court's Decision in *Stolt-Nielsen*

The dispute in *Stolt-Nielsen* arose out of a Department of Justice investigation that revealed the petitioner, a shipping company, was engaging in an illegal price-fixing conspiracy. *Stolt-Nielsen*, 130 S. Ct. at 1765. The respondent, a shipping customer, brought a putative class action asserting antitrust claims for supracompetitive prices that the shipping company had been charging its customers over the course of several years. *Id.* The Multidistrict Litigation Panel eventually consolidated that case with other similar cases; the parties agreed that, as a consequence of judgments and orders arising out of that MDL case, they had to arbitrate their antitrust dispute. *Id.* The respondent subsequently served the petitioner with a demand for class arbitration. *Id.*

The parties then entered into a supplemental agreement that the question of class arbitration was to be submitted to a panel of three arbitrators. *Id.* The parties stipulated that the arbitration clause was “silent” with respect to class arbitration. *Id.* at 1766. After hearing argument and taking evidence from the parties, including expert testimony on the customs and

usage in the maritime trade, the arbitration panel concluded that the arbitration clause allowed for class arbitration. *Id.* The arbitration panel stayed its decision to permit the parties to seek judicial review. The petitioners filed an application to vacate the award in the United States District Court for the Southern District of New York. *Id.*

The district court vacated the award on the ground that the arbitrators had acted in manifest disregard of the law because they failed to conduct a choice-of-law analysis. *Id.* This court reversed, concluding that the decision was not in manifest disregard of the law because the petitioner had not cited any authority applying a federal maritime rule of custom and usage against class arbitration and because there was nothing in New York law that established a rule against class arbitration. *Id.* at 1766-67.

The Supreme Court granted *certiorari* to decide the question “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the [FAA].” *Id.* at 1764. The five-member majority first noted that “an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator ‘exceeded his powers,’ for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.” *Id.* at 1767. Of significance to the majority was that the arbitration panel “appears to have rested its decision on [a] public policy argument.” *Id.* at 1768. *See also AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740, 1750 (2011) (noting that in *Stolt-Nielsen* “we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation”). The *Stolt-Nielsen* Court admonished that “[b]ecause the parties agreed their agreement was ‘silent’ in the sense

that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation," hypothesizing that the FAA, federal maritime law, or New York would provide the governing rule. 130 S. Ct. at 1768. The Court reiterated that, in light of the parties' stipulation that they were "in complete agreement regarding their intent," i.e., that their arbitration agreement contained "no agreement" on the issue of class arbitration, "the only task left for the panel . . . was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration." *Id.* at 1768, 1770. Because the arbitration panel failed to follow this approach, the Supreme Court concluded that it had "exceeded its powers" when it "imposed its own policy choice" rather than engaging in its required "task" of "interpret[ing] and enforc[ing] a contract," "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "giv[ing] effect to the intent of the parties." *Id.* at 1767-68, 1770, 1774-75.

The Court's interpretation of the parties' "silence" is key. Our dissenting colleague states that he believes the "silence" in *Stolt-Nielsen* was interpreted as "simply reflect[ing] the fact each party recognized the arbitration clause neither specifically authorized nor specifically prohibited class arbitration." Dissenting Op. at 1-2 (citing Brief for Respondent at 26, *Stolt-Nielsen*, 2009 WL 3404244, at *26). The dissent, however, fails to acknowledge that although that is the interpretation that the Respondent in *Stolt-Nielsen* wished the Court to adopt, that is not the interpretation that the Court *did* adopt. To the contrary, the Court interpreted the stipulated silence to mean that "the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." *Stolt-Nielsen*, 130 S. Ct. at

1768. *See also id.* at 1766 (“The parties . . . stipulated that the arbitration clause was ‘silent’ with respect to class arbitration. Counsel for [the Respondent] explained to the arbitration panel that the term ‘silent’ did not simply mean that the clause made no express reference to class arbitration. Rather, he said, ‘[a]ll the parties agree that when a contract is silent on an issue there’s been no agreement that has been reached on the issue.’”). The Court further noted that “parties were in complete agreement regarding their intent.” *Id.* at 1770. That is to say, according to the majority in *Stolt-Nielsen*, there was no express *or implicit* intent to submit to class arbitration. Indeed, the dissent in *Stolt-Nielsen* pointed out that the majority’s interpretation of “silence” was incongruous with the Respondent’s interpretation. *Id.* at 1781 (Ginsburg, *J.*, *dissenting*) (noting the majority’s failure to acknowledge that counsel for the Respondent clarified his quoted statement to say that “[i]t’s also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitration”). Although the dissent here appears to agree with Justice Ginsburg’s interpretation of the parties’ stipulated “silence” in *Stolt-Nielsen*, significantly for purposes of this case, that was not the interpretation adopted by the majority.

