UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. BOX 77960
WASHINGTON, D.C. 20013

PAULETTE L. TAYLOR, a/k/a Elly C, et al., Complainants, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Agency.	} } } } } } } } } } } }	APPEAL No. 0720140019 EEOC Case Nos. 120-2003-0304X 120-2003-0305X AGENCY Case Nos. SSA-03-0224 SSA-03-0208

CLASS AND CLASS AGENTS' BRIEF IN OPPOSITION TO AGENCY'S REQUEST FOR RECONSIDERATION

The Class and Class Agents hereby file this Brief in Opposition to the Agency's Request For Reconsideration ("Request") of certain aspects of the Equal Employment Opportunity's Office of Federal Operations recent June 26, 2019 decision on the appeal of the Social Security Administration from the Final Decision of the Administrative Judge Entered December 13, 2013. The Agency's Request was served July 31, 2019; this Opposition is being postmarked within twenty (20) days thereafter.

The Agency's Request should be denied outright because it raises no valid points regarding any clearly erroneous interpretations of either fact or law in the Commission's decision. Mostly, the Agency merely retreads well-worn ground, and repeats arguments that

have already been rejected both by the Administrative Judge and by the Commission. Indeed, most of the points have been addressed previously in the Class' Opposition to the Agency's Appeal, and rather than repeat those arguments in full, the Class would refer the Commission to that document and request that it be incorporated herein in full.

As an initial matter, the Agency misstates the Class' burden of proof. It is not "extraordinarily high" or an "extremely high burden as required by law," as argued by the Agency. Agency Request at 4, 6. Not surprisingly, the Agency cites no court case, administrative rule, or administrative case precedent, for such an audacious claim because there is none. Rather, the burden of proof in a case of employment discrimination is a preponderance of the evidence, the normal civil case standard. To argue that the burden of proof in the present case is extraordinarily high is at best an introduction to the weak grounds to be interposed for reconsideration. It plainly is not an extremely high burden. Because it is not, the Agency's argument in this regard may be rejected out of hand, for it is arguing a legal point that does not exist, and any argument predicated on the notion that the Class did not meet its non-existent "extraordinarily high burden" fails perforce as entirely meritless. Indeed, the Agency cherry-picks a few quotes from the Administrative Judge's decision about the overall class claims and exports them to the matter of the GS-11 to GS-12 promotions. This is altogether inappropriate.

The Agency's Request For Reconsideration marks the sixth time that the Agency has attempted to derail class certification in this case. It has failed repeatedly, and always for good reason. It should fail again.

The Agency opposed the original motion to certify what has heretofore been called the "Taylor-Harley Class" before the Administrative Judge, and it lost. The Agency appealed that

certification decision to the Commission's Office of Federal Operations, and it lost again. The Agency again moved the Administrative Judge to decertify the class in March 2008, and it lost. On September 30, 2011, several months after the Interim Decision on Liability was issued by the Administrative Judge on March 31, 2011, the Agency moved once again to decertify the class. The Administrative Judge denied that motion in a written order on December 13, 2011. In the Administrative Judge's interim and final decisions, the Administrative Judge certified, as she was well authorized to do, a class of black females who have been denied promotions to GS-12 jobs at the Agency headquarters. The Agency challenged that class or subclass in its appeal, and it lost. The Agency's assertion in its Request, at 16, that the Commission appeal was its first chance to challenge the Administrative Judge's certification of the GS-11 class certification is inaccurate. Actually, the Agency challenged the GS-11 class certification to the Administrative Judge herself when it moved to decertify the GS-11 class in September-October 2011. The Agency now moves to reconsider the Commission's appeal decision regarding, *inter alia*, class certification. It should lose yet again.

The Administrative Judge ruled that the "Class has prevailed in the showing of class-wide discrimination against nonsupervisory African-American female employees who were denied promotions into the GS-12 level, from December 9, 2000 to the present, as a consequence of the Agency's unrebutted statistical evidence of disparity in promotions." Interim Decision on Liability, issued March 31, 2011 ("Op."), at 74. The Commission upheld that finding, and, faced with the present meritless Agency Request To Reconsider, should do so again.

The Agency's new, but convoluted, argument, based on a twisting and turning interpretation of MD-110, Rule 23, Fed. R. Civ. P., and the *Garcia v. DOJ*, EEOC Appeal No. 8966598005 (June 7, 2013), and *Belia S v. DOJ*, EEOC Request No. 0520130561 (Aug. 12, 2014), is preposterous and easily discarded. That is because the answer lies in quotes cited, albeit incompletely, by the Agency itself. MD-110 plainly provides the exact authority of the Administrative Judge to change the overall class certification and create a GS-11 class:

> **Even after a class is certified, the Administrative Judge remains free to modify the certification order** or dismiss the class complaint **in light of subsequent developments.** See General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982). **The Administrative Judge has the authority**, in response to a party's motion or **on his/her own motion, to redefine a class, subdivide it,** or dismiss it if the Administrative Judge determines that there is no longer a basis for the complaint to proceed as a class complaint. Hines v. Department of the Air Force, EEOC Request No. 05940917 (January 29, 1996).

