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APPEAL NO. 08-1247

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUINTON BROWN, JASON GUY, RAMON ROANE, ALVIN SIMMONS, SHELDON SINGLETARY, GERALD WHITE, and JACOB RAVENELL, individually and on behalf of the class they seek to represent,

Plaintiffs-Appellants,

v.

NUCOR CORPORATION and NUCOR STEEL-BERKELEY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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ARGUMENT IN REPLY

I. NUCOR'S HOSTILE ENVIRONMENT ARGUMENT RESTS ON AN ERROR OF LAW

A. Nucor Does Not Answer The Principal Error Of Law At Issue In This Appeal

Nucor's argument is dependent upon the error of law at the core of the district court's decision. It argues that the court properly exercised its discretion by dividing the hostile environment experienced by each class member into "plant-wide" and "department" components, but never explains how this is consistent with the Supreme Court's repeated admonition that "the actionable wrong is the environment, not the individual acts that, taken together, create the environment." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2175 (2007) (citing *National R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-116, 118 (2002)). *Morgan* and similar precedent are never mentioned in the defendants' brief.

"Employers may not turn a practice that *Morgan* deems unitary into two or more distinct practices by calling each subdivision of the workplace a separate 'team.'" *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 768 (7th Cir. 2007) (Easterbrook, J.). The latter case explained that "[t]he Supreme Court held in [*Morgan*] that a hostile working environment is a single unlawful practice under Title VII." *Id.* The Sixth Circuit has also explained the error of law embedded in

arguments like that now advanced by Nucor: "In essence, under this view, each minority employee would have to show that the employer had an intent specifically to harass her, and could not proceed on a theory that the employer had a general intent to harass all employees of the minority group." *Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999).

The abuse of discretion standard of review does not permit the district court to premise its decision on an error of law. *A Helping Hand LLC v. Baltimore County Md.*, 515 F.2d 356, 370 (4th Cir. 2006) ("An error or law constitutes an abuse of discretion."). There is no dispute that the district court split each class member's environment in half. The court found that "[a]lthough the [plant-wide] acts were arguably experienced by all African-American employees working at the plant, they are only ***part*** of a class member's hostile work environment claim." JA8989 (emphasis added). This finding was correct in intimating that "department" and "plant-wide" events were "parts" of a single hostile environment, but the district court ultimately erred as a matter of law in somehow concluding that these "parts" of the same environment could be divided in two. The human mind does not divide perception of its environment in this manner. Confederate flags and racial slurs are no different when they occur in every department "plant-wide" than when they occur again in a given department. The "plant-wide racist acts" found by the district court

occur *in each department*, not in some mythical department-free zone in the plant. This is not a case in which class members were found to experience only a departmental hostile environment that varied from one department to another. The district court specifically found that all class members were affected by *both* a plant-wide and department environment. The court would not have found such hostility to be "plant-wide" if it were really limited to sporadic individuals in the manner argued by Nucor.

Once that legal error is set right, the argument about "department differences" fades away because such differences are only *part* of each class member's common plant-wide work environment found below — an environment that cannot be divided into separate parts as a matter of law.

B. Centralized Managerial Tolerance Fostered The Plant-Wide Hostile Environment Found Below, Creating A Common Issue Of Fact And Law

Nucor expresses no disagreement with the caselaw holding that a hostile environment should not be divided by department when there is a "systemic policy of tolerance by the company." POB at 28 (quoting *EEOC v. Burlington Medical Supplies, Inc.*, 536 F. Supp.2d 647 (E.D. Va. 2008)). The Seventh Circuit has recently held that:

> . . . hostile working conditions at a single place of employment are a single unlawful practice. Title VII

> creates responsibilities for "employers" as entities. Employers may not turn a practice that *Morgan* deems unitary into two or more distinct practices by calling each subdivision of the workplace a separate "team." Most employers — and Hill's Pet Nutrition is no exception — allow plant managers and human-relations departments to control working conditions plant-wide. When a single managerial staff or chain of command decides to permit the men in the workplace to make life miserable for the women, that is a single unlawful practice whether or not a particular woman moves from one team to another within the plant.

Bright, 510 F.3d at 768.

Such a "single management staff or chain of command" was established by the evidence below. Nucor's brief does not take issue with the fact that the plant's General Manager, Ladd Hall, "admitted that it was his responsibility to investigate and respond to racial harassment or discrimination." POB at 28 (citing JA1127,1003-1004,1015-1016,1044-1045,1054-1056,1070,1105-1106,1111-1112,1123-1124,8537-8560). Hall had sole discretion to decide whether to redress a given incident or to involve the department manager in the investigation or responsive decisionmaking. *Id.* Defendants' written Policy on investigating concerns about racial harassment states in bold italics that "***you should report such matters to: Personnel Supervisor or General Manager***." Nucor Employee Handbook at p. B-4 (JA8894) (emphasis in original). Hall never involved the department managers in such process. Not even one of the five department managers has been shown to have lifted a finger to redress

the racial hostility found to be occurring both plant-wide and in their department. This creates a centralized hostile environment of the kind described in *Bright, supra*, and similar cases. *See Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 386-387 (7th Cir. 2007); *Burlington Medical*, 536 F.Supp. 2d at 660; *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*,990 F.Supp. 1059, 1081 (C.D. Ill.1998).

