IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL A. CONTRERAS, et al. Plaintiffs, vs. THOMAS RIDGE, SECRETARY, DEPARTMENT OF HOMELAND SECURITY Defendant.	Civil Action No. 02 CV00923 (JR) CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Miguel Contreras et al., by counsel, hereby submit their Opposition to Defendants' (Department of Treasury, United States Customs Service, and Department of Homeland Security) Motion for Summary Judgment. As demonstrated below, Defendants' Motion should be denied in its entirety because it is predicated on a serious misunderstanding of the law with regard to exhaustion of administrative remedies, adverse employment actions, and the *prima facie* case requirements under Title VII in a class action. In addition, summary judgment is inappropriate at this stage of the litigation because material issues of disputed fact exist as demonstrated by the separate Statement of Material Issues of Fact, the submitted testimony, documents containing Defendants' admissions, and other evidence submitted by Plaintiffs. Moreover, Plaintiffs have not had the opportunity for discovery on these issues and are unable to respond fully to many issues and require further discovery under Rule 56(f).

First, with regard to exhaustion of administrative remedies, the Defendants have failed to inform the Court of binding Supreme Court precedent governing the tolling of the statute of limitations in this case. In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the U.S. Supreme Court held that the filing of a class action claim tolls the statute of limitations for all putative members of the class who may be parties if the suit is permitted to continue as a class action. Additionally, in Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983), the Court expanded and clarified this doctrine stating that the "filing of class action by others tolled statute of limitations as to respondent because he was a putative member of the class." (collectively, Plaintiffs refer to this line of cases as the "American Pipe tolling doctrine."). The application of the American Pipe tolling doctrine is fatal to all of Defendants' arguments with regard to exhaustion of administrative remedies. All of the Plaintiffs' claims have been timely exhausted because the statute of limitation was tolled by either the Contreras class charge or a previous class action brought by Peter Gonzalez in 1988.

Second, there is no merit to Defendants' argument under Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999), that class-wide discrimination in work assignments, lateral transfers, undercover and other undesirable assignments, training, and discipline are not actionable in this class action. Brown held that in individual disparate treatment cases, federal employees must show that they have suffered an adverse personnel action in order to establish a *prima facie* case of discrimination. Defendant attempts to extend the Brown decision beyond its legitimate parameters to reach pattern and practice discrimination claims. See, e.g. Moore v. Summers, 113 F.Supp.2d 5, 23-24 (2000).

Notwithstanding Brown, the class-wide discrimination in assignments, lateral transfers, undercover and other undesirable assignments, training, and discipline alleged by the Plaintiffs are, or certainly could be with adequate discovery, adverse employment actions as defined by Brown. As shown herein, Plaintiffs have produced evidence showing that these types of employment practices constitute a significant change in employment opportunities. Plaintiffs also have requested discovery under Rule 56(f) on these issues. Therefore, material disputed issues of fact exist as to these issues that can only be resolved after further discovery.

Moreover, class-wide discrimination in these challenged practices contribute to the establishment of a racially hostile work environment under Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and thus would be actionable on that basis.

With regard to Defendants' arguments regarding Plaintiffs' alleged failure to plead or prove a *prima facie* case, Plaintiffs are not required to plead a *prima facie* case in the complaint under Swierkiewicz v. Soreman N.A., 534 U.S. 506 (2002). As discussed below, it is sufficient that the pleading put the defendants on notice of the claims. To the extent that a response is required, Plaintiffs' request discovery on these issues pursuant to Rule 56(f).

STATEMENT OF FACTS

GS-13 Special Agent Miguel A. Contreras contacted an EEO counselor on January 9, 1995 and filed a formal class action administrative charge against the United States Customs Service ("USCS") which was later designated TD 95-0014C. See Contreras Declaration, attached hereto as Exhibit 1 at ¶7; Contreras class charge TD 95-0014C, attached hereto as Exhibit 2 ; See also, Defendants' Memorandum of Points and

Authorities in Support of Defendants' Motion for Summary Judgment (hereinafter "Defendants' Memorandum"), Harvey Declaration at ¶35. The class charge was drafted by Special Agent Contreras without the assistance of an attorney. See Contreras Declaration, Exhibit 1 at ¶7. He brought the case on behalf of himself and all similarly situated past, present, and future series 1811, United States Customs Service Special Agents. In his administrative charge, Special Agent Contreras provided the following statement of the class allegations:

DESCRIPTION OF CLASS ALLEGATION OF DISCRIMINATION

> Mr. Contreras and the class he represents applied for promotions; USCS had vacancies for which it was seeking applicants; Mr. Contreras and members of the class qualified to seek such promotions; Mr. Contreras and the class were denied the positions; and the USCS continued to seek applicants or filled the positions with persons from a different class.
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> The current policies and programs at USCS in relation to Hispanic special agents tend to limit, segregate and classify them in a way which is depriving them of employment opportunities. Such policies are adversely affecting their status as employees because of their National Origin. Furthermore, the current merit promotion policies and programs relative to the use of subjective criteria by USCS when promoting employees to higher grades have a substantial adverse impact on all Hispanic special agents. The subjective criteria currently in use by USCS is faulty and illegal in the areas of recruitment of applicants, hiring, initial job assignments, transfers, promotions, retention and training. Hispanic special agents have been disproportionately impacted by such practices.
>
> USCS' repeated failure to promote Mr. Contreras to a supervisory position is the result of its discriminatory practices by which Hispanic agents such as Mr. Contreras, who are fluent in Spanish, receive a disproportionately large share of unfavorable work assignments including Spanish-English translation, wiretap monitoring, temporary duty, undercover work, geographical transfers and assignment to dangerous and otherwise undesirable posts. In addition, USCS has failed and refused to assign Hispanics to positions and locations which provide promotional opportunities.

> Because of the aforementioned practices, Mr. Contreras and similarly situated Hispanic special agents have been precluded from obtaining the training and diverse work experience which constitute the basis upon which applicants for promotion are evaluated. In addition, USCS has failed to accord proper recognition and weight to the expertise and experience that Hispanic agents have obtained. For these reasons, Hispanic agents are underrepresented within USCS Offices of Investigation and Internal Affairs, particularly at the higher grades.
>
> As a result of USCS' discriminatory practices, Mr. Contreras and similarly situated Hispanic agents spend more time in grade before being promoted to the next higher grade than do non-Hispanic agents before being promoted to the next higher grade than do non-Hispanic agents. Hispanic special agents at USCS are paid less than similarly situated non-Hispanics special agents. In addition, Hispanic agents at USCS are not being compensated for their use of a foreign language, a special skill which similarly situated Hispanic special agents at the Federal Bureau of Investigation and the Drug Enforcement Administration are being compensated for.
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> Hispanic agents at USCS are also subject to discrimination with respect to the terms and conditions of employment, including awards, training and imposition of discipline.
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> The aforementioned specified USCS practices constitute a pattern and practice of unlawful discrimination based on National Origin. The class of Hispanic Special agents at USCS who are victims of this pattern and practice is so numerous that joinder of all members is impracticable. There are questions of law and fact common to this class, the claims of Mr. Contreras are typical of the claims of all members of the class, and Mr. Contreras will fairly and adequately represent the interest of this class. USCS has acted on grounds generally applicable to the class, thereby making appropriate both final injunctive and declaratory relief with respect to the class as a whole.