MD-110 (*boldface added*). Finding against discrimination against the overall Taylor and Harley class, but simultaneously finding clear discrimination in promotions against black females in the GS-11 group, the Administrative Judge simply did what MD-110 plainly authorizes and what was clearly indicated by the evidence: she modified her prior certification orders to create a GS-11 class that was discriminatorily denied promotions.

Certainly the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), did not upset the class certification considerations in this case. As an initial matter, and equally applicable to both the GS-11 promotion class and the *Taylor and Harley* class, case law interpreting Rule 23, Fed. R. Civ. P., is not strictly applicable in EEOC proceedings. The EEOC's regulations concerning class actions are set forth in 29 C.F.R. §1614-204(a). Although the regulations adopt the same four elements as are found in Rule 23(a), they do not incorporate

or use the language of Rule 23(b), Fed. R. Civ. P. Thus, the interpretation of class certification requirements in EEOC administrative cases must come, ultimately, from the regulations, not Rule 23. Whatever may be said of *Wal-Mart's* effect on the application of Rule 23(b) criteria does not carry over automatically to the EEOC regulations, and *Wal-Mart* cannot be read as controlling over this case.

In any event, *Wal-Mart* did not reverse existing case law about proving discrimination through statistical evidence. Both the majority and the dissent agreed that statistical evidence alone can establish an inference of discrimination. *Wal-Mart* at 18, n.9, and at 5, n.4 (Ginsburg, J., dissenting) (noting that majority "acknowledges" that "statistical evidence alone may suffice" to prove discrimination). In the present case, the Administrative Judge credited the conclusion of the Agency's own expert, Dr. Murray Simpson, that statistically significant disparities exist for GS-12 promotions. Thus, even under the most restrictive reading of *Wal-Mart*, the Agency is *still* liable for proven GS-11 classwide discrimination.

Moreover, the unique facts of *Wal-Mart* – which involved a nationwide class covering 1.5 million female employees – are strikingly different both from the narrowly-tailored GS-11 promotion class that prevailed on liability and from the rest of the *Taylor and Harley* class that did not. The instant case involves an isolated set of decisions pursuant to a single promotion policy at a single location specifically analyzed and proven, through statistics the Administrative Judge has already determined (and the Commission has affirmed) were reliable and convincing, to have disproportionately excluded African-American females from advancement from the GS-11 level to the GS-12 level. The strength of these statistics raised the inference of

discrimination, not only unrebutted by the Agency, but evidenced by the Agency's own expert's analysis, that supported the finding of liability on behalf of this class of employees. Unlike *Wal-Mart*, this case does not involve a nationwide class of 1.5 million women in hundreds of different localities, or a statistical analysis assessed to be unconvincing. In short, *Wal-Mart* is both factually and legally distinguishable, and, thus, even if it were binding on the Administrative Judge and the Commission, it would not be controlling.

The Agency is also incorrect that, under *Wal-Mart*, unfettered, subjective decision making cannot establish an inference of discrimination. Agency's Request at 4. Certainly, *Wal-Mart* is no bar to class certification in cases where managers exercise discretion, or in cases where a variety of managers make the decisions in question, as several courts have found since *Wal-Mart* was decided. On the contrary, *Wal-Mart* reaffirmed the holding of *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *Wal-Mart* at 15 ("To be sure, we have recognized that, 'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory[.]")(citing *Watson*, 487 U.S. at 990-91). Thus, even under *Wal-Mart*, the fact that discretion is exercised among managers who engage in subjective decision making does not in and of itself preclude class certification.

Since *Wal-Mart*, the courts have certified classes in the face of a *Wal-Mart*-based challenge. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 672 F.3d 482, 488 (7th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 2012 U.S. Dist. LEXIS 137418, *82-85 (N.D. Cal. Sept. 25, 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270, No. 10-6950, at *6 (S.D.N.Y. July 17, 2012).

Nonetheless, the Agency would have this reviewing body believe that the Agency's promotional procedure – a multi-layered procedure characterized by federal government employment forms, interview panels, written interview questions and interviewers' notes, written decision forms, and two layers of review by higher management, is somehow "a very similar policy" when compared to the *Wal-Mart* brand of unfettered discretion in promotion decision making – a free form, entirely standardless, procedure-free promotion policy. The Agency is completely and utterly wrong. Contrary to the Agency's contention, there are no striking similarities, but rather striking dissimilarities between *Wal-Mart* and the case at bar. In *Wal-Mart*, the plaintiffs' only evidence of a "general policy of discrimination" was the testimony of a sociologist regarding *Wal-Mart*'s "strong corporate culture." *Wal-Mart. at 2553.* Thus, the only common policy the plaintiffs had demonstrated was one of allowing complete and total discretion to local managers, which the Supreme Court saw as "a policy *against having* uniform employment practices." *Id.at 2554* (emphasis in original). This case, like *Ellis,* is the opposite.[1] In *Ellis*, the employer, Costco, imposed the same recruitment and selection process for promotion across the company, both in terms of the persons generally involved in promotion decisions and the process by which they make those decisions. Senior management was involved in the guidance on how to fill jobs. *Ellis* at *54-55. Here, the only Agency employment policy challenged is the uniform promotion selection policy, centrally promulgated, which applies to every employee and job opening, in every department and division at Agency headquarters, and which is guided by the centrally controlled HR function.

