UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

JOHN TUCKER, et al.	)	
	)	
Plaintiffs,	)	**CASE NO. 05-CV-440-GPM**
v.	)	**Chief Judge G. Patrick Murphy**
	)	**Magistrate Clifford J. Proud**
WALGREEN COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFFS' MOTION TO COMPEL RESPONSES TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

COME NOW Plaintiffs, by and through counsel, and pursuant to Federal Rules of Civil Procedure 26, 34 and 37, move this Court to compel Defendant Walgreen Co. ("Walgreens") to produce documents, including electronic personnel databases, responsive to Plaintiffs' First Request for Production of Documents ("RFP"). In support of this motion, Plaintiffs state as follows:

I. INTRODUCTION

In June 2005, Plaintiffs, fourteen African-American current and former Walgreens employees brought this nationwide race discrimination class action against Walgreens pursuant to 42 U.S.C. § 1981. Walgreens operates approximately 4,700 retail drug stores throughout the United States. Plaintiffs have worked in Florida, Illinois, Indiana, Michigan, Missouri, Kansas, and Texas. In August 2005, Plaintiffs filed a First Amended Complaint ("FAC") alleging that Walgreens maintains a nationwide pattern or practice of discrimination against African-Americans in (1) promotions within its retail management and pharmacy career tracks and non-retail corporate positions; (2) selections for entry level retail management trainee positions; and (3) assignments to less desirable stores which impede their compensation and promotion opportunities.

Plaintiffs seek hybrid class certification under Fed. R. Civ. P. 23(b)(2) and (b)(3), or under (b)(3), *see* FAC, ¶¶ 54-60. In their pursuit of class certification, Plaintiffs are mindful of Rule 23(a)'s four prerequisites to maintaining a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all 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.

Fed. R. Civ. P. 23(a). Plaintiffs propounded their First Request for Production of Documents ("RFP") seeking information that will (1) demonstrate the appropriateness of class certification; and (2) offer significant proof of Walgreens' centralized, nationwide policy of race discrimination in each of the areas of employment alleged in the FAC.[1]

Walgreens' responses to the RFP are seriously inadequate and replete with numerous objections. Walgreens produced documents in response to only three of the forty-one requests. It produced no electronic personnel databases. Moreover, during the parties' meet and confer process that preceded this motion, Walgreens took positions that would seriously impede Plaintiffs' ability to obtain documents and data they need to meet Rule 23 requirements. Specifically, Walgreens seeks to severely limit the geographic scope of discovery and to produce a subset of data and documents that would prevent Plaintiffs from analyzing the *company-wide* impact of the challenged employment practices. Additionally, Walgreens has failed to produce documents it acknowledges are responsive to the requests and to which it does not object and has refused to give Plaintiffs a timeframe for when it will produce these documents. Walgreens has asserted various privileges but has failed to identify with any specificity the documents it contends are privileged, and has refused to give Plaintiffs a time frame for when it will identify these documents or produce a privilege log.

[1] *See* ABA Civil Discovery Standards (1999) ("ABA Discovery Standards"), § 5(a) at p.11 ("[a] party should tailor discovery requests to the needs of [the] case. This means that the content of the requests should apply to the case, and the form of discovery requested should be the one best suited to obtain the information sought. (Exh. 3).

Walgreens' dilatory tactics are troubling under any circumstances; however, they are especially so here because of the limited time within which Plaintiffs must move for class certification to comply with the trial scheduling requirements of the Local Rules. For all of these reasons, Plaintiffs respectfully request that the Court order Walgreens to immediately and completely produce the documents and data responsive to Plaintiffs' RFP, as identified herein.

II. PROCEDURAL BACKGROUND

The following events summarize efforts leading to this Motion to Compel.

On August 18, 2005, Plaintiffs submitted to the Court and Walgreens a letter with suggestions regarding the exchange of documents under Fed. R. Civ. P. 26(a) and pointing out that "because this case is pleaded as a large class action[,] … it is anticipated that the Initial Disclosures under Rule 26(a) by the Defendant will include the basic electronic personnel records from which statistical inferences will be made." *See* Exh. 4, Aug. 18, 2005 Letter T. Klosener to Magistrate Judge Proud.[2]

On September 21, 2005, Plaintiffs' counsel documented efforts to discuss with Walgreens' counsel the suggestions raised in the August 18 letter and again requested to confer on the matters. *See* Exh. 5, Sept. 22, 2005 Letter T. Klosener to J. Ybarra. To date, Walgreens has refused to allow the parties' respective computer scientists to meet informally with counsel to facilitate the exchange of electronic personnel data. Plaintiffs renewed their suggestions on ways to facilitate production of the database in a conference of September 29, 2005.[3]

[2] The suggestions Plaintiffs made are of the kind encouraged by the ABA to streamline and reduce the costs of discovery. *See* ABA Discovery Standards, § 14(a) at p. 24 ("the parties should confer to try to agree on the most efficient and cost-effective way to have the documents produced and reviewed.") (Exh. 3).