Turning back to *Stolt-Nielsen*, the Court then took on the task of answering the question left open by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003): “establish[ing] the rule to be applied in deciding whether class arbitration is permitted.” *Stolt-Nielsen*, 130 S. Ct. at 1772. Acknowledging that although “interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration ‘is a matter of consent, not coercion.’” *Id.* at 1773 (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479

(1989)). The Court emphasized the “consensual nature of private dispute resolution,” noting that “parties are generally free to structure their arbitration agreements as they see fit” and that “parties may specify *with whom* they choose to arbitrate their disputes.” *Id.* at 1774 (internal quotation marks omitted) (emphasis in original). Accordingly, because the primary purpose when enforcing arbitration agreements is “to give effect to the intent of the parties,” the Court concluded that “it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 1775. Significantly, the *Stolt-Nielsen* Court was concerned that the arbitration panel had imposed class arbitration despite the parties’ explicit stipulation that “they had reached ‘no agreement’ on that issue,” i.e., that they had stipulated that the arbitration agreement contained neither an explicit nor implicit intent regarding class arbitration. *Id.*

It is equally important to note that the Court declined to hold that an arbitration agreement must *expressly* state that the parties agree to class arbitration—“[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class arbitration”—because in the case before them, “the parties stipulated that there was ‘no agreement’ on the issue of class-action arbitration.” *Id.* at 1776 n.10. The Court contemplated that an arbitration agreement may contain an implicit agreement to authorize class arbitration, but an “implicit” agreement to authorize class arbitration may not be “infer[red] solely from the fact of the parties’ agreement to arbitrate.” *Id.* at 1775. In other words, simply agreeing to submit the dispute to an arbitrator does not equal an agreement to class-action arbitration. “[M]ere silence” on the issue of class arbitration, therefore, cannot give rise to “consent to resolve . . . disputes in class proceedings.” *Id.* at 1776. Thus, the Court saw “the

question as being whether the parties *agreed to authorize* class arbitration” and held that “where the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.” *Id.* (emphasis in original).

B. District Court’s Authority to Vacate Award

The Federal Arbitration Act (“FAA”) sets forth specific grounds for vacating arbitration awards. 9 U.S.C. § 10(a). Grounds for vacating an award under section 10(a) are: “corruption, fraud, or undue means in procurement of the award, evident partiality or corruption in the arbitrators, specified misconduct on the arbitrators’ part, or ‘where the arbitrators exceeded their powers.’” *Wall Street Assocs., L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 848 (2d Cir. 1994) (quoting 9 U.S.C. § 10(a)). Because the FAA supports a “strong presumption in favor of enforcing arbitration awards . . . the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist.” *Id.* at 849. In addition to the section 10(a) grounds for vacatur, we have recognized a judicially-created ground, namely that “an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law.”¹

¹ To vacate an award on the basis of a manifest disregard of the law, the court must find “something beyond and different from mere error in the law or failure on the part of the arbitrators to understand or apply the law.” *Westerbeke*, 304 F.3d at 208. (internal quotation marks omitted). The two part showing requires the court to consider, first, “whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable,” and, second, whether the arbitrator knew about “the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it.” *Id.* at 209 (internal quotations and alterations omitted). See also *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, No. 10-3847-cv, slip op. at 18 (2d Cir. June 2, 2011) (“We therefore will not vacate an award because of ‘a simple error in law or a failure by the arbitrators to understand or apply it’ but only when a party clearly demonstrates ‘that the panel intentionally defied the law.’”) (quoting *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)). Here, the district court did not base its vacatur order on the manifest disregard of law doctrine, *Jock*, 725 F. Supp. 2d at 448 n.4, and, at any rate, it is clearly not applicable to this case where this circuit’s decision in *Stolt-Nielsen* was controlling at the time and the Supreme

Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 208 (2d Cir. 2002) (internal quotation marks omitted); *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133,139 (2d Cir. 2007).

“We have . . . ‘consistently accorded the narrowest of readings’” to section 10(a)(4) permitting vacatur where the arbitrator has exceeded her powers. *Reliastar*, 564 F.3d at 85 (quoting *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003)); *Westerbeke*, 304 F.3d at 220. This is “especially” true when section 10(a)(4) is invoked to challenge an award deciding “a question which all concede to have been properly submitted in the first instance.” *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997) (quoting *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991)). The focus of our inquiry in challenges to an arbitration award under section 10(a)(4) is “whether the arbitrators had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrators correctly decided that issue.*” *Id.* (emphasis added); *Westerbeke*, 304 F.3d at 220. Put simply, “[s]ection 10(a)(4) does not permit vacatur for legal errors.” *Westerbeke*, 304 F.3d at 220. If the “arbitrator’s award draws its essence from the agreement to arbitrate,” then “the scope of the court’s review of the award itself is limited. Notably, *we do not consider whether the arbitrators correctly decided the issue.*” *Reliastar*, 564 F.3d at 86 (internal quotation marks and alterations omitted) (emphasis added). We will uphold

Court’s decision in that case was issued a year after the arbitrator’s award. On page 10 of the dissent, our colleague states that the arbitrator “exceeded her authority by manifestly disregarding explicit provisions of the agreement inconsistent with class arbitration.” Respectfully, the dissent has conflated two separate grounds for vacatur, which are independent of each other and do not overlap. As we have already pointed out, whether an arbitrator exceeds her authority or manifestly disregards the law carry requires a reviewing court to undertake two different inquiries for determining whether vacatur is appropriate.

an award so long as the arbitrator “offers a barely colorable justification for the outcome reached.” *Id.* (internal quotation marks omitted). As the Supreme Court emphasized in *Stolt-Nielsen*, vacating an arbitration award requires the moving party to “clear a high hurdle,” and “[i]t is not enough . . . to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.” 130 S. Ct. at 1767 (internal quotation marks, citations, and alterations omitted). “In other words, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court’s conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision.” *Reliastar*, 564 F.3d at 86 (internal quotation marks omitted).