The case at bar is actually much more contained than *Ellis v. Costco, supra*, and infinitely more contained than *Wal-Mart*. Moreover, here, as in *Ellis*, where plaintiffs obtained certification of a nationwide class encompassing class members at numerous locations, the size of the class is a mere fraction of the size of the *Wal-Mart* class.

In *Wal-Mart*, the Supreme Court concluded that the plaintiffs had merely identified the wholesale delegation of total discretion – the polar opposite of a uniform policy. Plaintiffs here identify a specific employment practice that the Agency implements headquarters-wide under the influence and control of a few top managers. Thus, in *Ellis*, like the case at bar, "Plaintiffs have produced significant and persuasive proof that the discretion exercised within that process occurs 'under the rubric of a company-wide employment practice.'" *Id.*, quoting *Chen-Oster v. Goldman, Sachs & Co.*, 10 CIV. 6950 LBS JCF, 2012 U.S. Dist. LEXIS 99270, 2012 WL 2912741, at *3 (S.D.N.Y. July 17, 2012) (citing, *e.g.*, *Dukes*, 131 S. Ct. at 2554). A promotion system that guides discretion differs from the "fragmented discretion untethered to any companywide policy and procedure" of the type that the Supreme Court found problematic in *Wal-Mart*. *Ellis* at *83, citing *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270, No. 10-6950, 2012 WL 2912741 at *3, n. 18 (S.D.N.Y. July 17, 2012)(class certified where local discretion was closely tethered to a national, universal corporate policy).[2]

[2] *See also* Floyd, 82 Fed. R. Serv. 3d 833 at *13 [*84] 82 Fed. R. Serv. 3d 833 at *13. ("[D]efendants confuse the exercise of judgment in implementing a centralized policy [—here, a police department stop and frisk policy —] with the exercise of discretion in formulating a local store policy or practice.") (emphasis in original); *Stinson v. City of New York*, 10 CIV. 4228 RWS, 2012 U.S. Dist. LEXIS 56748, 2012 WL 1450553, at *9 (S.D.N.Y. Apr. 23, 2012), reconsideration denied, 10 CIV. 4228 RWS, 2012 U.S. Dist. LEXIS 100634, 2012 WL 2952840 (S.D.N.Y. July 19, 2012) ("Unlike in Dukes where the plaintiffs alleged a corporate policy of

Additionally, the Agency pretends that *General Telephone v. Falcon*, 457 U.S. 147 (1982) requires a "biased testing procedure" (or perhaps a reasonable facsimile). It doesn't. That is not even what was involved in *Falcon*. *Falcon* was about the maintainability of an across-the-board classwide challenge to discriminatory employment policies generally, without focusing on an employment practice. A "biased testing procedure" was merely an example of an employment policy that Justice Stevens used to make a more general point. Indeed, the term "biased testing procedure" was used exactly once in *Falcon* – in a footnote (n. 15) – whereas the Agency now invokes the phrase no fewer than five times in order to eke out an incomprehensible argument about whether or not the GS-11 class claims meet the criteria for class certification. It is a preposterous argument because the GS-11 does involve the exact same identifiable (and identified) promotion policy, one that is written and mandated by federal regulations, and administered by a small set of managers, using the same forms and the same process, under the exact same federal government regulations, in a single concentrated location, and reviewed by an even smaller set of officers. The GS-11 claims are not an across-the-board attack on the Agency's employment policies; indeed, they could hardly be more specific or involve greater commonality. It is completely baffling how the Agency could even think that all of its prior challenges to the broader (but for the same reasons, proper) *Taylor and Harley* promotion class could be found – multiple times – to have been appropriately certified by the Administrative Judge and approved by the Commission, and yet somehow the narrower GS-11 class was not

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discretion to local managers and a corporate culture hostile to the advancement of women, Plaintiffs here have alleged a specific policy promulgated by Defendants, namely, that Defendants have established a practice by which NYPD officers issue summonses without probable cause in order to meet a summons quota.").

certifiable. No amount of Agency re-mastication of the facts and law can change the prior rulings in this case.

Even so, contrary to the Agency's argument, the class here never relied on unfettered discretion alone to establish the class. Statistical and anecdotal evidence can certainly satisfy the requisite showing of commonality in a case involving discretionary decision-making. The Agency conceded as much previously. *See* Agency's Second Motion to Decertify. at 4. In *Wal-Mart*, the Supreme Court held that the statistical evidence offered by the putative *Wal-Mart* class did not sufficiently demonstrate pervasive discrimination throughout the class. *Wal-Mart* at 16-17. In the case at bar, the statistical evidence does demonstrate such pervasive discrimination, as the Administrative Judge found and the Commission affirmed. That key fact distinguishes *Wal-Mart* from this case and also establishes *Wal-Mart's* inapplicability in the present context.