C. The Named Plaintiffs Worked In Every Production Department And Sought Transfer Or Promotion To All Such Departments

Nucor repeatedly states that "six of the seven named plaintiffs worked in one department", but never responds to the fact that they also worked in four other production departments during the liability period. *See* POB at 8 & n.3 and 29 & n. 6; *see also* JA8539-8543,8551-8555. They additionally worked along side the employees of the two other departments — maintenance and shipping — who were stationed shoulder-to-shoulder with the plaintiffs in the same work area. *Id.* Only two of the seven named plaintiffs worked in just one department — Alvin Simmons and Gerald White. *Id.* Sixteen class members from six departments testified about the common plant-wide hostile environment they experienced. *Id.*; *see also* JA8986-8987,8994 (court listing "sixteen declarations and affidavits of African-American employees to prove the existence of a common practice of employment discrimination at the plant" and finding that "[n]inety-four African-American employees worked at the plant from 2001 to 2004").

Nucor also ignores the evidence of racial hostility reported to Nucor "by more than 50 African-American employees spread across all six departments of the plant." POB at 16 (citing JA1001-1004,8546,8511-8524). Those 50 or more employees described hundreds of racially hostile incidents of exactly the same character and type in every department — the same confederate flags, racial slurs, and racial graffiti on walls, bathrooms and across the plant-wide radio and e-mail system. *Id.*

The seven named plaintiffs also applied for transfer or promotion into all of the production departments. JA289,317,319,321,323,325-333,993-1072,8537-8560. The district court found that the named plaintiffs applied for and were denied promotional transfers to four different departments. JA477-478,486-488; POB at 8; JA289,317,319-320,333.

D. Any Individual Differences Would Not Be Relevant Until Stage II Of A Bifurcated Trial

To the extent that individual differences ever surface, they would not be relevant until Stage II of a bifurcated trial of the type that has been structured for this type of case. "At the initial, 'liability' stage of a pattern-or practice suit the [plaintiff class] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. * * * Without any further evidence from the [plaintiff], a court's finding of a pattern or practice justifies an

award of prospective relief." *Teamsters v. United States*, 431 U.S. 324, 360 (1977); *see also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984); *Franks v. Bowman*, 424 U.S. 747 (1976); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1299-1300 (8th Cir. 1999) (applying the pattern or practice holding in *Teamsters* and *Franks* to class hostile environment claims); POB at 25-26.

Plaintiffs have already shown that the majority of courts considering how to try a class hostile environment claim have held that individualized claims or evidence are not relevant at Stage I where the focus is on the classwide pattern or practice and request for declaratory or injunctive relief. POB at 25-26 (citing cases); *see e.g., Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 361 n.2, 362 (D. Md. 2004) ("The class-wide liability phase of a pattern or practice hostile environment claim merely requires objective proof of a hostile work environment; claims based on individual experiences are resolved in the remedial phase of the trial. * * * Evidence of the subjective experiences of each class member is not necessary to support class-wide liability; there must only be evidence that some class members experienced objectively severe and pervasive conduct."); *Mitsubishi*, 990 F. Supp. at 1076 (". . . to require subjective showings would needlessly conflate the proofs necessary to establish a pattern or practice with those necessary to establish individual liability for sexual harassment."); *Rodriguez v. Maricopa County*

Community College Dist., 2006 WL 89938 *6 - *7 (D. Az. 2006); *E.E.O.C. v. Dial Corp.*, 156 F. Supp. 2d 926, 946 (N.D. Ill. 2001); *Palmer v. Combined Ins. Co.*, 2003 WL 466065 * 4 (N.D. Ill. 2003).

II. THE DISTRICT COURT FOUND A "PLANT-WIDE" SUBJECTIVE PROMOTION PROCEDURE AND THAT NUCOR LACKS ANY OBJECTIVE SYSTEM TO EVALUATE PROMOTION APPLICANTS

A. Total Subjectivity Is Not Required To Establish A Common Question Of Law Or Fact

Nucor has not expressed disagreement with the decisions from this and other Circuits which have held that a subjective promotion procedure presents a common question of law and fact because it looks to the pattern or practice itself, not to individualized promotion decisions. POB at 35-37 (citing cases). Rather than distinguishing such authority, Nucor argues that "a class may only be certified if the promotions decisions were 'entirely subjective' or 'unfettered.'" DB at 29-30. The Supreme Court, however, has held that objective criteria are "entirely subjective" if they are combined subjectively: "However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 989 (1988). The district court found that "an objective system to evaluate applicants is lacking" at Nucor. JA8978. Dr. Buckley testified that even when a decisionmaker elected on his own to use an objective criteria, it was then

combined subjectively with other subjective criteria into a "gut feeling" of whom to promote. JA1515,1520. As explained in *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428, 332 & n.19 (D.C. 2002):

> Whether a particular manager uses objective criteria in making particular promotion decisions is irrelevant to the commonality analysis; instead, what is significant is that the determination of which criteria to use is left entirely to the individual manager. That is, although individual promotion decisions may in isolated cases be made based on some objective criteria, Sodexho's overall promotion practices remain entirely subjective, because the decision of whether to use objective criteria--and if so, which criteria to use--is a matter left to the discretion of the individual manager.