Accordingly, an arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties’ agreement. For example, in *Westerbeke*, 304 F.3d at 220, we drew a distinction between two situations. One is where the law or the parties’ agreement categorically prohibits the arbitrator from reaching an issue so that, in reaching that issue, the arbitrator exceeds her authority. *Id.* (citing *Fahnestock*, 935 F.2d at 519 (vacating an arbitration award imposing punitive damages where New York law expressly prohibited arbitrators from imposing punitive damages) and *Katz v. Feinberg*, 290 F.3d 95, 97-98 (2d Cir. 2002) (holding that the arbitrators had exceeded their authority by reaching an issue that the agreement exclusively committed to independent accountants, not the arbitrators)). The other is a situation where the parties grant the arbitrator the authority to determine an issue, but the

arbitrator makes an error of law in deciding that issue. *Id.* (citing *DiRussa*, 121 F.3d at 824 (confirming an award denying attorneys' fees for a party that successfully established a violation of the Age Discrimination in Employment Act, which required a statutory award of attorneys' fees). Concluding that the parties were contesting whether the arbitrator properly interpreted New York law regarding the award of expectancy damages, not whether the arbitrator had the authority to award such damages generally, the court in *Westerbeke* held that the award could not be vacated under section 10(a)(4) despite the fact that such damages might be precluded by New York law. 304 F.3d at 220. In other words, the arbitrator may well have committed an error of law, but in doing so she was rendering a decision the parties authorized her to make and thus did not exceed her authority in making the determination.

The threshold issues for the district court to consider in this case when deciding whether it was appropriate to vacate the award pursuant to section 10(a)(4) was, first, whether the parties had submitted to the arbitrator the question of whether their arbitration agreement permitted class arbitration and, second, whether the agreement or the law categorically prohibited the arbitrator from reaching that issue. The district court, however, appears not to have considered the "high hurdle" that vacating an award under section 10(a)(4) requires but to have proceeded instead to engage in a substantive review of the arbitrator's decision, holding that "in light of *Stolt-Nielsen*, . . . the arbitrator's construction of the RESOLVE agreements as permitting class arbitration was in excess of her powers and therefore cannot be upheld." In substance, while articulating a rationale that purported to examine whether the arbitrator exceeded her authority, the district court's analysis focused in fact on whether the arbitrator had correctly interpreted the arbitration agreement itself. This was error.

The district court seems to have taken the plaintiffs' concession that the agreement lacked an explicit authorization permitting class arbitration as a concession that the agreement did not manifest even an implicit intent to permit class arbitration. *Jock*, 725 F. Supp. 2d at 448. The plaintiffs' concession that there was no explicit agreement to permit class arbitration, however, is not the same thing as stipulating that the parties had reached no agreement on the issue. Nor is it the same as stipulating that the agreement is "silent" on the issue of class arbitration in the sense that "silent" was used by the *Stolt-Nielsen* majority. As the district court correctly acknowledged, "*Stolt-Nielsen* does not foreclose the possibility that parties may reach an 'implicit'—rather than express—'agreement to authorize class-action arbitration.'" *Id.* at 449 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775). Where the district court strayed was in substituting its interpretation of the agreement for that already undertaken by the arbitrator when she performed the legal analysis she was asked by the parties to undertake. When the district court did so, it determined that nothing in the record supported any implied agreement to permit arbitration, but this was an issue the arbitrator had already considered and decided differently. *Id.*

Under our precedent it is not for the district court to decide whether the arbitrator "got it right" when the question has been properly submitted to the arbitrator and neither the law nor the agreement categorically bar her from deciding that issue. *Reliastar*, 564 F.3d at 85-86; *Westerbeke*, 304 F.3d at 220. In that regard, there is no question that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator. In its brief submitted to the arbitrator on the issue, Sterling expressly asked the arbitrator to "find . . . [t]hat RESOLVE does not allow for class arbitration." Similarly, in the converse, the plaintiffs asked

the arbitrator to “find that the RESOLVE Arbitration Agreements at issue permit class arbitration.” In sum, the parties agree that they disagree about whether the arbitration agreement permits class arbitration. Put another way, unlike *Stolt-Nielsen*, the parties have not stipulated that the agreement is “silent” as to class arbitration—that is, the parties here are not in agreement that the RESOLVE agreement contains no explicit or implicit intent regarding the issue of class arbitration—and there is no escaping the fact that the parties submitted that question to the arbitrator for a decision.