See Contreras Class Charge, Exhibit 2 at 3-4.

Special Agent Contreras had attempted to exhaust a class-wide charge of retaliation in his administrative charge, but was advised by the EEO counselor that he was not permitted to so under the administrative regulations. See Contreras Declaration, Exhibit 1 at ¶7; see also, 29 C.F.R. § 1614.204(a).

On April 12, 1995, the Department of Treasury's Office of Equal Opportunity Programs ("OEOP") petitioned the Equal Employment Opportunity Commission ("EEOC") to assign an Administrative Judge to handle the Contreras class charge. See Defendants' Memorandum, Harvey Declaration at ¶36. The Administrative Judge issued an opinion in November 1995, finding that the complaint was not subject to dismissal under any of the provisions of 29 C.F.R. § 1614.107 and that it met the prerequisites of 29 C.F.R. § 1614.204(a)(2). The Administrative Judge certified the class as pled by Contreras and ordered the Department of Treasury to process it as a class action. See EEOC Opinion, attached hereto as Exhibit 3 at 1.

On December 21, 1995, the Treasury Department issued its final agency decision rejecting the Administrative Judge's opinion because it found that the class complaint was untimely and did not meet the prerequisites of a class complaint. See Defendants' Memorandum, Harvey Declaration at ¶37. On January 17, 1996, Special Agent Contreras appealed the final agency decision to the EEOC. See EEOC Opinion, Exhibit 3 at 1.

On May 11, 1998, the EEOC vacated the Department of Treasury's final agency decision and certified the class again. In its final agency decision, the Department of Treasury had dismissed all of the class allegations as untimely with the exception of training, promotions and lateral transfers. [1] See EEOC Opinion, Exhibit 3 at 3. The EEOC specifically found that the Department of Treasury had read the EEOC regulations with regard to the certification of a class complaint too narrowly. The EEOC determined that Contreras had addressed agency practices with regard to awards, discipline, language

[1] There should be absolutely no dispute in the instant motion as to whether the class claims regarding training, promotions and lateral transfers have been exhausted since the Defendants never challenged them as proper class allegations in the administrative process.

skills during EEO counseling and that he had individual EEO complaints concerning discipline and performance evaluations which were properly consolidated with the class complaint. Id. The EEOC concluded that allegations concerning promotions, training, assignments, awards, discipline and work assignments based on language skills were timely raised. Id.

The EEOC conducted an exhaustive analysis of the class complaint and found that it satisfied the class certification requirements of numerosity, commonality, typicality and adequacy of representation. The EEOC vacated the agency's decision, certified the class complaint, and directed the Department of Treasury to continue processing the class complaint. See id. at 4-5.

The Department of Treasury sought reconsideration of the EEOC's decision to certify the class. On October 22, 1999, the EEOC denied the request and ordered again that the Contreras' charge be processed as a class complaint. See Defendants' Memorandum, Harvey Declaration at ¶38.

On June 22, 2000, EEOC Administrative Judge Matthew Bradley issued an order defining the class as all Special Agents (Criminal Investigators), job series 1811, grades 12 through 15 of Hispanic national origin, employed in the Office of Investigations and the Office of Internal Affairs of the United States Customs Service. See June 22, 2000 Order, attached hereto as Exhibit 4. The Order stated that the "decision certifying the class does so based on the theory that the Agency's policies and practices toward Spanish-speaking agents, specifically regarding how there are assigned, have a negative impact with respect to training, promotions, awards and discipline." Id.

The case was reassigned to EEOC Administrative Judge Joel Kravetz. On December 21, 2001, Administrative Judge Kravetz entered an Order allowing a substitution of the undersigned class counsel and setting an extremely short discovery period for the case. See December 21, 2002 Order, attached hereto as Exhibit 5. The Order listed ten other cases that had been subsumed into the Contreras class complaint. See id. at 7. The Order further noted that "the parties also **agree** that each of the five alleged actions (training, assignments, awards, discipline, and promotion) comprise adverse actions." See id. at 2 (emphasis added).[2] The Scheduling Order set the case for an administrative hearing to begin on June 10, 2002.

The parties began discovery on promotions, training, assignments, awards and discipline. On February 1, 2002, Plaintiffs' new class counsel petitioned the Administrative Judge to add allegations of class-wide retaliation to the complaint. See Plaintffs' Motion to Include Retaliation Claims, attached hereto as Exhibit 6. On February 15, 2002, the Administrative Judge denied Plaintiffs' motion and Entered a Protective Order to facilitate discovery in the case. See February 15, 2002 Order, attached hereto as Exhibit 7. In April 2002, Customs' Office of Chief Counsel sent out notice of the EEOC class action complaint to the Hispanic Special Agent class members, along with a Privacy Rights Waiver and a Class Member Contact Information form. See Notice of EEOC Class Complaint, attached hereto as Exhibit 8.

The parties continued with discovery in preparation for the hearing until Plaintiffs withdrew from the administrative process due to the lack of adequate discovery and filed

[2] Again, since the Defendants agreed to this proposition in the administrative process, they should be estopped from challenging it here.

their class complaint in the United States District Court for the District of Columbia on May 10, 2002.

ARGUMENT

Defendants' Motion for Summary Judgment should be denied in its entirety because it is predicated on a serious misunderstanding of the law with regard to exhaustion of administrative remedies, adverse employment actions, and the *prima facie* case requirements. In addition, summary judgment is inappropriate here because Defendants have failed to demonstrate the absence of a disputed material issue of fact. Moreover, Plaintiffs have not had the opportunity for discovery on these issues and is unable to respond fully to many issues and require further discovery under Rule 56(f).

I. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Bonds v. Heyman, 950 U.S. 1202 (D.D.C. 1997). In addition, the Court "may not make credibility determinations or weigh the evidence." Reeves. v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000).

Untimely exhaustion of administrative remedies is an affirmative defense, and the defendant bears the burden of pleading and proving it. See Brown v. Marsh, 777 F.2d 8, 13 (D.C. Cir. 1985). If the defendant meets its burden, the plaintiff then bears the burden of pleading and proving facts supporting equitable avoidance of the defense. See Bayer

v. United States Dept. of the Treasury, 956 F.2d 330, 332 (D.C. Cir. 1992). As demonstrated below, Plaintiffs have met that burden.

II. THE CONTRERAS CLASS CLAIMS HAVE BEEN EXHAUSTED

A. Defendants' Exhaustion Arguments Are Contrary to Established Law

By any measure, the Plaintiffs have exhausted the allegations in their class complaint and by extension their individual claims. As the D.C. Circuit Court of Appeals has emphasized:

> [e]xhaustion is not an end in itself; it is a practical and pragmatic doctrine that 'must be tailored to fit the peculiarities of the administrative system Congress has created.' Exhaustion under Title VII, like other procedural devices, should never be allowed to become so formidable a demand that it obscures the clear Congressional purpose of 'rooting out . . . every vestige of employment discrimination within the federal government.'

Brown v. Marsh, 777 F.2d 8, 14 (D.C. Cir. 1985) (quoting President v. Vance, 627 F.2d 353, 363 (D.C. Cir. 1980)).