[3] Walgreens' counsel disclosed that Walgreens would not be ready to transmit the electronic personnel records requested in Plaintiffs' RFP in the time allotted by Rule 34. Plaintiffs suggested that the parties' computer scientists discuss the existence and format(s) of the electronic personnel records, as suggested first in the August 18 letter to Magistrate Judge Proud. Counsel for Walgreens refused. Plaintiffs also suggested that Walgreens produce at least the record layout(s) or descriptions of the fields of data contained in the database(s) to allow counsel for both sides to discuss any fields to which Walgreens might object as being beyond the scope of discovery. Walgreens also rejected this proposal. Plaintiffs' counsel have used both suggested procedures successfully in other employment

On September 23, 2005, Plaintiffs received Walgreens' Rule 26(a) disclosures -- 18 days late. *See* Exh. 8. They included no documents or database records. Walgreens asserted various privileges but has never submitted a privilege log as required by Rule 26(b)(5).

On October 6, 2005, Walgreens served its Responses and Objections to Plaintiffs' RFP three days late.[4] *See* Exh. 2. The only documents Walgreens produced were allegedly complete copies of personnel files of named class representatives and various workplace policies. It did not produce any personnel databases or electronic records. On October 10, 2005, Plaintiffs sent a letter to Walgreens outlining the inadequacies of the responses. *See* Exh. 9, Oct. 10, 2005 Letter T. Klosener to J. Ybarra. On October 14 and 17, 2005, the parties engaged in two telephone conferences for more than three hours to discuss the discovery disputes. Unable to resolve the dispute, Plaintiffs bring the instant motion.

III. DISCOVERY STANDARDS AND GUIDELINES

Rule 26(b) permits discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." See Acuna v. Rudzinski, 2001 LEXIS 18848, *13 (N.D. Ill. 2001). However, for good cause, a court may order discovery of any matter relevant to the subject matter involved in the action. White v. Kenneth Warren & Son, Ltd., 203 F.R.D. 364, 366 (N.D. Ill. 2001). For purposes of discovery, relevancy will be construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." TIG Ins. Co. v. Giffin, Winning, Cohen & Bodewes, 2001 LEXIS 12995, *1-*2 (N.D. Ill. 2001), *quoting* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

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discrimination class action cases to streamline production of electronic personnel data. *See* Exhs. 6 and 7 (Oct. 4, 2005 emails between K. Spriggs and J. Ybarra.)

[4] Plaintiffs' RFP was served on September 1, 2005. Pursuant to Fed. R. Civ. P. 5(b)(2)(B) and 34, Walgreens' responses were due on October 3, 2005. Although Walgreens' responses were served three (3) days late and the Plaintiffs had not consented to the late service, Plaintiffs did not did not object to the Court.

A party seeking to certify a class must demonstrate that it has met all four requirements of Fed. R. Civ. P. 23(a), and at least one of the requirements of Rule 23(b). Wilfong v. Rent-a-Center, 2001 U.S. Dist. LEXIS 16958, *2-*4 (S.D. Ill. Dec. 27, 2001); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004). The party seeking certification must provide facts sufficient to satisfy Rule 23(a) and (b) requirements. Dukes, 222 F.R.D. at 143, *citing* Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir. 1977). A court should rule on Rule 23 issues only on the basis of a fully-developed record. General Telephone Co. v. Falcon, 457 U.S. 147, 161 (1982) ("rigorous analysis"). Integral to that "vigorous analysis" is the right of the plaintiffs to adequate discovery to allow a full presentation of the facts. Doniger, 522 F.2d at 1312-13; Abdallah v. The Coca-Cola Company, 1999 U.S. Dist. LEXIS 23211 (N.D. Ga., July 16, 1999) (the shape and form of a class action evolves only through the process of discovery, and it is premature to draw a conclusion as to class certification before the claim has taken form). In making its Rule 23 determination, it is appropriate for the court to consider evidence submitted outside of the pleadings, such as deposition testimony, declarations, and expert reports. Hirschfeld v. Stone, 193 F.R.D. 175, 182 (S.D. N.Y. 2000), *citing* Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982).

In two recent significant cases alleging nationwide patterns of employment discrimination, the plaintiffs met their Rule 23 commonality requirement by presenting "extensive evidence of (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (3) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management." Dukes, 222 F.R.D. at 144; *see also* Wilfong, 2001 U.S. Dist. LEXIS 22718 at *8, 11 ("Plaintiffs offer significant proof of a general policy of sex discrimination which manifests itself in each of the employment practices under attack … [and] statistics … [that] establish the existence of a class of women who were arguably

affected by the implementation of the anti-female policy by the company's operating management.").[5]

Using these and other company-wide employment discrimination class actions as guidelines, Plaintiffs carefully tailored their RFP to seek the production of documents and other information of the type courts have relied on in making Rule 23 determinations and granting certification. Plaintiffs discuss the inadequacies of Walgreens' RFP responses and why they unfairly limit Plaintiffs' ability to meet their Rule 23 requirements below.