Nor did the arbitrator exceed her authority under the agreement or the law by deciding the issue and ruling that the arbitration agreement allowed the plaintiffs to pursue class arbitration even though the agreement lacked an express provision permitting class arbitration. *Stolt-Nielsen*, on which the district court relied, did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration. 130 S. Ct. at 1776 n.10. There is nothing in the agreement itself, moreover, that prohibits an arbitrator from determining whether the agreement contemplates class arbitration. In other words, the arbitrator was acting within her authority when she concluded that the arbitration agreement between Sterling and the plaintiffs manifested an intent to allow for class arbitration because the issue was properly before her having been placed there by the parties. In addition, she had a colorable justification under Ohio law to reach the decision she did, to wit, Ohio law does not bar class arbitration.

By re-examining the record to determine the question that the arbitrator had already decided—whether the parties intended to permit arbitration of class claims—the district court substituted its legal reasoning for the arbitrator’s. Yet the only question before it, both preceding

and following the issuance of *Stolt-Nielsen*, was whether the arbitrator was authorized by the parties, the agreement, and applicable law to render the decision she did. The record demonstrates unequivocally that the arbitrator operated within the bounds of her authority in reaching her decision. Sterling has not argued, nor would we find, that the decision manifestly disregarded the law. The decision of the arbitrator should thus be confirmed.

It is worth reemphasizing that the primary thrust of our decision is whether the district court applied the appropriate level of deference when reviewing the arbitration award. With all due respect, our dissenting colleague appears to have fallen into the same trap as did the district court by focusing, to the point of disposition, on what the “correct” interpretation of *Stolt-Nielsen* should be. Like the district court, the dissent fails to identify how the arbitrator exceeded her authority, which, if true, would be a valid basis for vacating the award. Indeed, the dissent explicitly acknowledges that the arbitrator faithfully followed the law as it existed at the time of her decision. (Dissenting Op. p. 6). Our Circuit has never held that an intervening change of law, standing alone, provides grounds for vacating an otherwise proper arbitral award.

Instead, the dissent, like the district court, focuses impermissibly on substituting its interpretation of what the arbitration agreement does or does not allow—a function explicitly submitted by the parties to the sound judgment of the arbitrator. To achieve the result that both the dissent and the district court would impose in this case would require that we forsake the “substantial deference” we have for decades accorded to an arbitrator’s decision that is rendered within the authority given her by the parties and under law. *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). There is simply no basis for abandoning that principle in this case and toppling the pedestal on which our federal jurisprudence has repeatedly

placed a properly authorized arbitrator's determination of the facts and analysis of the law. To do so here in order to strike down the arbitral determination allowing class arbitration requires throwing the baby out with the bathwater.

C. Sterling's interpretation of *Stolt-Nielsen* is not persuasive

In support of the district court's determination, Sterling argues that the agreement is "silent" on the issue of class arbitration because it does not contain an express provision permitting class arbitration and that the arbitrator found that the arbitration agreement did not *prohibit* class arbitration, rather than finding that it *permitted* class arbitration. Sterling's arguments are unpersuasive.

To begin with, in fairness to the arbitrator, the legal standard she was operating under at the time framed the issue as whether the applicable law *prohibited* class arbitrations. J.A. 703 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 100-01 (2d Cir. 2008) *overruled by Stolt-Nielsen*, 130 S. Ct. 1758 (2010) (reversing vacatur award where party had not cited any "federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue")). Nonetheless, it was Sterling that framed the issue and asked the arbitrator to find that the agreement did not allow for—i.e., prohibited—class arbitration, and it was the plaintiffs who asked the arbitrator to find that the agreement permitted class arbitration. A determination that class arbitration is not prohibited under the agreement clearly answers both parties' question. The arbitrator's analysis, using principles of contract interpretation under Ohio law, included an examination of the language of the contract to determine the parties' implicit intent to permit class arbitration. That

she phrased her conclusion in the negative is of no moment and certainly does not indicate she improperly reached an issue that was not before her.

Sterling's attempt to equate the lack of an express agreement with a lack of intent to agree to class arbitration also misses the mark because it relies on a rationale that *Stolt-Nielsen* did not advance. *Stolt-Nielsen* did not hold that the intent to agree to arbitration must be stated expressly in an arbitration agreement. 130 S. Ct. at 1776 n.10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration."). Moreover, the negative inferences from the *Stolt-Nielsen* opinion supports the approach taken by the arbitrator. A primary basis for the Supreme Court's decision to vacate the arbitration award in *Stolt-Nielsen* was that the arbitration award went beyond the terms of the agreement and governing law, and the panel relied on public policy grounds to support its finding that the arbitration agreement permitted class arbitration. 130 S. Ct. at 1767-68. None of those factors obtains here.

The dissent states that the FAA, not state law, establishes the primary principle that the parties must consent to arbitration. Dissenting Op. at 6-7. We do not disagree. We disagree, however, that state law is "irrelevant" for the issues presented here. We note that in *Stolt-Nielsen*, a primary concern for the Court was that the arbitration panel based its holding on public policy grounds, rather than looking to the FAA, maritime, or state law. 130 S. Ct. at 1768-69. Indeed, although the FAA absolutely requires that the parties "not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," where that agreement contains what is argued to be an implicit agreement to submit to

class arbitration, the arbitrator must necessarily look to state law principles of contract interpretation in order to divine whether such intent exists. *Id.* at 1773, 75 (“While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.”) (internal quotation marks and citations omitted).