Defendants' arguments regarding exhaustion attempt to do exactly what the D.C. Circuit warned about in Brown v. Marsh,-- stand Title VII on its head and create an exhaustion doctrine so formidable that it obscures the Congressional purpose of 'rooting out . . . every vestige of employment discrimination within the federal government." Id. Under Defendants' "theory" of exhaustion, claims in a Title VII discrimination federal lawsuit are not "exhausted" unless they precisely track the exact contours of the administrative charge. See Defendants' Memorandum at 23, 27, 30-36, 38-39, 41-52.[3]

[3] Defendants also ignore the operation of American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), and its progeny, to argue that administrative exhaustion requires every class member to contact an EEO counselor within 45 days of a challenged personnel action. See Defendants' Memorandum at 23-34, 27-28, 31-36, 38-39, 41-52.

Defendants' positions in this regard are contrary to well-established law. Courts have long allowed federal Title VII claims so long as they are sufficiently "like or related" to those specified in the administrative charge. See Mackin et al. v. Specter Freight Systems, Inc. et al., 478 F.2d 979, 988 (D.C. Cir. 1973) ("the matters the Commission proceeds to investigate should determine the scope of the complaint for purposes of applying Title VII's jurisdictional requirements."); Klein v. Derwinski, 869 F.Supp. 4, 10 (D.D.C. 1994) ("when a plaintiff alleges new claims from the same basis of discrimination, they can be litigated, notwithstanding the failure to raise them at the administrative level, if they could 'reasonably be expected to grow out of the charge of discrimination.'"); Armstrong v. Reno, 172 F. Supp. 2d 11, 20 (D.D.C. 2001) (including complaints that "would have logically arisen in the course of DEA's investigation of the plaintiffs' five EEO complaints, had they completed the investigation."); see also, Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1976). Thus, a Title VII action may be based not only on the specific claims contained within the EEOC charge, but also on any kind of discrimination similar to or related to the allegations of the charge, limited only by the scope of the EEOC investigation that could be expected to grow out of the charge. See Newberg on Class Actions § 24.88 (3d ed. 1992) (hereinafter "Newberg").

B. All of Plaintiffs' Claims Are Like Or Related To The Class Charge

All of the claims contained in Plaintiffs' federal class action complaint were "like or related" to the Contreras class charge and could be reasonably be expected to grow out of an investigation of it. In the administrative process, the EEOC specifically rejected the Department of Treasury's narrow reading of the EEOC class certification regulations,

and certified the Contreras class complaint. The EEOC found that Contreras had timely raised class allegations of discrimination in promotions, training, assignments, awards, discipline and work assignments based on language skills. See EEOC Opinion, Exhibit 3 at 3. Plaintiffs' federal class action complaint alleged the exact same discriminatory practices: promotions, training, assignments (including transfers, undercover and other work undesirable assignments), awards (including bonuses and foreign language awards) and discipline. See Complaint at ¶¶13-67.

The only additional claims were those based retaliation, harassment and hostile work environment. Id. at 68-83. As to the retaliation claim, there is no requirement to exhaust such a claim in this Court, it can be raised for the first time in federal court. See, Baker v. Billington, No. 99-2394 (PLF), 2003 U.S. Dist. LEXIS 6993, at *16 n.4 (D.D.C. April 24, 2003) ("it is generally accepted that the exhaustion of administrative remedies doctrine does not apply to claims based on alleged retaliation"); Hayes v. Shalala, 902 F. Supp. 259, 266 (D.D.C. 1995); Webb v. District of Columbia, 864 F. Supp., 175, 184 (D.D.C. 1994) (requiring plaintiffs to file every new instance of discrimination would serve only to invite further retaliation and erect needless procedural barriers); Hunt v. D.C. Department of Corrections, 41 F. Supp. 2d 31, 37 (D.D.C. 1999)[4]; see also, Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992) ("all circuits that have considered the matter agree that plaintiff need not exhaust administrative remedies for a retaliation claim").

[4] The rationale for excusing administrative exhaustion under such circumstances is that the retaliation is "like or reasonably related to . . . and growing out of [the discrimination claims]," and by exhausting discrimination claims, the plaintiff has in effect exhausted her remedies with respect to the retaliation claim growing out of that discrimination claim. Hunt at 37 (citing Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989). Moreover, the D.C. Circuit has held that "so long as the employer (1) was on notice that its actions allegedly violated Title VII, and (2) has been afforded an adequate opportunity to pursue a mutually satisfactory resolution with the employee, no purpose would be served by demanding a stream of further administrative pleadings." Loe v. Heckler, 768 F.2d 409, 420 (D.C. Cir. 1985).

Even if there were a requirement to exhaust retaliation claims, in this particular instance, Special Agent Contreras did everything he could to exhaust the class claims. He attempted to file a class administrative charge regarding retaliation, but was told by an EEO counselor that it could not be done under the regulations. See Contreras Declaration, Exhibit 1 at ¶7. Later, by counsel, Contreras tried to add the retaliation charge again in the administrative process, but was denied. Id.

Although the hostile work environment and harassment claims were not specifically pleaded in the administrative process, such claims have been exhausted because they reasonably could be expected to grow out of the EEOC investigation of the Contreras class charge. See e.g. Klein v. Derwinski, 869 F.Supp. 4, 10 (D.D.C. 1994) (When a hostile work environment results from the same discrimination that formed the basis as the charge in the administrative process, it is deemed to be exhausted.) Plaintiffs' claims here involve the cumulative effect of Defendants' systemic class-wide discrimination against Hispanic Special Agents in promotions, training, assignments, awards, discipline and work assignments based on language skills. Such discrimination was severe and pervasive, creating a hostile work environment that caused serious and debilitating emotional distress and interfered with the official duties of members of the class. Contrary to Defendants' arguments, these claims go far beyond "a few stray" remarks based on national origin, they are based on the sum total of the systematic discrimination and retaliation felt by the Hispanic Agents. See Defendants' Memorandum at 45-46. See Brown v. Brody, 199 F.3d 446, 454 (D.C. Cir. 1999) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)) ("plaintiffs could

maintain an action even in the absence of a tangible economic effect on employment if the work atmosphere" amounted to a hostile work environment).

C. The EEOC Found That Contreras Had Exhausted The Class Claims

On May 11, 1998, the EEOC vacated the Department of Treasury's final agency decision and certified the class for the second time. Specifically, the EEOC found that Treasury had read the EEOC regulations regarding class certification too narrowly. See EEOC Opinion, Exhibit 3 at 3. The EEOC determined that Contreras had addressed agency practices with regard to awards, discipline, language skills during EEO counseling and that he had individual EEO complaints concerning discipline and performance evaluations which were properly consolidated with the class complaint. The EEOC concluded that allegations concerning promotions, training, assignments, awards, discipline and work assignments based on language skills were timely raised. Id. The EEOC ordered Treasury to process the complaint as a class action. Treasury requested reconsideration and the EEOC denied it. Discovery began and the class case was set for a hearing in June 2002 until the Plaintiffs filed the instant action in federal court. See December 21, 2002 Order, attached hereto as Exhibit 5. By any measure, the Contreras class complaint was administratively exhausted.