In *Wal-Mart*, the Supreme Court considered the regression analyses performed by the plaintiffs' experts that compared, on a region-by-region basis, the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. *Id.* at 16. Another analysis compared workforce data from Wal-Mart and competitive retailers and concluded that Wal-Mart "promotes a lower percentage of women than its competitors." *Id*. The Court held that these studies were "insufficient" to establish commonality, because the analyses done at the regional and national level did not sufficiently establish that discrimination was carried out at the store and district level. It stated that, "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." *Id*. at 16.

Here, by contrast, and particularly with respect to the GS-11 class in whose favor liability has been established, the Agency's statistical expert, Dr. Simpson, examined promotions at a single location and at specific grade levels. He used a methodology (a "cohort study") designed to mirror the actual decisions made by the Agency, separating the decisions into pools of similarly situated employees and dividing them by decisional level, *i.e.*, Associate Commissioner component, and occupational series. *See* Op. at 34; Agency Exhibit 25 A and Agency's Motion at 5. Dr. Simpson's specific conclusion was that there was a statistically significant underrepresentation of black females in promotions to the GS-12 level. *See id*.; Op. at 63. The level of statistical significance, 3.48 standard deviations, convinced the Administrative Judge that a "gross disparity in promotions for Black females to the GS-12 level" raised an unrebutted inference of discrimination that a policy or practice of discrimination was operating to prevent these class members' advancement to the GS-12 level. Op. at 63. Because the Agency cannot and has not "rebutted this inference of discrimination or otherwise proffered any evidence to explain the gross disparity" affecting this particular group of class members, the Administrative Judge found in their favor. *See id.*

In short, the glue holding together the portion of the class in whose favor the Administrative Judge found is much, much stronger than that proffered in *Wal-Mart*. Here, the statistical model was created – by the Agency's own expert witness – to mirror **actual decisions** made at the Associate Commissioner level within **one** facility in **one** geographical location

pursuant to **one** employment policy and proved discrimination against class members attempting to advance to **one** specific grade level. Dr. Simpson's statistical analysis constituted the "significant proof" of a common practice of discrimination that was found lacking in *Wal-Mart*, where the *Wal-Mart* plaintiffs attempted to apply regional and national statistics to store-specific decision-making processes affecting 1.5 million different women of a nationwide class working in hundreds of different stores. Thus, the statistical evidence that the Administrative Judge found was sufficiently strong to establish liability for black females denied promotions to the GS-12 level is certainly also abundantly strong to establish that those same black females' claims share common questions of law and fact. *Wal-Mart* does nothing whatsoever to disturb that determination, and the Agency's argument otherwise should be rejected.

Finally, even though the Administrative Judge did not find reliable the expert analyses of Dr. Rebecca Klemm for purposes of establishing liability, her analyses may be considered alongside those of the Agency's expert, Dr. Simpson, and the Class Agent's other statistics expert, Dr. Lance Seberhagen, to establish the propriety of class certification, *i.e.*, that black females were suffering from the common impact of discrimination in promotions to GS-12 jobs to such an extent that it was entirely proper for their claims to be considered together. The fact that the Agency failed even to mention Dr. Seberhagen, who also found significant under-selection of GS-11 black females to GS-12 positions, undercuts its argument on this point entirely.

In a case in the U.S. Court of Appeals for the Fourth Circuit, the appellate court reversed a district court noting that "the question [at class certification] was not whether the appellants

have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of appellants' discrimination claims was sufficient to support class certification." *Brown v. Nucor Corp.*, 576 F.3d 149, 156-157 (4th Cir. 2009) (reversing lower court's rejection of statistical analysis finding a disparity in excess of two standard deviations and finding it "independently sufficient to meet the Rule 23 commonality requirement"). *See also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2nd Cir. 1999) ("More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but [these statistics], in conjunction with the anecdotal evidence, satisf[y] the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.") (internal citation omitted)); *Chavez v. Illinois State Police*, 251 F.3d 612, 642-43 (7th Cir. 2001) (two standard deviations, "if based upon appropriate statistical analysis, would be statistically significant"); *Alexander v. Local 496, Laborers Intl. Union of North America*, 177 F.3d 394, 421, n. 10 (6th Cir. 1999) ("Any standard deviation number smaller than 2.00 (e.g. 2.5) [or greater than 2.00, if expressed in positive numbers] constitutes a statistically significant underrepresentation, i.e., one where the probability that the resulting numbers occurred by chance is extremely small.") (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1988)); *Segar v. Smith*, 738 F.2d 1249, 1282 (D.C. Cir. 1984) (holding that a statistical disparity at the .05 level [equivalent to 2.00 standard deviations] to be sufficiently significant to raise an inference of discrimination).

Again, unlike in *Wal-Mart*, Dr. Simpson's analysis examined actual promotion decisions occurring only at a single location, SSA Headquarters, and he did so through a cohort modeling process designed to reflect the actual unitary process by which decisions were made. The

Administrative Judge found this methodology "a reasonable means of modeling the promotion process at the Agency." Op. at 35.