IV. DISCOVERY ISSUES IN DISPUTE

A. The Appropriate Geographic Scope Of Discovery In This Nationwide Class Action[6]

Walgreens seeks to limit the geographic scope of its responses to Request Nos. 1-2, which seek production of electronic databases containing race, job and compensation history "for all present and past employees of Walgreens …" (Request No. 1) and race and other data for "internal and external applicants for … retail store and pharmacy management trainee and management positions (Request No. 2).[7]

Plaintiffs seek production of company-wide personnel data. Walgreens, however, seeks to limit its production to a restricted universe of its own design. Specifically, Walgreens proposes to produce data only for districts that have stores in what Walgreens characterizes as

[5]Both Dukes and Wilfong involved large multiple facility companies, like the defendant here. In Dukes, Walgreens represented that "the proposed class covers at least 1.5 million women who have been employed over the past five years at roughly 3,400 stores." Dukes, 222 F.R.D. at 142. In Wilfong, the district court noted that Rent-a-Center operated "over 2200 stores." Wilfong, 2001 U.S. Dist. LEXIS 22718 AT *4.

[6] Walgreens also objects to the temporal scope of Plaintiffs' discovery requests, which Plaintiffs defined as from January 1, 1998 to the present time. *See* Exh. 1, Plaintiffs' RFP at 3, ¶ 8. Walgreens proposed no alternative to this time period. Plaintiffs are willing to be flexible regarding the temporal scope of pre-class certification discovery.

[7] Although Request No. 2 sought external applicant data for both the Assistant Store Manager/Management Trainee and other management positions, Plaintiffs will limit their request to Assistant Store Manager/Management Trainee applicants (both internal and external) only. Additionally, it is Plaintiffs' understanding that the Assistant Manager and Management Trainee positions are, in fact, the same position and represent different names Walgreens has used over time for the entry level management trainee position. For the sake of simplicity, Plaintiffs will refer to this position as the Management Trainee ("MGT") position throughout this motion.

"African-American/low income Peer Groups."[8] By Walgreens' own estimate, this restriction would limit its production to personnel data covering only about thirty percent (30%) of the company.

Walgreens' purported primary rationale for refusing to produce company-wide data is its disingenuous interpretation of the FAC as alleging that the pattern or practice of discrimination against African-Americans is confined to "African-American/low income Peer Group" stores and/or districts that contain these stores.

Walgreens' geographic scope objection is baseless, and its reading of the FAC is plainly wrong. The severe geographic restriction on discovery of personnel databases Walgreens proposes would seriously impede Plaintiffs' ability to conduct critical statistical analyses necessary to demonstrate *company-wide* patterns of racial disparities in assignments, compensation, and promotions and, thereby, to meet Rule 23(a)'s "commonality" requirement.[9] Moreover, the data Walgreens proposes would yield seriously distorted statistical analyses that would not accurately reflect *company-wide* patterns of the challenged employment practices.[10]

1. Walgreens' Reading of the FAC is Contrary Its Clear and Unambiguous Language.

Walgreens' strained reading of the FAC ignores that Plaintiffs have pleaded separate and distinct claims of promotion discrimination *and* segregation on behalf of a nationwide class of

[8] Plaintiffs understand Walgreens maintains "Peer Group" information for most of its stores. Two of the "Peer Groups" are referred to as "African-American/low income." *See* Exh. 10 (Peer Group Information).

[9] In any event, Walgreens has not produced even this limited data to Plaintiffs. "It is improper to withhold documents that are clearly called for by a request simply because the responding party objects to producing some of the documents that have been asked for." ABA Discovery Standards, § 12(d) at p.21 (comments section).

[10] Additionally, Walgreens' refusal to provide company-wide personnel data will hinder Plaintiffs' ability to identify and contact class members to gather anecdotal evidence in support of class certification. *See* Wilfong 2001 U.S. Dist. LEXIS 22718, *13-14 (citing the "275 sworn declarations from current and former employees" about ways they had been discriminated against by defendant on account of their gender, and finding "[t]hese declarations provide 'the personal experiences with the company' that "bring the cold numbers convincingly to life.")

African-Americans.[11] Specifically, FAC, ¶¶ 24 (a) – (d), allege discrimination in selections and promotions, irrespective of store location or designation; ¶ 26, alleges discrimination in selections of management trainee positions, irrespective of store location or designation; ¶ 27, alleges discrimination in promotions, irrespective of store location or designation; ¶ 28, alleges discrimination in promotions, irrespective of store location or designation; and ¶ 29, alleges discrimination in promotions, irrespective of store location or designation.[12]

In sum, Plaintiffs allege Walgreens discriminates against African-Americans in promotions *within* the retail and pharmacy management career paths *throughout* the country generally, irrespective of the store location or designation to which African-Americans are assigned, and into non-retail corporate positions.[13] Plaintiffs separately and independently also allege that training, promotion and compensation opportunities of African-Americans are further adversely impacted by Walgreens' disproportionate assignment of African-Americans to stores which Plaintiffs characterize as "African-American/low income." *See* n. 11, *supra*.