D. The EEOC's Decision Is Entitled To Great Deference

The EEOC's interpretation of its own regulations was reasonable and as such is entitled to great deference. See EEOC v. Shell Oil Co., 466 U.S. 54, 74 (1974) ("EEOC's interpretation of its own rules is entitled to deference."); Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971) (EEOC's interpretation "entitled to great deference"); Chevron U.S.A. Inc., v. National Resources Defense Counsel, 467 U.S. 837,

845 (1984) ("If this choice represents a reasonable accommodation of the conflicting policies that were committed to the agency's care by statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."). Absent a showing that the EEOC's decision was one that Congress clearly would not have sanctioned with regard to Title VII, Defendants are not entitled to upset the EEOC's decision.

D. Contreras Tolls The Statute Of Limitation For All Claims After 1995

In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the U.S. Supreme Court held that the filing of a class action claim tolls the statute of limitations for all putative members of the class who may be parties if the suit is permitted to continue as a class action. Additionally, in Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983), the Court expanded and clarified this doctrine stating that the "filing of class action by others tolled statute of limitations as to respondent because he was a putative member of the class." The principles of the American Pipe tolling doctrine are fully applicable to administrative limitations periods. See McDonald v. Secretary of Health & Human Serv. 834 F.2d 1085, 1092 (1st Cir. 1987). This is why individual EEO cases are consolidated into the class actions at the administrative stage by the Department of Treasury's Office of Equal Opportunity Programs ("OEOP").

The application of the American Pipe tolling doctrine is fatal to all of Defendants' arguments with regard to exhaustion of administrative remedies, particularly those based on the failure to contact an EEO counselor within 45 days and did appeal adverse decisions. See Defendants' Memorandum at 23-34, 27-28, 31-36, 38-39, 41-52. Putative class members can rely on the class complaint to toll the statute of limitations. For

claims within the parameters of the Contreras class action, the class members do not need to file separately with Defendants' EEO office or take further action to preserve their administrative remedies. This tolling of their claims continues until there is a final resolution of the class allegations in the case.

Therefore, all claims as detailed in the Contreas Complaint have been preserved since the filing of the Contreras administrative charge in 1995.

E. Gonzalez Tolls The Statute of Limitations For Claims Before 1995

There was a prior class action case against the Customs Service that was brought by Hispanic series 1811 Special Agents and other Hispanic employees with allegations substantially similar to the Contreras case. In Gonzalez et al v. Brady et al., Civ. Action No. 89-0120 (D.D.C.), the Plaintiffs alleged discrimination based on Hispanic national origin in assignments (including wiretap, language duty and undercover), training, promotional opportunities, benefits (including awards) discipline and Spanish language use. The Gonzalez plaintiffs further alleged class-wide reprisals and retaliation for asserting their equal employment opportunity rights. See Complaint in Gonzalez et al v. Brady et al., Civ. Action No. 89-0120 (D.D.C.) (hereinafter "Gonzalez Complaint") attached hereto as Exhibit 9 at 14-19.

The Gonzalez class administrative charge was filed on May 20, 1988. It was filed in federal court in January 18, 1989 and was not resolved until February 26, 1998. See Gonzalez et al. Docket sheet, attached hereto as Exhibit 10. The Contreras class administrative charge was filed on March 23, 1995 and hence overlapped the Gonzalez class action. Under the American Pipe tolling doctrine, claims relating to assignments, training, promotions, discipline, awards and language use are tolled for all Special Agents

who were members of the Gonzalez class up until the present time because of the subsequent initiation of the Contreras class action. In other words, the Gonzales class action tolled the claims of these putative members until at least 1998, but in the interim the Contreras action was filed, these claims are preserved to the present.[5]

In United Airlines v. McDonald, 432 U.S. 385 (1977), the Supreme Court held that the American Pipe tolling doctrine applies until the final disposition of the class allegations. In that case, the district court denied class certification and the case proceeded for several years until it was settled. After the settlement, a putative class member attempted to intervene in order to appeal the denial of class certification. The Supreme Court held that such intervention was proper and that the statute of limitations was tolled through the entire lawsuit, so that a new named plaintiff could appeal the prior denial of class certification.

[5] In addition, such pre-1995 claims may be preserved as a continuing violation or pursuant to equitable estoppel. The U.S. Supreme Court limited the scope of continuing violations doctrine in Natl' R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The Court explicitly noted that it did not consider the timely filing question with regard to class-wide "pattern-or-practice" claims under Int'l Bhd. Of Teamsters, 431 U.S. 324 (1977). Id. at 115, n.9 Thus, the continuing violation theory with respect to pattern-or-practice cases continues to remain viable. See Lyons et al. v. England, 2002 U.S. App. LEXIS 21055 at *24, n.8. (October 9, 2002) ("noting that question of how Title VII's filing deadlines should be applied to pattern-or-practice claims based on a series of discriminatory acts, some of which occurred outside the limitations period, has been left unanswered by the [Supreme] Court."). There also are strong indications that equitable estoppel may apply to some of these claims, because of systematic retaliation in the Customs Service. Former Assistant Commission Walter Biondi testified that Customs Service Commissioner George Weise told him about a meeting in December 1996 or January 1997 with then Treasury Undersecretary for Enforcement Raymond Kelly and Treasury Deputy Assistant Secretary Elizabeth Bresee. At this meeting, Undersecretary Kelly gave orders that "Anybody who filed an EEO complaint against their agency is a disloyal employee, should be shown no favor, and treated accordingly." See Biondi Deposition excerpts, attached hereto as Exhibit 11 at 98:10-99:16. Portions of a Customs 1995 EEO Task Force Report also reveal that "there was a broad based concern in the Office of Investigations workforce that filing an EEO complaint will adversely affect an employee's career and subject her/him to retaliation." "Fear of retaliation was raised as an issue in 55% of the interviews conducted, and was judged a critical issue by 43% of the employees in those interviews." "The survey asked the respondents if they thought they would be labeled a troublemaker and suffer career damage if they filed a grievance or discrimination complaint. Nearly, 74% (1,752 out of 2,384) of the employees responding to the question indicated that they would be adversely affected." See Customs 1995 EEO Task Force Report (hereinafter "1995 EEO Task Force Report"), attached hereto as Exhibit 12 at 54.

III. ADVERSE ACTIONS

A. Plaintiffs' Need Not Establish "Adverse Actions" In A Pattern & Practice Case

Defendants maintain that Plaintiffs' discrimination claims relating to assignments, lateral transfers, undercover and other undesirable assignments, training, and discipline are not actionable under Title VII because they do not rise to the level of "adverse employment actions," as that term is defined in Brown v. Brody, 199 F.3d 446 (D.C. Cir. 1999). See Defendants' Memorandum at 30-34, 36-38, 41-43, 49-52.

Brown held that in individual disparate treatment cases, federal employees must show that they have suffered an adverse action in order to establish a prima facie case of discrimination.[6] Defendants seek to extend that holding to encompass pattern and practice class action cases. Notably, Defendants are unable to cite a single case from any court that supports this conclusion. Indeed, Brown itself calls into question the Defendants' entire position in this regard for class cases.