Indeed, as far back as the appeal from the original grant of class certification, the Commission determined that Dr. Seberhagen's analysis showed that the Agency's Baltimore facility's promotion rates for the combined three-year period (2001-2003) had an "adverse impact" against blacks for grade 11 (as well as grades 12 and 13), and an "adverse impact" against black women for grade 11 (as well as grades 12, 13 and 14). Commission Decision of May 15, 2006, at 5.[3] The Commission also determined that this statistical evidence, combined with the affidavits and surveys from African-American females who were denied a promotion or were discouraged from applying for promotion, corroborated the Class Agents' assertions regarding the manner in which others were promoted and were sufficient to establish that "class agents' claims and injuries were sufficiently broad to be typical of the wider interests of the class and the putative class members share common factual and legal questions surrounding whether the agency discriminated against them in implementing a practice that resulted in the non-selection of African-American females." *Id.* at 5.

[3] This fact was apparent to one Agency manager who testified frankly about the under-selection of black females: "I believe it's a fact that African-American woman [*sic*] are not promoted if you just look at the statistics you mentioned. If you just look at the statistics, they are not promoted in the proportion to which they make up this Agency. I think that is an established fact." Designated Deposition testimony of Frederick Streckewald, at 142:20 – 143:3. Further, "we have a large portion of African-American females and I think they're under represented . . . if you looked at any particular level beyond a certain grade level for promotions." *Id.* at 143:20-23.

Additionally, Dr. Rebecca Klemm's report examined the competitive promotions for which Best Qualified List ("BQL") candidates could be derived. Her analysis took into account the actual candidate pools from the point in the promotion process at which the BQLs were formed. She compared the numbers of promotions for African-American females to other groups and calculated the numbers of promotions that would be expected for African-American females in the absence of discrimination against them. She made computations for each of the GS levels 8 through 14 across all years 2000-2007, and also by year, across each GS level 8 to 14. CA EX 37, Klemm Report, Ex. 4.

Dr. Klemm's analyses found that, in every year from 2000 through 2006 in which she had complete data, there was a statistically significant shortfall in the number of promotions African-American GS-11 females received; these disparities were measured in excess of two standard deviations. CA EX 37, Klemm Report. Further, the analysis found that, for promotions from GS-11 to GS-12 throughout the duration of the class liability period, statistically significant shortfalls – expressed both in terms of standard deviations and the EEOC regulations' 80% Rule – existed in promotions of African-American females to GS-12 positions. *Id.*

Here, Dr. Simpson's, Dr. Klemm's and Dr. Seberhagen's statistical analyses all rule out chance as an explanation for the apparent disparate results of the promotion process.[3] When

[3] *See Chavez v. Illinois State Police*, 251 F.3d 612, 642-43 (7th Cir. 2001) (two standard deviations, "if based upon appropriate statistical analysis, would be statistically significant"); *Alexander v. Local 496, Laborers Intl. Union of North America*, 177 F.3d 394, 421, n. 10 (6th Cir. 1999) ("Any standard deviation number smaller than -2.00 (*e.g.* -2.5) [or greater than 2.00, if expressed in positive numbers] constitutes a statistically significant underrepresentation, *i.e.*, one

experts rule out chance, the real reason for disparity must be something else, such as discrimination. *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 427 (7th Cir.2000) ("ruling out chance was an important step in the plaintiffs' proof, even if it was not a single leap from the starting line to the finish line"); *Hazelwood School District v. United States*, 433 U. S. 299 (1977).

These three experts' analyses examined actual promotion decisions at the Agency; they did not, as in *Wal-Mart*, merely compare promotions made at a specific store level to regional or national statistics.

While some different decisionmakers were involved in the promotions from GS-11 to GS-12, they were, compared to *Wal-Mart*, a relatively discrete set of decisionmakers, guided by only a few people within a single human resources operation, and they all made their promotion decisions at SSA Headquarters pursuant to the same well-defined policy. That policy granted them unfettered discretion to decide, without justification or documentation, which candidate to select from a pool of "best-qualified" applicants. The experts' analyses rule out the possible explanations for the disparities noted by the Court in *Wal-Mart* – that class members were, perhaps, not interested or qualified for the positions and were, for those reasons, not selected. *See Wal-Mart*, slip op. at 17 ("Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or

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where the probability that the resulting numbers occurred by chance is extremely small.") (citing *Hazelwood*, 433 U.S. at 309 n.14).

regional statistics.") All of the members of the GS-11 class were, in fact, demonstrably interested in and qualified for the positions, because each of them had actually applied (via a considerably detailed application) and each of them had in fact been approved for the Best Qualified Lists. *See id.*

Furthermore, unlike *Wal-Mart*, all of the GS-11 class members were – undeniably – subject to the same detailed, step-by-step, promotion process and policy with articulated criteria. JEX 4 at 178. In *Wal-Mart*, by contrast, the individual store managers had such pervasive subjective discretion as to be tantamount to the employer having no promotion policy at all. *Wal-Mart* at 14-15. A uniform policy and process is a foundational element of commonality because the whole point of the commonality requirement is to make it unnecessary for each one of multitudes of claimants to prove (and explain) to a judge or empaneled jury, over and over again, the same process or policy that was followed in order to make the decision(s) in question.