In fact, § IV of the FAC, which is titled "General Patterns of Discrimination *and* Segregation," contains two subsections. Subsection A is titled "Discrimination in Selections and Promotions." *See* FAC, ¶¶ 26-29. Subsection B is titled "Segregation of Black Management Employees and Pharmacists." *See* FAC, ¶¶ 28-31.

Thus, a fair, and indeed the only, reading of the FAC makes evident that Plaintiffs pleaded distinct and separate allegations of "discrimination" and "segregation." Walgreens'

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[11] Although the FAC refers to "African-American/low income stores," Plaintiffs use that term in a much more generic sense than Walgreens. Plaintiffs do not confine their use of the term to stores in "African-American/low income Peer Groups," but instead to "African-American/low income stores" which include stores that are located in higher than average African-American *and/or* in lower than average income neighborhoods.

[12] Likewise, FAC ¶ 48, separates low income and predominantly minority stores individually and not combined as one defined category.

[13] This discriminatory pattern or practice also has an attendant impact on the compensation of African-Americans who are denied promotions into higher level positions or whose promotions are delayed on account of race.

attempt to read into the FAC a limitation on the geographical scope of Plaintiffs' allegations is unsupportable.[14]

2. Plaintiffs Must Be Able to Discover and Analyze Company-wide Data and Documents in Order to Meet The Requirements of Rule 23

a. Geographical Limitations on the Personnel Data Would Impede Plaintiffs' Ability to Conduct Adequate Statistical Analyses To Show "Commonality."

Most significantly, Walgreens' restriction on the geographic scope of discovery would prevent Plaintiffs from presenting comprehensive statistical analyses in support of class certification. "The importance of statistical analysis to a certification of a class in employment discrimination is well-documented." Jefferson v. Ingersoll Milling Machine Co., 1999 U.S. Dist LEXIS 13126, (N.D. Ill. Oct. 8, 1998), *affirmed in relevant part and vacated in part*, 195 F.3d 894 (7th Cir. 1999); *see also* Dukes, 222 F.R.D. at 154, *citing* Caridad v. MetroNorth Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999) ("[u]se of statistical analysis to raise an inference of class-wide discrimination and satisfy commonality is well accepted."). In Dukes, the prominent nationwide gender discrimination class action against Wal-Mart, plaintiffs presented, and the district court relied on, statistical analyses of company-wide promotions, compensation and other data in determining that plaintiffs' met Rule 23's commonality requirement. See Dukes, 222 F.R.D. at 155. Wal-Mart produced extensive and company-wide electronic records on all of its

[14] Illustrative of Walgreens' misreading of the FAC, is its counsel's observation that "if the discrimination [Plaintiffs] complain about is the staffing of "African-American/low income" stores, as alleged in the Amended Complaint, then it follows that the only employees who could be injured by that practice are those who were, or could have been, assigned to these stores. An African-American employee in Idaho, for example, cannot be in the class if there are no "African-American/low income" stores to which this person could have been discriminatorily assigned." *See* Exh. 11, Oct. 18, 2005 Letter J. Ybarra to T. Klosener at 6. However, if this hypothetical African-American employee in Idaho was rejected for a MGT position or denied a promotion in the retail management career path or pharmacy career path, or into a non-retail corporate management position because of his or her race, he or she is a member of the class as pleaded by Plaintiffs. *See* FAC ¶¶ 24, 26-29.

employees nationwide during pre-class certification discovery, which plaintiffs' experts analyzed and provided testimony on in support of plaintiffs' motion for class certification.[15]

In Wilfong, also certified as a nationwide class, plaintiffs presented statistics demonstrating that "women have been under-represented in hiring, been denied promotions at statistically significant lower rates … and … terminated at higher rates than similarly situated men, again to a statistically significant degree." Wilfong, 2001 U.S. Dist. LEXIS 22718, *13. These statistics provided the "kind of significant proof that an employer operates under a general policy of discrimination which will support a finding of commonality under Rule 23." *Id.*

Likewise, in this case, Plaintiffs' labor market economist expert, Dr. Marc Bendick, states that to test the three major hypotheses alleged in the FAC, *i.e.*, that there are company-wide patterns of discrimination against African-Americans in promotions, store assignments, and MGT selections, it is imperative to analyze nationwide statistical data. *See* Exh. 13, Declaration of Dr. Marc Bendick ("Bendick Decl.") at ¶¶ 11-23.[16] With respect to promotions, Dr. Bendick states that if the data is limited to the universe of districts containing "African-American/low income Peer Group" stores, as Walgreens proposes,

> . . . it would be difficult to draw sound, empirically-based conclusions on the company's promotional practices nation-wide for at least three reasons:
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> · The data would not provide direct evidence on promotional practices in all districts.