In Brown, the plaintiff argued that any sort of personnel action that is undertaken by a federal employer for a discriminatory reason is actionable under Title VII. For support, the Plaintiff pointed to the following passage in Palmer v. Schultz, 815 F.3d 84, 97-98 (D.C. Cir. 1987), which is equally applicable in the case at hand:

> A plaintiff may bring a Title VII claim for alleged discrimination with respect to any employment decision by an agency of the federal government. The statute itself states that "all personnel actions affecting employees or Applicants for employment . . . shall be made free from any discrimination based on [race, color, religion, sex or national origin]." 42 U.S.C. §2000e-16[(a)].
>
> [This language covers] "all personnel actions" [based on race, color, religion, sex, or national origin] regardless of whether the personnel action affects promotions or causes other tangible or economic loss.

[6] A tangible employment action constitutes a significant change in employment status such as hiring, firing, failing to promote, reassignment with different responsibilities or a decision causing a significant change in benefits. Brown, 199 F.3d at 456.

The Brown court noted that Palmer's language appeared to conflict with Mitchell v. Baldridge, 759 F.2d 80 (D.C. Cir. 1985), and McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984), and other cases in the circuit. Brown at 453. The Court then reconciled Palmer with its other decisions. Id. at 453-54. The Court explained that unlike Palmer, but like Mitchell and McKenna, Brown's claim was an individual disparate treatment claim rather than a pattern or practice claim. The "very different" nature of the claim in Palmer placed in context the quoted language at issue. As a result, the Brown court carefully limited its holding to individual disparate treatment plaintiffs, such as Brown, finding that they must show an adverse personnel action in order to establish a prima facie case under the McDonnell Douglas framework. Id. at 455.

The Brown court recognized that pattern or practice cases are different than individual cases. While the key inquiry in an individual's case is the reason for a particular employment action, "at the liability stage of a pattern or practice case the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." Cooper v. Federal Reserve Bank, 467 U.S. 867, 876 (1984) (quoting International Bhd. of Teamsters, 431 U.S. at 360 n.46) (emphasis added). Due to these manifest differences, the Brown court specifically left Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987), undisturbed as to class actions.

Claims relating to a pattern or practice of discrimination are not subject to Brown's limitations regarding adverse employment actions. Indeed, this makes perfect sense given that in most cases, the predominant form of relief in class action employment discrimination suits is injunctive relief. Here, Plaintiffs have sought certification under Rule 23(b)(2) and (b)(3). If class action plaintiffs could not even get to first base with

claims regarding discriminatory assignments, transfers, training or discipline, it would be impossible to secure reforms to these and other class-wide employment practices.

No matter what, class-wide discrimination in assignments, lateral transfers, undercover and other undesirable assignments, training, and discipline would certainly constitute evidence of a hostile work environment. See Brown, 199 F.3d at 454 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)) ("plaintiffs could maintain an action even in the absence of a tangible economic effect on employment if the work atmosphere" amounted to a hostile work environment). If, as Plaintiffs allege, the Defendants have engaged in a pattern and practice of requiring Hispanic Special Agent to undertake dangerous undercover assignments, dead-end assignments or unwanted transfers to undesirable locations, members of the class would suffer the effects of a hostile environment, even if there were not immediately ascertainable economic harm. Thus, even if the Court were to determine that such employment practices were not cognizable under Brown, evidence of those claims is relevant to and supports the existence of a hostile environment claim.

In addition to the non-applicability of Brown to pattern and practice cases, the Defendants are estopped from arguing that assignments, lateral transfers, undercover and other undesirable assignments, training, and discipline are not adverse actions because they had previously agreed in the administrative proceedings that such employment actions were adverse actions. See December 21, 2002 Order, attached as Exhibit 5 at 2. (noting "the parties also agree that each of the five alleged actions (training, assignments, awards, discipline and promotion) comprise adverse actions.").

In any event, the determination of whether any particular challenged employment practice is an "adverse personnel action" is a material disputed issue of fact as demonstrated below.

B. The Specific Class Claims Are Adverse Actions In Any Event

1. Assignments and Lateral Transfers:

Assignments and lateral transfers are adverse personnel actions because they affect the ability of Special Agents to be promoted or to obtain locality pay. Plaintiffs require additional discovery on these issues before they can further respond to this portion of the Defendants' motion. See, Rule 56(f) Declaration of David J. Shaffer at __. Previously, Defendants refused to produce a 30(b)(6) witness on the documents and databases relating to these subjects. Plaintiffs have filed a motion to obtain this discovery, but will require additional discovery on the substance of these practices. See Plaintiffs' Motion for an Order to Direct Defendants and their Counsel to Preserve Documents and to Compel Discovery.

2. Undercover and other Undesirable Assignments:

Undercover assignments are adverse employment actions because they are dangerous and can negatively impact the career development of Special Agents. See, e.g. Segar v. Civiletti, 508 F. Supp. 690, 713 (D.D.C. 1981) (finding disproportionate assignment to undercover work subjected African-American Drug Enforcement Agents to greater dangers and hardships, precluded obtaining experience necessary for promotion, teaches limited range of skills, and impairs ability to remain current with administrative duties); Stross v. Michigan Department of Corrections, 250 F.3d 336, 342 (6th Cir. 2001) (holding lateral transfer in prison an adverse action if it would be

objectively intolerable to a reasonable person). Additionally, John Magaw, who served as Director of the Bureau of Alcohol, Tobacco and Firearms ("BATF") and the United States Secret Service, testified before Congress that assignments to undercover work prevented female and minority agents from getting the proper training to compete for promotions. See Relevant excerpts of John Magaw Testimony, Transcript of Senate Judiciary Committee Hearings on Federal Law Enforcement and the Good Ol' Boys Round, July 21, 1995, attached hereto as Exhibit 14 at 20-21.

Undercover, as well as Title III wiretap work involving language translation and tape transcription duties are not as highly valued for promotion as other duties. The inordinate amount of undercover and Spanish language related duties has affected the ability of Hispanic Agents to obtain the diverse experiences necessary for equal consideration for promotion. See Contreras Declaration, Exhibit 1 at ¶15.

In addition, Special Agent John Yera who was paralyzed from a gunshot wound during an undercover operation, submitted a declaration attesting to the fact that undercover work is dangerous and not career enhancing.[7] See Declaration of Special Agent John Yera, attached hereto as Exhibit 15. According to Agent Yera, Hispanic Agents are assigned undercover work, especially so called "casual" undercover without training and they are often not provided with adequate backup or support. Id. at ¶15. Undercover work is not career enhancing because the undercover agent cannot serve as

[7] The dangerousness of undercover work was confirmed by Jimmy Gurule, the Undersecretary for Enforcement for the Department of Treasury. In a recent speech to the Hispanic American Police Commanders Association ("HAPCOA"), he saluted Hispanic Americans for their contributions to law enforcement and specifically singled out two Hispanic Agents who made the ultimate sacrifice. See HAPCO Speech of Jimmy Gurule (hereinafter "Jimmy Gurule HAPCOA Speech"), attached hereto as Exhibit 16 at 1-2. One was BATF Agent Ariel Rios who was murdered on an undercover assignment when a drug cartel discovered his true identity. The BATF building was later named in honor of Special Agent Rios. The other was DEA Agent Enrique Camarena who was kidnapped, tortured and murdered by one of the drug cartels and a local police officer in Guadalajara, Mexico.

the "case agent," only the "case agent" receives primary credit for any seizures or arrests that result from an undercover operation. Id. at ¶4.