All of the statistical evidence, taken together in the context of the common policy and procedure, suffices to establish that the GS-11 class was characterized by common questions of law and fact that made common consideration of the GS-11 class claim entirely proper. The question of whether the class members suffered a pattern or practice of discrimination was properly analyzed as a class issue. The Administrative Judge concluded that the GS-11 class was shown to have suffered discrimination. The Class and, indeed, the Agency, both presented significant evidence – both statistical and anecdotal – that the policy of vesting unfettered discretions in the hands of selecting officials to choose, without rationale or justification, whomever they wish from the Best Qualified Lists, has resulted in discrimination against

African-American female employees in promotions from GS-11 to GS-12 at SSA's headquarters. This evidence constitutes "significant proof" that SSA operated under a general policy of discrimination against African-American females, a practice unlawful under Title VII. *Wal-Mart Stores, Inc. v. Dukes, supra*; *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 990-91 (1988); *Robinson v. Metro North Commuter RR*, 267 F.3d 147 (2nd Cir. 2001); *Amft. and Graham v. Mineta, DOT*, 2007 WL 985183, EEOC Appeal No. 07A40116 (April 6, 2006), reconsideration denied, 2007 WL 30513400 (Oct. 9, 2007). This general practice of discriminating against the GS-11 class establishes definitively that there are questions of law and fact common to the class sufficient to satisfy Fed. R. Civ. Proc. 23(a)(2), were it strictly applied.

"[The] commonality requirement has been liberally construed and 'those courts that have focused on Rule 23(a)(2) have given it a permissive application so that common questions have been found to exist in a wide range of contexts . . . .'" *Rodger v. Electronic Data Systems Corp.*, 160 F.R.D. 532, 537 (E.D.N.C. 1995) (citations omitted). The Administrative Judge previously found that the Class Agents and eleven class members provided proof of commonality and summarized that "all stated that they had been employed within the Agency for several years without promotion." Administrative Judge's 2/18/05 Decision to Accept Class Complaint, at 10. Further evidence adduced in this case reinforced the decision to certify the GS-11 class. Karen Better-Bastfield, a GS-11, testified in about the discrimination she experienced as a result of the challenged common employment policy and practice.

Even though some of the experts' statistical analyses were rejected as insufficient to establish liability at the merits hearing, they nevertheless can suffice, especially when taken

together, to establish commonality for class certification purposes. It is well-settled that the merits of either party's statistical results are not a controlling issue regarding class certification. "Statistical dueling" is irrelevant to the class certification determination. *Taylor v. District of Columbia*, 241 F.R.D. 33, (D.D.C. 2007) (citing *Caridad*, 191 F.3d at 292 (observing that, although the defendant's critique of plaintiff's evidence "may prove fatal at the merits stage, the class plaintiffs need not demonstrate at this stage that they will prevail on the merits.")). Although Dr. Klemm's analysis was rejected by the Administrative Judge as sufficient to establish liability at trial, her analysis alone, and certainly when considered alongside Dr. Seberhagen's and Dr. Simpson's, is sufficient to establish commonality for class certification purposes.

As the Fourth Circuit held, "the question [at class certification] was not whether the appellants have definitively proven disparate treatment and a disparate impact; rather, the question was whether the basis of appellants' discrimination claims was sufficient to support class certification." *Brown v. Nucor Corp*., 576 F.3d 149, 156-157 (4th Cir. 2009). "Indeed, '[c]ertification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims.'" *Id*. at 152 (quoting *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 332-33 (4th Cir.1983)). *See also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2nd Cir. 1999) ("More detailed statistics might be required to sustain the Plaintiffs' burden of persuasion, but [these statistics], in conjunction with the anecdotal evidence, satisf[y] the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification.") (internal citation omitted).

The Agency also mischaracterizes not only the Commission's decision and the Administrative Judge's decision but also its own evidence when it argues that it did rebut the inference that the gross statistical disparity in African-American women's promotions from GS-11 to GS-12 with an "additional expert." Specifically, the Agency argues that this expert, Dr. James Outtz, attributed the admitted statistically significant disparity to a lack of skills and credentials for such promotions among black females in the GS-11 ranks.

The Class' Opposition to the Agency's original appeal states the many reasons why the Administrative Judge starkly rejected Dr. Outtz' testimony, calling it

> a feeble explanation through Dr. Outtz's testimony that the underrepresentation in the information technology field may be a plausible reason for the underselection. However, Dr. Outtz's testimony appears to address hiring into fields such as information technology. His testimony does not address the reason for a disparity in promotion levels for cohorts who have already been hired by the Agency, are in the same grade in the general service, occupational series and reporting to the same Associate Commissioner component.

AJ Decision at 63-64.