In divining the parties’ intent on the issue of class arbitration, the arbitrator relied solely on the terms of the agreement and Ohio law: “[u]nder Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language.” J.A. 703 (citing *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 247 (1974)). Based on the language of the agreement, to deny the plaintiffs the right to seek classwide relief would deny them access to at least one type of legal or equitable relief available to them in court—namely, certification to pursue classwide relief. That result would be contrary to the promise of the RESOLVE arbitration agreement, which states that by signing the agreement the employee is waiving any right to seek relief through any government agency or court, but that she “may, however, seek and be awarded equal remedy through the RESOLVE program” and that the arbitrator has the “power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction.”

Sterling also argues unpersuasively that this language is similar to the language of the arbitration clause in *Stolt-Nielsen*. The arbitration clause in *Stolt-Nielsen*, however, was not as broadly worded as the RESOLVE agreement. It merely stated that the arbitration clause would be applicable to “[a]ny dispute arising from the making, performance or termination of this Charter Party.” *Stolt-Nielsen*, 130 S. Ct at 1765. That is not the same as saying that the

employee “may, however, seek and be awarded equal remedy through the RESOLVE program” and that the arbitrator has the “power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction.”

Stolt-Nielsen has reaffirmed the basic precept of the FAA, that “arbitration is a matter of consent, not coercion.” *Id.* at 1773 (quoting *Volt*, 489 U.S. at 479). “Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must ‘give effect to the contractual rights and expectations of the parties.’” *Id.* at 1773-74 (quoting *Volt*, 489 U.S. at 479). The intent of the parties, therefore, is controlling. *Id.* at 1774. “Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.” *Id.* (internal quotation marks omitted). It is clear from the terms of the arbitration agreement that Sterling required its employees to sign that the parties intended to make available in arbitration all remedies and rights that would otherwise be available in court or before a government agency. It was not unreasonable, and clearly not manifestly wrong, for the arbitrator to construe this to mean that the parties also intended to include the right to proceed as a class and seek class remedies. To read that right out of the arbitration agreement would fail to give effect to the employees’ contractual rights and expectations of what the arbitration agreement provides.²

² As an aside, it is a bit disingenuous for Sterling to argue that permitting class arbitration to proceed would lose sight of the requirement that “parties may specify with whom they choose to arbitrate their disputes,” *Stolt-Nielsen*, 130 S. Ct. at 1774, because the putative class in this case would presumably include only employees who signed the RESOLVE agreement. Accordingly, because Sterling and each potential member of the putative class agreed to arbitrate their disputes, they implicitly agreed that they may seek to do so as a class, and Sterling is certainly not being forced to arbitrate with anyone whom it did not require to arbitrate with it.

Regardless, whether the arbitrator was right or wrong in her analysis, she had the authority to make the decision, and the parties to the arbitration are bound by it.³ In sum, we hold that the arbitrator did not exceed her authority in determining that the agreement permitted the plaintiffs to proceed with their effort to certify a class in the arbitration proceedings.

IV. Conclusion

For the reasons stated, we REVERSE the judgment of the district court vacating the arbitration award and REMAND with instructions to confirm the arbitration award.

³ We further note that the arbitrator's decision merely permits the plaintiffs to seek class certification; it does not make it a foregone conclusion that a class will be certified. The arbitrator must still consider the propriety of class certification in this case if and when an application to certify a class is advanced. That consideration will no doubt include examination of the problems identified in the dissent regarding the feasibility of class certification in the circumstances presented here. The articulation of the principles set forth in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 2011 WL 2437013 (June 20, 2011), may well be principles for the arbitrator to consider when she is presented with the employees' motion actually to certify a class. However, in no way do they inform or detract from the question presented by the parties to the arbitrator for decision—to wit, whether the agreement permits class arbitration at all.

Jock v. Sterling Jewelers, 10-3247-cv

WINTER, Circuit Judge dissenting:

I respectfully dissent.

This case is the arbitration counterpart to Wal-Mart Stores, Inc. v. Dukes, 546 U.S. ____, 2011 WL 2437013 (June 20, 2011). As in Wal-Mart, the class action complaint filed by appellants in the Southern District, followed by their request for class arbitration, the subject of this proceeding, asserted a company-wide gender discrimination claim against a national employer based on a statistical study finding disparities in pay and promotions between male and female employees where the company has delegated relevant decision-making power to local executives. Wal-Mart, 2011 WL 2437013, at *9-10. I need not pause to consider the Wal-Mart decision's effect on the present matter because Stolt-Nielsen v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), is a binding precedent on all fours.

The issue in Stolt-Nielsen, which reversed a decision of this court, was, in the Supreme Court's words, "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)." Id. at 1764. The Court answered that question in the negative. Id. at 1775.