[15] Plaintiffs' statistical expert in Dukes described the records Wal-Mart produced as including: (1) "an electronic copy of Wal-Mart's personnel database including data for all U.S. employees who were employed between January, 1996 and March, 2002. There were 3,945,151 persons included in this database."; (2) "[a] Complete job history for each of these persons …, including job history information …" including "[f]or each person, … basic identification information such as employee ID, social security number, name, address, phone number, gender, and race, as well as extensive information on the person's job history at Wal-Mart:" (3) "250 computer tapes which included detailed bi-weekly payroll information for Wal-Mart U.S. employees, and year-end summaries of payroll data for each person, for the years 1996-2001;" (4) "two databases [with] limited information about employees who bid for job vacancies;" (5) Wal-Mart's "associate database, which include[d] information on recent performance review ratings for hourly employees;" and (6) data pertaining to salaried employees, including "Performance Review information." *See* Exh. 12, Richard Drogin, Ph. D., Statistical Analysis Of Gender Patterns In Wal-Mart Workforce, February 2003, filed in Dukes v. Wal-Mart, Case No. C01-02252 MJJ (N.D. Cal.), at ¶¶ 6-11.

[16] Dr. Bendick was one of the plaintiffs' experts in Dukes.

> · It would be risky to make inference from those 80-100 districts to the remaining districts because the remaining districts are known to be different from the districts about which [he] would have data in at least one important way (the presence or absence of "African American/low income" stores. And
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> · Because of the inter-district promotions, applicant and selection information would be incomplete even for the districts for which data were provided.

Id. at ¶ 14.

Dr. Bendick identifies similar deficiencies in analyses of patterns of store assignments and MGT selections based on the limited data Walgreens proposes to produce. *Id*. at ¶¶ 15-22. Additionally, Dr. Bendick describes examples of the possible "interactions among the three hypotheses," *id.* at ¶¶ 24-25, and concludes that:

> Because of such possible interactions among hiring, promotions and assignments, to accurately test *any* of the three principal hypotheses of discrimination nation-wide requires nation-wide data on *all* three processes. Geographically-limited data on . . .* *any* of the three subjects -- such as from 1,500 stores in 80-100 districts -- would adversely affect the accuracy of the analysis on *all three* hypotheses.

Id. at ¶ 26 (emphasis in original).

Additionally, the universe of personnel data Walgreens proposes would present a skewed picture of the company. If, as Plaintiffs allege, Walgreens disproportionately assigns African-Americans to certain stores, statistical analysis of employment decisions in those stores and other stores in the same districts would not accurately reflect *company-wide* patterns. For example, if as Plaintiffs allege, African-Americans promoted by Walgreens to retail management positions are more likely to be assigned to certain stores, then analyzing the promotion patterns of those stores and other stores in the same district would, not surprisingly, reflect higher promotion rates for African-Americans than for the company as a whole or in other districts, thus skewing the results of the analyses in Walgreens' favor. Moreover, an analysis of such limited data would fail to account for the impact of inter-district promotions. *See* Exh. 13, Bendick Decl. at ¶¶ 14, 18. Additionally, limiting production to a subset of store and district level data, would absolutely

prevent Plaintiffs from analyzing racial disparities of promotions into non-retail corporate positions, which Plaintiffs contend are discriminatory. *See* FAC, ¶ 29.

For all of the reasons discussed above, the Court should direct Walgreens to produce the electronic databases in response to Plaintiffs' Request Nos. 1 and 2[17], in their entirety and immediately.

b. Walgreens' Geographic Scope Limitation on Discovery Would Prevent Plaintiffs From Obtaining Documents to Show Uniform Practices and Company Structure.

Walgreens also objected to and seeks to limit the geographic scope of its responses to Request Nos. 5-7, 23, 25-31, 33, 36-37. These requests seek the production of "EEO-1 reports" (Request No. 5); "organizational charts" (Request No. 6); "documents identifying … the location … of each [Walgreens] retail store" (Request No. 7); documents reflecting procedures or criteria used in store assignment of retail and pharmacy managers (Request No. 23); documents pertaining to "manpower meetings" (Request No. 25); [18] documents pertaining to the procedures or criteria used in selecting employees to participate in the Emerging Leaders Program ("ELP") and comparable programs for the Pharmacy career path (Request Nos. 26, 29);[19] documents identifying the name and race of all employees who have been in the ELP and comparable programs for the Pharmacy career path (Request Nos. 27, 30), databases reflecting the applicant flow and selection rates for the ELP and comparable programs for the Pharmacy career path (Request No. 28, 31); equal employment opportunity policies, statements and training materials (Request No. 33); and internal and external complaints of race discrimination (Request Nos. 36, 37).

[17] Request 2 is discussed more fully in section (C), *infra*.

[18] Plaintiffs understand that at these meetings the Regional Vice Presidents and District Managers evaluate the EXAs and Store Managers to plan for future store staffing and placement.

[19] The Emerging Leaders Program is a nationwide program for which store and pharmacy managers are selected as part of the process of becoming eligible for promotion to retail district manager and pharmacy supervisor positions.