In its Request, the Agency recycles Dr. Outtz in its argument that the Commission made a clearly erroneous interpretation of a material fact "when it mistakenly found that the Agency 'did not rebut [the] inference of discrimination or otherwise proffer any evidence to explain the gross disparity.'" Agency Request at 14. The Agency is the one that is mistaken because it misapprehends both the word "rebut" and the phrase "to explain the gross disparity." It was absolutely correct that the Agency did not rebut the inference and that it did not proffer any evidence to explain the disparity. Rather, what the Agency did was offer the expert equivalent of a shell game, run by its paid consultant Dr. Outtz, from whom the Administrative Judge heard

some evidence but whose evidence was utterly without value, because it neither rebutted the inference nor explained the gross disparity.

The reason is simple: Dr. Outtz looked at one set of jobs, in the employment series of Information Technology Management, Computer Specialist and Physical Security Specialist, but did not examine the actual selection decisions at the Agency except for a very small sampling; nor did he examine the qualifications of persons considered for the promotions or the decision making documentation of the managers who made the selections. Instead, Dr. Outtz, who was retained for the purpose of trying to explain away the Agency's own expert's analysis showing significant disparities in promotions of black females for GS-12 positions, testified that Dr. Simpson *may have* been wrong because Dr. Outtz had determined through "his prior research" with the National Research Council of the National Science Foundation – in other words, in another endeavor entirely and not in any work that he did in this case – that "there is an underrepresentation of minorities generally with those skill sets." As the Administrative Judge correctly found, Dr. Outtz' testimony "focused on hiring in these fields in general and not promotions within the Agency. Dr. Outtz did not proffer any evidence to support that underrepresentation of minorities in general in these fields affected the promotion levels of minorities into these positions within the Agency." Op. at ¶¶ 174-78.

Frankly, it was offensive testimony, not only because of its audacious yet clumsy attempt at sleight-of-hand – substituting a few jobs in one GS-12 employment series for the entire range of GS-12 jobs, then blithely importing his unsubstantiated "prior research" from another endeavor entirely and applying its general conclusions about vague notions of "skill sets" derived from a quick look at some GS-12 job descriptions at the SSA, and then expanding it all

to the entire range of GS-12 jobs at SSA headquarters, all while assuming that black females were interchangeable with "minorities" writ large. Particularly damning also is that Dr. Outtz' entire testimony was predicated on a supposed appreciation of the "skill sets" involved. Yet Dr. Outtz, who is an Industrial-Organizational Psychologist and "specializes in the development and validation of selection procedures," did not even know whether or not the Agency had conducted a job analysis in accordance with the principles of industrial organizational psychology for those jobs where Dr. Simpson had found adverse impact in selections for specific job categories. Without a job analysis, as any trained I.O. Psychologist knows, one cannot know what knowledge, skills, and abilities are actually required for the job.

Although it is true that Dr. Simpson ignored the actual qualifications of the candidates when he created his candidate pools, Dr. Outtz made the same mistake. It is a completely undisputed fact in this case that the selection decisions were made from a list of "Best Qualified" candidates who had specifically applied, had their qualifications vetted by a panel knowledgeable of the jobs, and were found to be the best qualified applicants. Therefore, any notion that the disparity could possibly be explained by the absence of qualified minorities is completely and utterly contradicted by the basic "Best Qualified List" protocol used for these jobs. The GS-11 class members not only did have the skills sets, but they were indeed among the very best candidates who were qualified. The fact that the Agency even put Dr. Outtz on the witness stand to assert his outlandish testimony, and would assert it again here, smacks of mendacity. The Administrative Judge saw straight through it. She concluded: "Dr. Outtz offered no evidence that any underrepresentation [of black females in the information technology field] actually existed at the Agency in hiring for these positions and that the levels of

representation created any statistically significant underpromotion of Black females in fields such as [the] information technology field." Op. at ¶178.

Thus, the Agency's protest is about parsing words. It is not that the Agency did not try to rebut the inference of discrimination manifested by their own expert's findings of statistically significant disparities in underpromotion of GS-11 black females. The Agency did try, albeit disingenuously with testimony that did not pass muster. In other words, the Agency failed to do it: failed to rebut the inference. The same is true regarding the Agency's assertion that the Commission was incorrect in finding that the Agency did not otherwise proffer any evidence to explain the gross disparity. The Agency did proffer some evidence, but that evidence did not explain the gross disparity; instead, it was rejected because it was comprised of some vague blather from an "expert" who violated the principles of his own profession and tried to convince the tribunal that some unsubstantiated conclusion in another organization was somehow an explanation for a much broader proposition in this case, all the while completely ignoring the most important basic fact in the case that explodes the entire premise: that the GS-11 class is comprised of black females who made the Best Qualified List for the promotions in question; *ergo*, they did not lack the requisite skill sets. None of them lacked the skill sets, at all, and it was the Agency's own decision makers who so found. No one's time or attention should be wasted on any further examination of this issue.