My colleagues attempt to distinguish Stolt-Nielsen on several grounds. First, they note the stipulation in Stolt-Nielsen that the arbitration agreement there was "silent" as to class arbitration. Maj. Op. at 11-12, 18. Second, they rely on Stolt-Nielsen's recognition of the possibility of implied agreements to class arbitration. Maj. Op. at 13-14, 18. Third, they make reference to the arbitrator's reliance on Ohio law in this case. Maj. Op. at 19, 21-23. Fourth, they rely on provisions of the various arbitration agreements at issue here empowering

arbitrators to award generally available types of legal and equitable relief. Maj. Op. at 23-24. Fifth, and finally, they invoke the limited scope of judicial review of arbitration agreements. Maj. Op. at 19-21. None of these grounds, which I address seriatim, suffices to distinguish Stolt-Nielsen.

I.

My colleagues emphasize the existence of a stipulation between the parties in Stolt-Nielsen that the pertinent arbitration clause was "silent" as to class arbitration. Maj. Op. at 11-12, 18. This stipulation simply reflected the fact that each party recognized that the arbitration clause neither specifically authorized nor specifically prohibited class arbitration. Brief for Respondent at 26, Stolt-Nielsen, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 3404244 at *26. The disputed issue was, as it was in the Second Circuit, the effect of that silence. Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 86 (2d Cir. 2008) ("The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award construing that silence to permit class arbitration, acted in manifest disregard of the law."). That is precisely the issue in this matter.

Neither party here claims that any of the various arbitration clauses at issue¹ either specifically authorizes or specifically precludes class arbitration, the same facts that constituted the "silence" that existed in Stolt-Nielsen. Indeed, that is the reason my colleagues seek refuge in a non-existent finding of the arbitrator, discussed infra Part II, that an agreement to class arbitration was implied.

¹ Many arbitration agreements, with significantly different provisions, were signed by the individual Sterling employees, see infra, p.4.

If the parties' arguments here and the face of the agreements are insufficient to establish their "silence," then the arbitrator's decision certainly was when she explicitly found "there is no mention of class claims." Clause Construction Award (Ex. F to Sterling Mem. of Law in Support of Mot. to Vacate) at 3, Jock v. Sterling Jewelers, Inc., 677 F. Supp. 2d 661 (2009) (No. 08 Civ. 2875). That being the case, and not having the benefit of the Supreme Court's views in Stolt-Nielsen, the arbitrator framed the issue before her by specifically relying on the Second Circuit's decision in Stolt-Nielsen. Following our now-reversed decision, she found only that the arbitration clauses here did not "prohibit class arbitrations," and therefore that they allowed class arbitrations. Clause Construction Award, supra, at 4. In short, the arbitrator viewed the arbitration clause here as, in all pertinent respects, identical to that in Stolt-Nielsen.²

II.

My colleagues also seek to distinguish Stolt-Nielsen on the ground that the decision recognized the possibility of implied agreements to class arbitration. Maj. Op. at 13-14, 18. True. However, the Supreme Court explicitly held that, in an FAA proceeding, an implied agreement could not be inferred from an arbitration clause's failure to "preclude class

² Moreover, my colleagues' narrow reading of Stolt-Nielsen -- limiting it to cases with supposed formal stipulations as to contractual silence -- casts grave doubt over the reasons for the Court's even granting a writ of certiorari in that case. Under Supreme Court Rule 10, "a writ of certiorari will be granted only for compelling reasons." The Supreme Court grants such writs only where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). If Stolt-Nielsen resolves only the effect of a sui generis and idiosyncratic stipulation of the parties, the case hardly meets those criteria. Given my colleagues' narrow reading of the decision and their reliance on an analysis indistinguishable from the decision of the Second Circuit reversed by the Supreme Court, Stolt-Nielsen has been rendered an insignificant precedent in this circuit.

arbitrations." 130 S. Ct. at 1775 (emphasis omitted). Had it not decided that question, the Court would have had either to address whether such an agreement might be implied from the arbitration clause in that case or to remand for such a determination. Instead, it held that "imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is [in]consistent with the Federal Arbitration Act." *Id.* at 1764, 1775-76.

An "implicit" agreement to class arbitration cannot, therefore, be inferred from an arbitration agreement's "silence" or "failure to preclude" class arbitrations, much less from thin air. Indeed, the arbitrator in this case did not purport to find an implied agreement. Following our decision in *Stolt-Nielsen*, where we speculated that "the arbitration panel may have concluded that even though the arbitration clauses are silent . . . their silence bespeaks an intent not to preclude class arbitration," 548 F.3d at 99, she inferred the class arbitration agreement entirely from the failure of the various agreements to "prohibit class arbitration," precisely what the Supreme Court said cannot be legitimately done. 130 S. Ct. at 1775.

Nowhere in her opinion does she purport to identify any provision of the agreement supporting the existence of an implied agreement. Far from it. Some of the agreement's provisions are in fact inconsistent with class arbitration, and the arbitrator had to manifestly disregard key provisions of the arbitration clauses in order to hold that class arbitration was authorized.