Walgreens seeks to limit production of these documents to only that portion of the company that contain stores in "African-American/low income Peer Groups." However, production of these documents on a company-wide basis is necessary for Plaintiffs to be able to determine whether Walgreens' policies governing assignment, compensation, promotion, selection and training "are similar across all stores;" and whether "there is a basic organizational structure that is consistent across store types and throughout the company's domestic stores in important respects." Dukes, 222 F.R.D. at 145.

For example, the Emerging Leaders Program, *i.e.*, Request Nos. 26-31, is a single program which brings together managerial candidates from the whole nation. Nevertheless, Walgreens seeks to limit production of documents pertaining to this program to a narrow universe, preventing Plaintiffs from analyzing the *company-wide* patterns of selections for the program. Additionally, Walgreens refuses to produce documents describing its corporate operations, *i.e.*, Request No. 6. These documents are necessary to determine if "there is a basic organizational structure that is consistent across store types and throughout the company's domestic stores in important respects." Moreover, these documents could provide information that may (i) explain or help explain the decision-making chain of command responsible for the discriminatory practices alleged in the FAC; (ii) identify departments or persons responsible for investigating and resolving complaints of discrimination by Walgreens' employees; or (iii) reveal departments or persons with responsibility for human resources, personnel, equal employment and/or diversity management and oversight.

The failures to respond to Request 6 (organization charts) and 8 (job descriptions) would preclude the Plaintiffs from elementary data about jobs for which two named Plaintiffs applied. Plaintiff Chris Dargin applied for at least three corporate positions (FAC, ¶ 129) while Plaintiff Arien Jackson applied for two such positions. FAC, ¶¶ 78-79.

The Court should direct Walgreens to produce documents responsive to Request Nos. 5-7, 23, 25-31, 33, 36-37 in their entirety and immediately.

B. Data and Documents Regarding Factors Affecting the Desirability of Walgreens' Retail Stores

Plaintiffs' Request Nos. 15-22 seek data regarding Walgreens' stores, including customer count (Request No. 15), profit (Request Nos. 16-18), "shrink" (Request No. 19), incident reports (Request No. 20), the presence of security guards (Request No. 21) and staffing levels (Request No. 22). Plaintiffs seek this information to demonstrate "commonality" and in support of their segregation claim, i.e., that Walgreens maintains a pattern or practice of disproportionately assigning African-American retail management and pharmacy track employees to less desirable stores, and thereby impeding their promotional and compensation opportunities. *See* FAC, ¶¶ 29-31.

Walgreens claims that its proposal to provide Plaintiffs with data for employees in districts with "African-American/low income Peer Group" stores negates Plaintiffs' need for the information sought in Request Nos. 15-22. *See* Exh. 14, Oct. 17, 2005 Letter T. Demchak to J. Ybarra at 7. However, as discussed above, Walgreens' presumption that Plaintiffs' reference to "African-American/low income store" is limited to the "African-American/low income Peer Groups" is disingenuous and flatly wrong. Plaintiffs allege that African-Americans are more often assigned to "difficult" stores, stores with "security issues," "high customer volume" stores, stores that "employ security guards," and/or "understaffed" stores. *See e.g.*, FAC, ¶¶ 57, 75 and 79. These may or may not correspond to stores in Walgreens' "African-American/low income Peer Groups." The information sought by these requests is necessary to determine whether there are common patterns of assignment of African-Americans to stores with these factors and whether those assignments negatively affect their promotion and compensation opportunities, as alleged in the FAC.

Dr. Bendick's opinion supports this point. *See* Exh. 13, Bendick Decl. at ¶ 18 (4th bullet) ("categorizing stores as 'African-American/low income' versus 'all others' may not reflect the actual distinction between stores to which African-Americans may be discriminatorily assigned.").

C. Data Regarding External Applicants for Management Trainee Positions

Plaintiffs' Request No. 2 seeks production of documents identifying "internal and external applicants for employment in Walgreens' retail store and pharmacy management trainee positions." Plaintiffs' Request No. 24 seeks documents "pertaining to [Walgreens'] formal external recruitment of candidates for retail store Management Trainee positions." Walgreens objected to and refuses to produce documents pertaining to "external applicants" in response to Request No. 2, [20] and to produce any documents in response to Request No. 24, on grounds that the information is "irrelevant to any claim or defense in this case." Specifically, Walgreens contends that since "none of the named Plaintiffs allege that they suffered discrimination as an external applicant," Plaintiffs have no right to obtain documents pertaining to external applicants.[21] *See* Exh. 11, Oct. 18, 2005 Letter J. Ybarra to T. Klosener at 6; *see also id.* at 8-9. Courts have certified classes that in which employees were allowed to represent external applicants. Richardson v. Byrd, 709 F.2d 1016, 1020 (5th Cir. 1983).

To the extent that Walgreens' objection is an attack on Plaintiffs' ability to meet Rule 23's typicality requirement, that challenge is premature and, in any event, without merit. "Typicality is said to require that the claims of the class representatives be typical of those of the class, and to be 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."