The Agency complains that its own expert's finding of a statistically significant disparity of 3.48 standard deviations is not "gross" enough to warrant an inference of discrimination. Glomming onto *dicta* in cases where, regardless of the amount of a statistical disparity, the courts caution factfinders to be aware of all the facts and circumstances that might explain an

otherwise large disparity, the Agency contorts that message into the notion that the factfinder here, and the reviewing Commission, somehow could not recognize 3.48 standard deviations as indicative of discrimination regardless of the facts and circumstances. But, read carefully, the Agency's Request cites no authority validly undercutting the Commission's reliance on *Castaneda v. Partida*, 430 U.S. 482 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299 (1977). And, indeed, the courts have said no such thing. The courts have said that huge, gross disparities are enough alone. No court has ever said they are required. The 3.48 standard deviations that the Agency's own expert found is highly significant. Nothing in any of the case law remotely suggests that 3.48 cannot be the basis of a finding of discrimination. The 2 standard deviations threshold – which translates into a roughly 5% chance (20 to 1) of an alternate explanation – is, and has been for decades, the widely accepted borderline. In the Commission's regulations, there is the 80% rule that plays a similar role. The level of 3.48 standard deviations far exceeds either. Even though the Agency again undercuts its own expert, Dr. Simpson, the fact remains that the Agency put him on the witness stand and offered into evidence his expert report and analysis. Further, the Agency had its chance to explain the statistical disparity, and the best it could do was Dr. Outtz, which the Administrative Judge dismissed as a "feeble" attempt at an explanation. The Commission clearly considered all of this evidence and, for obviously good reasons, upheld the Administrative Judge. The Agency's argument that the Commission was clearly erroneous in doing so is nothing more than a tired linguistic gymnastic routine that has been, and should be again, rejected.

The Agency also complains, again, that there was not enough anecdotal testimony to support, even in conjunction with a proven statistical disparity, a classwide liability finding.

While it is true that the only member of the GS-11 subclass who testified was Karen Better-Bastfield, Agency Br. at p. 6, the Agency again does not disclose that the Administrative Judge restricted the number of class member witnesses who could testify at trial to *ten (10) at the maximum*. Because the Class Agents had to present witnesses from all across the Agency's headquarters and grade levels, as well as experts and, importantly, Agency managers, there was very limited opportunity to present numerous witnesses from each of the eight grades in the trial. Karen Better-Bastfield was the only GS-11 witness that the Class put on the witness stand because that is all the Class could afford to expend on one grade level. In any event, the testimony of the Class Agents Taylor and Harley, as well as the other Class Members, added to the overall picture of how the promotion decision making worked to the disadvantage of black females at all grades.

The Agency bemoans, again, the lack of a GS-11 subclass agent. The role of a class agent is an important one before the trial, indeed throughout the litigation. But the class agent's role is diminished post-trial. There are few, if any decisions to make, and not nearly as much the class agent can do to assist class counsel. Questions of typicality and adequacy of representation are generally a thing of the past. At the point in the litigation when the GS-11 class was created, there was no more need for a class agent: the purpose had been fulfilled. The case moves to a stage where individual class members are to come forward to make claims for relief. There is nothing in MD-110 remotely suggesting that, where the Administrative Judge exercises her authority to revise the class, that somehow it is necessary to go back to the beginning to have a class agent appointed and examined in all the ways that may have been necessary at the beginning of the case.

In any event, there is no question that the claim of Karen Better-Bastfield, who testified at trial, is typical of any other promotion claim of a GS-11. The claims really are the same; promotion to GS-12, under the Agency's uniform promotion process. Thus, it is of no particular moment that there is not presently an official GS-11 class agent. Moreover, Class Counsel cannot simply appoint a class agent; it is a matter for the Commission to certify one. All that said, Ms. Better-Bastfield would be a fine class agent, if the Commission should see fit to appoint her. As the GS-11 black female who testified at trial and who clearly makes a *prima facie* case of discrimination, Better-Bastfield has shown that she is fully capable of serving in the capacity of class agent. Even if a class agent is necessary, the Administrative Judge's failure to name one was, if erroneous at all, harmless error. If a class agent must be named, the Commission is empowered to do so. The Agency's arguments in this regard are much ado about nothing, and there is certainly no clearly erroneous finding of fact or law.

Accordingly, the certification of the GS-11 class was proper, and the finding of liability of the Agency for discrimination against the GS-11 class was well-founded and supported, and the Commission's affirmance of these decisions was well-supported and appropriate. Certainly, there was no clearly erroneous findings requiring reconsideration.

CONCLUSION

For all of the above reasons, the Commission should not reconsider its affirmance of the Administrative Judge's decision finding discrimination by the Agency against the GS-11 class, and the cause should be remanded for implementation of a remedy for the GS-11 class.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2019, a copy of the foregoing **CLASS AND CLASS AGENTS' BRIEF IN OPPOSITION TO AGENCY'S REQUEST FOR RECONSIDERATION** was sent via certified U.S. mail to the following:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
131 M Street, NE
Washington, DC 20508

and was sent via first-class U.S. mail to the following:

Associate Commissioner
Office of Civil Rights and Equal Opportunity
Attn: Formal Complaints Branch
SOCIAL SECURITY ADMINISTRATION
P.O. Box 17712
Baltimore, Maryland 21235-7712

and was sent via email and first-class U.S. Mail to the following:

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