Defendants rely solely on the testimony of Mr. Paul Kilcoyne as to their arguments regarding undercover. However, there are significant limitations and deficiencies to Mr. Kilcoyne's knowledge of Defendants' undercover policies, practices and procedures. In a recent 30(b)(6) deposition, Kilcoyne testified that his knowledge of the program goes only from July 2001 to approximately November or December 2002. See Kilcoyne Deposition excerpts, attached hereto as Exhibit 17, at 43:19-44:7. He also testified that he had no knowledge about any documents prior to July 2001 used in the Customs undercover program. See, id. at 8-10. Since Mr. Kilcoyne was the Defendants' 30(b)(6) witness, this means that the Defendants have no such knowledge and Plaintiffs are entitled to an adverse inference on this issue.

Mr. Kilcoyne testified that there are no records in covert operations kept on "casual" undercover assignments, but there may be in a Report of Investigation. See, id. at 17:11-14. He testified (and therefore so did the Defendants) that he did not have any knowledge about the use of undercover agents in Internal Affairs. See, id. at 17:18-21. Mr. Kilcoyne testified that did not know if there were documents showing when someone opted out of undercover training and that covert operations did not have any documents that showed agents opted out of an undercover assignment due to safety concerns. See, id. at 21:16-21; 27:11-14. Mr. Kilcoyne testified that he was not aware of any documents that showed that performing undercover work was career enhancing. See, id. at 32:6-9. Again, Plaintiffs are entitled to an adverse inference on these issues.

Plaintiffs submit that they have submitted sufficient evidence to defeat Defendants' Motion for Summary Judgment with respect to undercover assignments or that Defendants' lack of knowledge entitles them to an adverse inference in their favor. However, to the extent that Plaintiffs have not met that burden, Plaintiffs request further discovery pursuant to Rule 56(f). See, Rule 56(f) Declaration of David J. Shaffer at 13.

Defendants have refused to produce 30(b)(6) witnesses as to documents and databases pertaining to Title III wiretap work, tape translation duties or other assignments involving Spanish language duties. Such refusal is the subject of Plaintiffs' pending motion. See Plaintiffs' Motion for an Order to Direct Defendants and their Counsel to Preserve Documents and to Compel Discovery. Plaintiffs require this discovery as well as discovery on the substance of those issues, before they can respond adequately to this portion of the Defendants' motion. See, Rule 56(f) Declaration of David J. Shaffer at 13.

3. Training:

With regard to the denial of training, Plaintiffs require additional discovery on this issue before they can respond adequately to this portion of Defendants' motion. See, Rule 56(f) Declaration of David J. Shaffer at 13. Moreover, Defendants' 30(b)(6) witness testified that she knew of no documents connecting training with the Merit Promotion Plan for promotion. See Lynne Smith Deposition excerpts, attached hereto as Exhibit 23 at 17:9-14. She also lacked any knowledge of the training database, except that it is not complete prior to 1999 or 2000. Id. at 28:5-22. She lacked knowledge of any policies prior to 2000. Id. at 43:12-16. In any event, training is a vital aspect of promotability and denial of training impacts a Special Agent's career and effectiveness,

which also impacts performance evaluations. All of these are career-enhancing opportunities and are therefore adverse actions.

Defendants also allege that Plaintiffs cannot state a claim for relief regarding Contreras' repeated denials of attendance at the Customs National Hispanic Association Conferences, which interfered with his ability to organize and prosecute this case and receive training that was provided those conferences. See Contreras Declaration, Exhibit 1 at ¶¶13-14. This action is retaliatory, as well, since other minority Special Agents who did not have class actions pending against the agency were permitted to attend minority issues conferences.

4. Discipline:

With regard to discrimination in disciplinary actions, Plaintiffs require discovery on this issue before they can respond adequately to this portion of Defendant's motion. See Rule 56(f) Declaration of David J. Shaffer at 13. In any event, the admissions of Defendants create material issues of fact regarding this issue. The Customs Services' own Blue Ribbon Panel Report found that "the program has allowed Customs employees under proposed discipline or performance action to circumvent established channels for handing such actions, effectively negating appropriate personnel action." See Blue Ribbon Panel Report, attached hereto as Exhibit 21 at 27. It also found that "[a] widespread perception exists that discipline has been unevenly applied within the Office of Enforcement, partially as a result of a protective system employed by various 'old-boy' networks." Id. at 27. Further findings on this issue are set forth in Section IV below. In total, however, they reflect a completely dysfunctional discipline system.

In addition, as set forth in Plaintiffs' discovery motion, discipline review panel briefing documents were shredded to prevent third parties from obtaining them. See Mary Yonkers Deposition excerpts, attached hereto as Exhibit 22 at 17:8-12; 19:14-20:8. Plaintiffs' Memorandum in Support of Motion for an Order Directing Defendants and their Counsel to Preserve Documents. Moreover, the Treasury Inspector General found that the discipline database (DAATS) was found to be "inaccurate and incomplete." See Treasury IG Integrity Oversight Review of the United States Customs Service (hereinafter "Treasury IG Report"), attached hereto as Exhibit 20 at 17.

IV. PRIMA FACIE CASE

Defendants have argued that Plaintiffs have not pled or cannot prove a *prima* facie case with respect to non-selection of Miguel Contreras for an El Paso position and the denial of an award to Ruben Gonzalez. See Defendants' Memorandum at 28-30 and 52-54.

A. It Is Not Necessary To Plead A *Prima Facie* Case

With regard to pleading, Plaintiffs are not required to plead a *prima facie* case in the complaint under Swierkiewicz v. Soreman N.A., 534 U.S. 506 (2002). All that is required is that the pleading put the defendant on notice of the claim. The complaint gave the defendant sufficient notice under Fed. R. Civ. P. 8(a) and given that the EEOC certified the class and was preparing to try the case on its merits, it certainly must have concluded that the Defendant received sufficient notice of the claims..

B. Plaintiffs Require Discovery on *Prima Facie* Case

To the extent that a response is required regarding proof of a *prima facie* case, Plaintiffs' request discovery on these issues pursuant to Rule 56(f). See, Rule 56(f)

Declaration of David J. Shaffer at 13. Indeed, no *prima facie* case can be alleged due to the lack of comparators in many instances because Defendants testified in Ms. Zaner's 30(b)(6) deposition that the Merit System Promotion Plan was not always followed and that numerous exceptions existed. See Susan Zaner Deposition, attached hereto as Exhibit 24 at 68:18-69:4; 74:3-19. For example, she testified that key managerial positions were not included in the posting of applicant flow process that fed into the Merit System Promotion Plan. Id. at 36:10-19. Moreover, she testified that the vacancy announcement system ("VAACS") was not reliable. Id. at 37:9-13.

Thus, Plaintiffs need only allege that Contreras and other Hispanic Special Agents applied for positions for which they reasonably believed that they met the minimum qualifications and non-Hispanics were not selected to state a prima facie case in the total absence, because according to Defendants no uniform standard was observed for promotion.