[20] Walgreens also objected to this Request on other grounds, including the geographic scope of the Request. *See* discussion at (A), *supra*.

[21] Plaintiffs allege that "Walgreens practices systemic discrimination in selecting employees for Assistant Store Manager and Management Trainee." FAC, ¶ 26.

Marisol v. Giuliani, 126 F.3d 372, 376 (2nd Cir. 1997). In this case, Plaintiffs allege Walgreens has a selection process for a single position –MGT– that it fills from two feeder pools, *i.e.*, internal and external applicants. Furthermore, Plaintiff Malica Page alleges she applied for and was denied an MGT position, *see* FAC, ¶¶ 111-12. Page's claim for discrimination in selection for MGT arises from the same course of events as other applicants for the position – both internal and external – and derives from the same legal theory of liability.

In any event, the adjudication of the Rule 23(a) typicality requirement is not appropriately raised at this stage of the litigation. The issue now before the Court is the proper scope of discovery. The information Plaintiffs seek regarding external MGT applicants is relevant and necessary to Plaintiffs' analysis of their claim that Walgreens' MGT selection process discriminates against both external and internal applicants in the same fashion. Significantly, where, as here, internal and external candidates compete for the same job vacancies, courts have specifically approved statistical analyses in which "hiring opportunities" as a group were analyzed, regardless of whether the successful applicant was internal or external. *See* EEOC v. Turtle Creek Mansion Corp., 70 FEP 899 (N.D. Tex. 1995), *aff'd*, 82 F.3d 414 (5th Cir. 1996).

Finally, Plaintiffs' expert Dr. Bendick states that the data required to test the hypothesis that Walgreens' MGT selection process is discriminatory must include both internal and external applicants "because Walgreens apparently considers applicants from both sources in making these selections." Exh. 13, Bendick Decl. at ¶ 23. Accordingly, the Court should direct Walgreens to produce all documents responsive to Request Nos. 2 and 24.[22]

[22] Walgreen cites Harriston v. Chicago Tribune Co., 992 F.2d 697, 703-04 (7th Cir. 1993) to support its proposition. *See* Exh. 11, Oct. 18, 2005 Letter J. Ybarra to T. Klosener at 6. Harriston does not support Walgreen's position, but merely stands for the proposition that a plaintiff who does not demonstrate that she is a member of the class she seeks to represent does not have standing to sue as a class representative. In Harriston, plaintiff sought to represent a class of all blacks that a newspaper failed to promote to management positions. However, plaintiff herself was promoted to a management position and did not identify any other management position that defendant denied her. *Id*. at 703-04. By contrast, Plaintiff Page applied for and was denied an MGT position, *see* FAC, ¶¶ 112-18.

D. Documents Withheld on the Basis of Privilege

Walgreens purported to interpose claims of privilege to Plaintiffs' Request Nos. 32-36 and 38 and objected to each of these requests "to the extent that [they] seeks the disclosure of documents protected by the attorney client privilege and/or the attorney work product doctrine." Nevertheless, Walgreens failed to produce a privilege log identifying the responsive documents it contends are privileged and thus Plaintiffs are unable to determine whether Walgreens has appropriately asserted privilege objections in response to these requests and whether responsive documents are properly being withheld.[23] Walgreens has not identified a date by which it will identify such privileged documents. Nor has Walgreens produced non-privileged documents responsive to these requests.

Rule 26(b)(5) mandates that if a party withholds information by claiming that it is privileged, it "shall make the claim expressly and shall describe the nature of the documents…in a manner that will …enable other parties to assess the applicability or protection."[24] Additionally, the 1993 Notes of the Advisory Committee stress that withholding materials without the Rule 26(b)(5) notice "is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege." Pulsecard Inc. v. Discovery Card Services, Inc., 1995 WL 526533 (D. Kan. 1995) (failure to assert privilege with specificity constitutes a waiver).

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[23] Walgreens also responded to Requests 1-3, 5-11, 20, 22, and 25-39 by stating that "subject to and without waiving" it would "produce … non-privileged documents," again without identifying what responsive documents might be privileged.

[24] "A discovery response that does not include this [particularized] identification [of asserted privileged documents] due to the voluminous nature of the documents or the attorney's lack of particularized identifying information as of the response due date should assert the applicable privilege as to each inquiry to which the privilege relates *and give a date within a reasonable time by which the identity of the writing or other communication asserted to be privileged will be furnished.*" ABA Discovery Standards, § 25(a) at 44 (emphasis added). However, Walgreens has not done this, instead it reported to Plaintiffs that it had not withheld any documents, but asserted the privilege because at some point in the future it may identify a privileged document that is attached to a responsive non-privileged document or because it wants to preserve the privilege in case there may be other privileged documents about which it is currently unaware.

The Court should require Walgreens to immediately produce all non-privileged documents responsive to all of Plaintiffs' requests and to timely produce a privilege log.