The members of the purported class each signed a provision that was often different from that signed by other members of the purported class. The arbitration clauses contain significant differences as to: (i) waiver of rights to seek relief in other tribunals; (ii) the kinds of disputes subject to the RESOLVE program; (iii) the particular laws under which claims may arise; (iv)

contribution amounts by employees to the costs of arbitration; (v) descriptions of the relief available; (vi) limitations periods; (vii) the role of a court before which litigation has already begun; (viii) where the arbitration is to take place; and (ix) the source of the law under which the arbitrable claim is to be decided. See Spagnola Affidavit (Ex. C to Sterling's Mem. of Law in Support of Mot. to Vacate) at Tab 2, Jock, 677 F. Supp. 2d 661 (No. 08 Civ. 2875).

When the various agreements are read in the aggregate, or even separately, the differences preclude class arbitrations. The arbitrator herself acknowledged that many of the arbitration agreements contained "unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators," Clause Construction Award, supra, at 4, all of which are inconsistent with class arbitration. Pertinent common themes in the arbitration clauses are (i) the need to follow Steps 1 and 2 of the RESOLVE program -- Step (1): a complaint with reference to supporting evidence; and Step (2): resort to mediation if Sterling does not remedy the complaint -- and (ii) the failure to mention class arbitration -- silence. These common provisions are inconsistent with an implied agreement to class arbitration. As a result, the arbitrator found it necessary to hold that Steps 1 and 2 of the RESOLVE program were to be ignored in class arbitrations. Then, having framed the issue according to this court's Stolt-Nielsen decision, she went on to find that the failure to "prohibit class arbitrations" prevailed. Clause Construction Award, supra, at 5.

My colleagues dismiss as "disingenuous" Sterling's argument "that permitting class arbitration to proceed would lose sight of the requirement that 'parties may specify with whom they choose to arbitrate their disputes,' Stolt-Nielsen, 130 S. Ct. at 1774, because the putative class in this case would presumably include only employees who signed the RESOLVE

agreement." Maj. Op. at 24 n.3. However, Sterling agreed to arbitrate only with employees who complete steps 1 and 2 of the RESOLVE procedures; it has not agreed to arbitrate with each and every employee that signed the RESOLVE program agreement, whether or not they assert a claim pursuant to its provisions.

Far from implying class arbitration from the agreement, therefore, the arbitrator manifestly disregarded both unique and common features of all the agreements based on the view of silence as to class arbitration upheld by the Second Circuit in Stolt-Nielsen but thereafter rejected by the Supreme Court. Having now been enlightened by the Supreme Court's views, we do not have the arbitrator's excuse.

III.

My colleagues also believe that the arbitrator purported to be acting under Ohio law. Maj. Op. at 19, 21-23. That is not the case. All she stated about Ohio law was that "the question of whether class claims are permitted or prohibited by an agreement that does not expressly address the issue . . . has apparently not been addressed in any reported decision by an Ohio court." Clause Construction Award, supra, at 4.

Moreover, Ohio law does not govern the issue before us. Stolt-Nielsen held that consent to class arbitration cannot be inferred from an agreement's failure to preclude it. The Supreme Court did not base its decision on the law of a particular state or federal maritime law. Rather, it relied on principles of law derived solely from the Federal Arbitration Act. Stolt-Nielsen, 130 S. Ct. at 1773 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'") (internal citations omitted); id. at 1775 ("The

[arbitration] panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.") (emphasis added). The Court's exclusive reliance on the FAA as a source of governing law was in contrast to the Second Circuit's extensive discussion of New York and federal maritime law in its Stolt-Nielsen decision, 548 F.3d at 96-101, and to the arguments before the Supreme Court that there were considerable precedents in New York and maritime law authorizing class arbitration in the face of contractual silence. Brief for Respondent at 31-33 & 38, Stolt-Nielsen, 130 S. Ct. 1758 (No. 08-1198).

The Supreme Court treated New York and federal maritime law as irrelevant. Rather, it framed the question as "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act," and answered that question in the negative. Stolt-Nielsen, 130 S. Ct. at 1764. The exclusive role of the FAA in providing substantive law to determine the requisite consent to class arbitration was recently confirmed by the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). That case held that the FAA substantive law "preempted" state contract law rendering unenforceable as unconscionable an explicit contractual preclusion of class arbitration. Id. at 1753.

The Supreme Court's concerns under the FAA with inferring consent to class arbitration are based on the fundamental differences between bilateral arbitration and class arbitration. As Stolt-Nielsen stated:

An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. . . . Consider just

some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

130 S. Ct. at 1775-76 (internal citations omitted) (emphasis added).

Moreover, as the Supreme Court has recently noted at some length, even where a designated arbitration organization has established rules for class arbitration, as has the American Arbitration Association ("AAA") in the present case, the shortcomings of class arbitration are substantial. Concepcion, 131 S. Ct. at 1750-52 (“[W]hile it is theoretically possible to select an arbitrator with some expertise relevant to class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties The absence of multilayered review makes it more likely that errors will go uncorrected.”). Class proceedings carry significant risks for plaintiffs as well as defendants. A class proceeding may well be driven by a quest for a substantial award of counsel fees alone, but the award will bind the members of the class who may pay little attention to the proceedings and are generally unaware of the consequences. Even where, as under the AAA rules, any settlement must be approved by the arbitrator, the critical safeguard of fairness review by an independent Article III judge, present in judicial class actions, is lacking. See id. at 1752; Fed. R. Civ. P. 23. While approval of a settlement by the arbitrator

may sometimes be required, counsel will have an influence on both the selection of an arbitrator and even his or her fees. See Hans Smit, Contractual Modification of the Arbitral Process, 113 Penn. St. L. Rev. 995, 1009 (2009) (noting that because the tribunal is normally composed of arbitrators designated by the parties, it will normally agree with the parties once they have agreed upon a proper class and settlement). An arbitrator who disapproves a settlement may do so only at a risk of not being selected in future cases.

IV.

My colleagues also rely upon the provision in the present agreement that the arbitrators may award any legal or equitable relief generally available in courts. Maj. Op. at 23-24. Clearly, this provision refers only to relief in the form of an award based on a violation of law or contract -- damages, injunctions, etc. -- and not to the availability of procedures used to pursue such relief. A class can be certified and yet not get "relief," i.e. it may lose. Significantly, one form of this provision found in some of the arbitration agreements here states that "the Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law." Spagnola Affidavit at Tab 2, supra, at 1. Applying the canon "ejusdem generis" -- a general item in a list of specific items of a particular genre must be construed to be limited to that genre, see Rajah v. Mukasey, 544 F.3d 427, 435 (2d Cir. 2008) -- the word "relief" is a reference to remedies compensating or punishing for harm done.

V.

Finally, my colleagues note the limited review of arbitration awards exercised by federal courts. Maj. Op. at 19-21. While that is surely a relevant point, this concern was not only as fully applicable to the award in Stolt-Nielsen as it is here but was also discussed extensively by the Supreme Court in that case. 130 S. Ct. at 1767-68. I will rely on the Supreme Court's discussion.

Moreover, my colleagues' deference here is not to the arbitrator's actual decision, which framed the issue under the Second Circuit's decision in Stolt-Nielsen, found that the agreement made "no mention of class" arbitration, allowed class arbitration because the agreement did not "prohibit" it, and exceeded her authority by manifestly disregarding explicit provisions of the agreement inconsistent with class arbitration. See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) ("[Arbitral] awards may be vacated . . . where the arbitrator's award is in manifest disregard of the terms of the agreement."). Rather their deference is to a decision that was, in fact, never made by the arbitrator -- namely that the arbitration agreement implied an agreement to class arbitration.

I therefore respectfully dissent.

Exhibit 1



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Buffalo Local Office

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	Charge No:
Marie Wolf c/o Burr & Smith	151-2005-03638
Charging Party	
Jacquelyn Boyle c/o Burr & Smith	151-2005-03639
Charging Party	
Carol King c/o Burr & Smith	151-2005-03709
Charging Party	
Dawn Soto-Coons c/o Burr & Smith	151-2006-00087
Charging Party	
Judy Reed c/o Burr & Smith	151-2006-00488
Charging Party	
Laryssa Jock	165-2005-00714
Charging Party	
Lisa Follett	525-2006-00197
Charging Party	
Linda Rhodes	525-2006-00570
Charging Party	
Carolyn Morse	525-2006-00571
Charging Party	
Christy Davies	525-2006-00644
Charging Party	

	Charge No:
Tana Shriver	525-2006-00789
Charging Party	
Leighla Smith	525-2006-00956
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Khristina Rodrigues	525-2006-01138
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Gloria Pagan	525-2006-01139
Charging Party	
Marie House	525-2007-00071
Charging Party	
Lisa L. McConnell	470-2006-04239
Charging Party	
Denise Maddox c/o Law Offices of Thomas A. Warren	525-2007-00253
Charging Party	
Sharon Scroggins	525-2007-00290
Charging Party	
Nina Shahmirzadi	525-2007-00419
Charging Party	
Sterling Jewelers, Inc. 375 Ghent Road Akron, OH 44333	Respondent

DETERMINATION

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

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

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

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

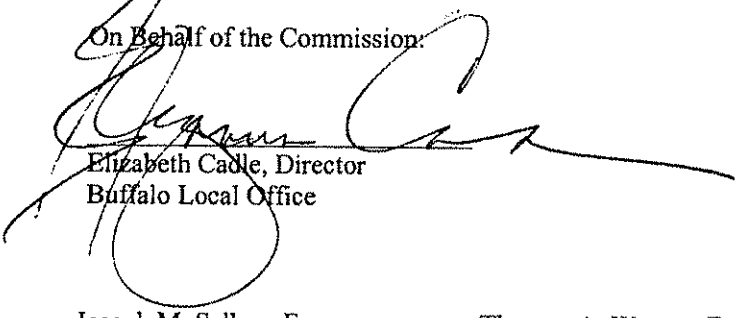
Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in a collective effort toward a just resolution to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

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

On Behalf of the Commission:

JAN 03 2008

Date


Elizabeth Cadle, Director
Buffalo Local Office

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