C. DEFENDANTS MADE SIGNIFICANT ADMISSIONS IN THE CASE

Finally, there are significant admissions by Defendants substantiating the class allegations in the Complaint and further proving a prima facie class case. These include, but are not limited, to the following:

(1.) BLUE RIBBON PANEL REPORT

On June 3, 1991, the Commissioner of Customs convened a Blue Ribbon Panel and requested a full and complete examination of allegations of corruption and mismanagement in the Southwest Region of the Service. See Blue Ribbon Panel Report, Exhibit 21. The report stated:

> The Panel focused its inquiry on the Southwest Region, particularly the Enforcement of Internal Affairs functions. Inspection and Control and other Customs components were not accorded the same scrutiny. Although the complexities of the Customs organization and mission preclude the applicability of every finding to every situation, the

> implications of our findings and recommendations can be applied to the entire Customs Service. On several occasions, the Panel was told that the circumstances that precipitated the unacceptable situation in the Southwest Region could be attributed to a unique and unfortunate combination of events and personalities. The Blue Ribbon Panel rejects this explanation. Instead, we found fundamental deficiencies in the management systems that were originally intended to safeguard the Customs Service.
>
> The problems encountered in the Southwest Region are symptomatic of the rapid growth of the Customs Service in the 1980's, which outpace the capacity of management systems to effectively support the organization. Managers were forced to solve problems on an ad hoc basis and in doing so, their solutions depended in part upon various interpersonal networks (referred to in this report as "old boy" networks). As a result, allegiances developed among persons in Customs rather than to the Customs Service as an institution. The Panel's recommendations are designed to reassert national authority and control, to eradicate the conditions that caused a "Balkanization" of the Customs Service.
>
> The findings of this report should be considered separate and apart form its recommendations. The findings are based on over 150 in-depth briefings and interviews with kef Federal, State and local law enforcement officials in Washington and in the Southwest. This process also included extensive and candid discussions with U.S. Customs managers, supervisors and employees. The findings represent the unanimous view of the Panel.
>
> In conclusion, the Panel's findings cannot be mitigated or dismissed. They represent the unanimous opinion of its members.

Many of the findings are particularly relevant here, for example:

(a) INTEGRITY

- Finding 4: Internal Affairs failed in its mission to fully investigate and resolve allegations of corruption.

- Finding 5: Internal Affairs consciously elected not to investigate serious mismanagement issues which had directly contributed to the perception of corruption.

(b) MANAGEMENT

- Finding 1: There is no reliable, Servicewide system to identify, report, address, investigate or resolve questions of mismanagement. Customs lacks a coherent system to assess organizational management.

- Finding 2: There is a notable lack of accountability among managers at all levels for actions which are taken or which fail to be taken with respect to management issues. The systems to deal with ineffective supervisors and managers do not work.

- Finding 4: There was a general inability to take action due to the perception that personal relationships were more important than organizational considerations. Individuals were characterized by their loyalty to different managers, rather than by institutional loyalty.

  -Managers and supervisors felt that they were unable to take action on numerous problems throughout the Southwest Regional Office of Enforcement due to the various "old boy" networks, and "connections."

- Finding 6: There is a lack of honest, thorough communication on serious management and performance problems. Employees ranging from senior managers to lower level employees indicate that they were never told "what they did was wrong".

- Finding 7: As a result of the networks of personal relationships, strained relationships, and ineffective communication, respect for and the authority of managers at every level were diminished. Performance problems could not be appropriately addressed.

  -Supervisors and managers whose performance was considered inadequate or whose overall demeanor was unacceptable went uncounseled.

  -"Problems" were addressed by reassignments of individuals without providing the specific or honest rationale that prompted the move. Directed reassignments became a normal corrective action rather than the exception.

-Some of these reassignments appeared to employees as punitive and/or retaliatory.

-On other occasions, "special assistant" positions (non-supervisory) were established for individuals, leaving them in place geographically. This not only failed to resolve the reassigned employee's status and future, but also crated the appearance of favoritism.

(c) OFFICE OF ENFORCEMENT

- Finding 1: The Panel found personnel at every level in the Southwest Office of Enforcement neither accept responsibility for managerial deficiencies nor are held accountable for their actions. The absence of a clear line of authority contributes to the problem.

- Finding 2: No career path exists in the Office of Enforcement, the net effect of which is to inhibit professional development. The current agent mobility policy is inconsistently applied and has been used more to punish or reward than to enhance professional development.

- Finding 3: The Customs Service recruitment policy that permits the employment and assignment of personnel to their home towns encourages vulnerability to and perceptions of corruption. It promotes loyalty to persons rather than the institution. This hiring policy also perpetuates "old boy" networks that work to the detriment of the Customs Service.

- Finding 4: In some instances, supervisory and managerial selections were made without consideration of supervisory potential and were based more upon personal favoritism than professional qualifications.

- Finding 5: Minority employees are largely recruited from local areas in which they are to be employed. Because there are insufficient numbers of minorities, there is a tendency to focus these employees in areas were their language skills are needed, such as undercover assignments and as monitors for Title I investigations. This limits their exposure to a wider range of enforcement operations.

- Finding 6: Minority employees are not being aggressively encouraged to compete for supervisory promotions.

- Finding 8: First line supervisors are often inexperienced and lack proper training.

- Finding 9: OE office inspections were clearly insufficient in that they did not focus on management issues and did not provide for follow-up to correct noted deficiencies.

- Finding 10: The Panel found instances where ratings of performance bore no resemblance to actual performance.

(d) OFFICE OF INTERNAL AFFAIRS

- Finding 1: IA did not adequately address serious and continuing allegations against Customs Service managers, thus perpetuating perceptions of mismanagement and corruption.

- Finding 2: The Internal Affairs policy that referred all non-criminal misconduct issues back to management for investigation permitted misconduct allegations to remain unresolved. Unacceptable conduct and/or management actions were minimized. It also contributed to a generalized perception and in some cases the reality that IA does not act independently of management.

- Finding 3: IA failed to review and monitor certain investigations to misconduct that were conducted by management, contributing to the appearance (and in some cases the reality) that managers take arbitrary actions against selected Customs personnel.

- Finding 4: Customs personnel (including managers) in the Southwest Region did not understand Customs policy for reporting allegations of corruption and misconduct.

- Finding 5: AI's investigative procedures did not ensure timely and complete investigations that could provide management with clear results or permit final closure on critical issues.

- Finding 6: In key cases reviewed by the Panel, neither the targets of the allegations nor supervisory personnel directly associated were interviewed by IA.

- Finding 7: Because of the failure to conclude investigations, employees who were targets of allegations of serious misconduct and/or perceived integrity violators remain under a cloud of suspicion.

(e) TRAINING

- Finding 1: Customs agents operating on the Southwest border need special attention to unique training requirements, technical law enforcement skills, Spanish language proficiency, emphasis on increased vulnerability to integrity concerns, and rigid adherence to constitutional and ethical standards.

- Finding 2: There is no formalized management training or continued in-service supervisory training program for supervisory personnel.

- Finding 3: Middle-level supervisors lacked the ability to effectively manage subordinate agents because they themselves lacked necessary leadership skills and investigative experience.

- Finding 4: New agents lack proper supervision in investigations and case management.

- Finding 5: Service-wide ethical and professional standards are inadequately addressed by existing training programs. Service-wide standards are also undermined by parochial perspectives and allegiances to "old boy" networks. Existing training programs do not adequately address this shortfall.