E. Documents Withheld "Subject to the Entry of a Protective Order"

Plaintiffs' Request Nos. 10 and 11 seek documents pertaining to Walgreens' bonus formulas for its retail management and pharmacy career paths. Plaintiffs' Request No. 20 seeks documents pertaining to Loss Prevention incidents in Walgreens' retail stores. Plaintiffs' Request No. 22 seeks documents pertaining to criteria Walgreens uses in deciding the numerical staffing of its stores. Plaintiffs' Request No. 25 seeks documents pertaining to "manpower meetings," Plaintiffs' Request Nos. 26 and 29 seeks document pertaining to the procedures or criteria used in selecting employees to participate in the Emerging Leaders Program ("ELP") and comparable programs for the Pharmacy career path. Plaintiffs' Request No. 36 seeks documents pertaining to internal complaints of race discrimination.

In addition to interposing overbroad as to geographic scope objections, *see* § A, *supra*, Walgreens also qualified its responses to these requests stating it would produce responsive documents "subject to an agreed protective order executed by the parties." *See* Exh. 2, Walgreens' Responses to RFP Nos. 10-11, 20, 22, 25-26, 29 and 36. Despite extensive efforts (first initiated by Plaintiffs on September 15, 2005), the parties have been unable to negotiate a mutually acceptable confidentiality agreement, and may require the assistance of the Court to resolve this issue to the extent that any protective order is warranted under Rule 26(c)(7).[25]

F. Other Document Requests to Which Objection was Interposed

1. "Peer Group" Documents

[25] In response to Plaintiffs' invitation, Walgreens promised to propose an initial draft of the agreement. Walgreens served its draft agreement nearly three weeks later on the same day it responded to the RFP, despite written and verbal reminders from Plaintiffs' counsel on September 19, 22, and 29, 2005. *See* Exhs. 15 and 16, Sept 19 and 22, 2005 emails K. Spriggs to J. Ybarra, and Exh. 17, Oct. 5, 2005 email R. Barner to K. Spriggs.

Plaintiffs' Request Nos. 12-14 seek documents regarding Walgreens' use of peer groups, *see* n. 8, *supra*. Walgreens objected to these requests as irrelevant because the formula and methodology regarding how Walgreens creates "Peer Groups," or otherwise identifies the demographics of its customers or the neighborhoods in which it locates its stores is unnecessary to determine whether assignment of employees to certain stores adversely impacts their promotion and compensation opportunities. As a compromise, Plaintiffs proposed to limit the requests to documents "describing how, by whom, and for what purpose" Walgreens uses information regarding "Peer Groups," or other information regarding the demographics of its customers or the neighborhoods in which it locates its stores. Walgreens represented that it "will consider the amended request." *See* Exh. 11, Oct. 18, 2005 Letter Ybarra to Klosener at 9. To date, Walgreens has neither accepted Plaintiffs' amendment nor produced documents responsive to the requests. The Court should require Walgreens to immediately produce all documents responsive to Request Nos. 12-14.

2. Internal and External Complaint of Race Discrimination

Plaintiffs' Request Nos. 36 and 37 seek production of documents regarding internal and external complaints of race discrimination, harassment, hostile work environment and retaliation. In addition to objecting to these requests on geographic scope, *see* § A, *supra*, and privilege grounds *see* § D, *supra*, Walgreens seeks to limit production to only race discrimination complaints related to promotion, training, assignment and compensation. This objection is not supported by applicable law. *See e.g.*, Louison v. Blue Cross Blue Shield of Greater New York, 1990 U.S. Dist. LEXIS 9089 (S.D. N.Y. July 23, 1990) ("As for the substantive scope of [plaintiff's discovery] request, it would be inappropriate to exclude complaints concerning discriminatory hiring even though plaintiff is alleging only discriminatory failure to promote and termination, since evidence relating to hiring may be relevant to plaintiff's complaint wrongful termination").

IV. RELIEF REQUESTED

WHEREFORE Plaintiffs pray that Court enter an Order requiring that Walgreens:

1. Produce to Plaintiffs the electronic databases sought in Request Nos. 1-2, and the explanatory documents sought in Request No. 3 within three days of the entry of this Order;

2. Produce to Plaintiffs all responsive, non-privileged documents sought in Request Nos. 5-38 within seven (7) days of the entry of this Order;

3. Produce to Plaintiffs a privilege log within ten (10) days of the entry of this Order; and

4. If the Defendant desires a protective order, tender the Court and to Plaintiffs a proposed protective order within three (3) days of the entry of this Order showing as to each category of documents as to which protection is sought that disclosure will work a clearly defined and serious injury on Walgreens and, if served, that Plaintiffs submit their written comments on the proposed protective order to the Court and Walgreens within two (2) days after service of the proposed order by Walgreens, for entry of a protective order by the Court.

Respectfully submitted,

FOLAND, WICKENS, EISFELDER,
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/s/ *Tiffany B. Klosener*

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 28TH day of October, 2005, the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, who will send notification of such filing to the following CM/ECF participants:

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