(vi) DISCIPLINE

- Finding 1: A widespread perception exists that discipline has been unevenly applied within the regional Office of Enforcement, partially as the result of a protection system employed by various "old boy" networks.

- Finding 2: There was an informal system within OE in which employees could be subject to "disguised" disciplinary actions such as punitive details or transfers as a result of disagreements between supervisors and employees.

- Finding 3: The system did not mandate that all incidents of misconduct be report to Internal Affairs, allowing managers and supervisors autonomy to make the determination as to whether acts of misconduct warranted investigation and action.

- Finding 4: The system which managers investigate non-criminal misconduct does not contain sufficient safeguards to prevent managers from investigating incidents within their chain of command, calling into question the objectivity of the inquiry. At the same time, the use of regional staff members to investigate incidents in SAC office has a negative effect on working relationships.

(2.) THE GOOD O' BOY ROUNDUP REPORT

On July 11, 1995, a newspaper article appeared on the front page of the Washington Times entitled "Racist ways die hard at Lawmen's retreat—Annual 'Good O'Boys Roundup' cited as evidence of 'Klan Attitude' at ATF." See Jerry Seper, Racist ways die hard at Lawmen's retreat, Washington Times, July 11, 1995. The article detailed allegations of racist misconduct by personnel of the BATF and other federal law enforcement agencies at an annual retreat outside Ocoee, Tennessee. The next day WJLA, channel 7, a local Washington television station of ABC aired an investigative series, featuring a videotape that showed events at the Roundup. The tape was shocking. It showed a "Nigger check point" sign at which, ostensibly, cars were checked to determine whether blacks were trying to attend the Roundup. Another sign asked, "Any niggers in that car?" There were also Confederate flags posted at the event.

On July 21, 1995, the Senate Judiciary Committee convened hearings regarding the participation of federal law enforcement personnel in the "Good Ol' Boys Roundup." In his testimony, Bureau of Alcohol, Tobacco and Firearms ("BATF") Director John

Magaw, explained that the event was organized by former Resident Agent-in-Charge Gene Rightmyer of the BATF Office in Knoxville, Tennessee. He acknowledged that racist activity had taken place at the Roundup every year it occurred since 1985. Director Magaw described to the Committee some of the activities at the Roundup, including a skit that was put on in which a person dressed as a Klu Klux Klansman simulated performing sodomy on a person with a blackened face.

The public outrage over the Roundup fueled intensive settlement negotiations in a racial discrimination class action against BATF by its African-American Special Agents and a proposed Settlement Agreement was reached. It was submitted to the Court and was granted preliminary approval on July 9, 1996. See Stewart et al. v. Rubin, 948 F.Supp.1077 (D.D.C. 1996).

Robert Rubin, the Secretary of Treasury acknowledged significant involvement by Customs officers in Senate testimony on the Good O' Boy Roundup Report, including 13 Customs Officers. See Statement of Secretary Rubin, attached hereto as Exhibit 18 at 7. Yet, the Chair of the Citizens' Review Panel, Professor Dorsen, complained that the Panel was not permitted to review the "hundreds" of Memoranda of Investigation and that they could not, therefore, "ascertain" whether they supported Treasury's Report and whether the investigation was conducted properly. See Professor Norman Dorsen Letter, attached hereto as Exhibit 19 at 4.

(3.) 1995 EEO TASK FORCE REPORT

Although there are numerous matters on which Plaintiffs require discovery, Defendants' 1995 EEO Task Force Study, Exhibit 12, provides some of the best examples:

- 62% of minority men and 54% of minority women believe they had hit a road block [as a Customs employee]. Many of the reasons given were employees not playing 'office politics', whistleblower retaliation, "not being a part of the "Good O' Boys" network, and lack of objectivity in the selection process.

- The Study found that the factors having the most negative effect on chances for promotion were gender, age and race/color/national origin.

- Of the 266 respondents who were planning to leave Customs, one of the most common reasons cited was to "get away from a discriminatory work environment."

- 23% of minorities, compared to 14% of non-minorities, reported that they had been asked to take hardship post.

- 32% of Hispanics, and 10% of Blacks, have been asked to take a hardship post.

- 74% of the respondents agreed with the statement that, in Customs "people are promoted because of who they know."

- 53% of minorities, compared to 40% of non-minorities, reported doing at least some undercover work in the past two years.

- 67% of Hispanics reported doing at least some undercover work in the past two years.

- 13% of Hispanics, double the amount of any other group, reported spending more than one-quarter of their time doing undercover work.

- Of those who have done undercover work, 18% believed the assignment had a negative effect on their career.

- Although a total of only 28% of the total respondents said they had been subject to an IA investigation or inquiry, 37% of Hispanics were subject to such investigation or inquiry.

- 24% of minorities and 14% of non-minorities said the inquiry/investigation affected promotion, reassignment, career-enhancing assignments and/or training opportunities.

- 49% of the respondents reported having experienced discrimination with respect to hiring, promotion, reassignment, career-enhancing assignments or training in the last three years.

- 27% indicated they chose not to file a complaint because of the fear of retaliation; 24% did not file because they felt it was not worth the effort.

- 74% of the respondents said that filing a grievance or complaint of discrimination would adversely affect their careers.

- 60% of whites believe that EEO is "something that is just designed to benefit minorities and women."

- 40% of respondents do not believe that discrimination claims are resolved in a fair and just manner.

- 65% of Hispanics believe their group has made little or no progress in the last 3 years.

- There were no female or Hispanics employed in the Senior Executive Service ("SES") within the Office of Investigations. Id. at 47.

- The report referenced the three class actions discussed in this brief, but stated "there have been no structured efforts to mediate these complaints." Id. at 81.

(4.) INTEGRITY OVERSIGHT REVIEW AND SHREDDING

In November of 2000, the Treasury Department's Inspector General found that the "USCS Management did not always administer discipline in accordance with the Table of Offenses and Penalties," and that information in its discipline database ("DAATS") "was not always accurate and, in many instances,

incomplete." See Treasury IG Report, Exhibit 20 at 16-17. Ms. Yonkers confirmed that Disciplinary Review Board ("DRB") briefing papers were shredded. See Yonkers Testimony, Exhibit 22 at 14:6-20. She further testified that when this was uncovered, Defendants ceased creating such documents altogether. See Id. at 18:15-19:3. All of this conduct should create an inference in Plaintiffs' favor, that is more than sufficient to overcome Defendants' Motion for Summary Judgment. See, McCormick on Evidence at Volume 2 at 264 (4th ed. 1992).

V. PLAINTIFFS REQUEST PERMISSION TO FILE A SUPPLEMENTAL COMPLAINT

To the extent, if any, that this Court determines Plaintiffs' Complaint is inadequate on any of the grounds set forth in Defendants' Motion, Plaintiffs respectfully request permission to file a Motion for Leave to File an Amended and/or Supplemental Complaint under Fed.R.Civ.P. 15(c) and (d). Plaintiffs anticipate filing for Leave to File a Supplemental Complaint under Rule 15(d) regarding information that they have learned since the filing of the original complaint, relating in part, to the effect of the Gonzalez class action as well other evidence they have discovered in the 30(b)(6) depositions and other sources.

Respectfully submitted,

_____/s/_____
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