McReynolds, 208 F.R.D. at 442; *see also, Watson,* 487 U.S. at 989-990; *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 485 (D. Minn. 2003) ("[I]t is not necessary that a defendant employ absolutely no objective criteria in its decision making process."); *Anderson v. The Boeing Company*, 222 F.R.D. 521, 537 (N.D. OK. 2004); *Warren v. Xerox Corp.*, 2004 WL 1562884, *11 (E.D. N.Y. 2004).

Defendants cannot insulate themselves from class certification by merely adding objective factors to a selection procedure that is still largely subjective. Requiring total subjectivity would leave an entire body of racial discrimination, like that in *Watson* and *McReynolds*, with no means of being certified on a classwide basis.

Nucor mistakenly argues that *Falcon* intended that result by requiring promotions to be "entirely subjective" in order to be "common" for Rule 23 purposes. *Falcon*, however, involved only a ***promotion*** plaintiff trying to represent a ***hiring*** class, and it was only in this inapposite context that the Court stated in footnote 15 that such a class could be certified if hiring and promotions had a common subjective promotion procedure. *Id.* Here, the named plaintiffs seek to represent a promotion class, not a combined hiring and promotion class. The Eleventh Circuit has explained why the "entirely subjective" comment in *Falcon's* footnote 15 was merely *an example* of when an entirely subjective promotion procedure cannot be joined in the same class with a partly objective hiring procedure and *vice versa*, not a *requirement* that promotion procedures standing alone must be entirely subjective to satisfy Rule 23. *Griffin v. Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987); *see also Smith v. Nike Retail Services, Inc.*, 234 F.R.D. 648, 661 n.12 (N.D. Ill. 2006) (*"Falcon's* reference to 'entirely subjective decisionmaking processes' is not presented as a requirement, but only as part of a footnoted list of potential ways that a plaintiff might be able to satisfy commonality and typicality in such a situation."). "Defendant's interpretation would, in effect, eviscerate the 'entirely subjective' exception in footnote 15 of *Falcon,* because it would find commonality only in an entity in which . . . every decision was based on purely subjective criteria." *McReynolds,* 208 F.R.D. at 442

n.19; *see also*, *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983).

This Circuit has already considered *Falcon* in the context of a promotion procedure that did not involve "unfettered discretion" because the defendant "put substantial weight on prior work experience" and "discretion . . . was further limited by a 'same department/same shift' policy." *Lilly v. Harris Teeter Supermarket*, 720 F.2d 326, 334 (4th Cir. 1983). After discussing *Falcon* at some length, the Court held that eleven intervenors could represent a class challenging partly subjective/partly objective promotion procedures even though the original plaintiff could not do so because he had only been subject to an entirely subjective termination. *Id.* at 334 ("[W]e therefore conclude that the intervenors . . . were properly certified for that claim.").

Nucor concedes that the Supreme Court's decision in *Watson* does not require an "entirely subjective" procedure in order to prove *the merits* of a discrimination claim, but argues that this level of proof should still be required for purposes of class certification. DB at 31. Nucor cites *Bacon* from the Sixth Circuit, but that case never addresses why it would make sense to require *more proof* at the preliminary class certification stage of a case than will be necessary to prove the *merits* of the claim at trial under *Watson*. *Bacon's* categorical approach to Rule 23 is inconsistent with this Court's decision in *Lilly*, which held that *Falcon* establishes no categorical

requirements, but "[i]nstead . . . reiterated that each case must turn . . . upon its particular facts." *Lilly*, 720 F.2d at 333. *Bacon* misinterprets footnote 15 of *Falcon* as an iron-clad requirement of total subjectivity, rather than an *example* of when a *promotion* plaintiff may represent a *hiring* class.

B. An "Entirely Subjective" Promotion System Was Established By The Evidence And Findings Below

Nucor's "entirely subjective" standard was met in any event by the evidence from both parties. Defendants' decisionmakers each admitted that they were not required to follow any particular policy or criteria in promoting employees. JA1129,1721-1722,1725-1728,1734,1736,1739-1740,1742,1753,1758,1760,1787. Department managers and supervisors testified that they did not follow the criteria listed on the job postings for promotion (JA1727-1728,1739-1740,1787), that they cannot really say what criteria were followed (JA1725-1728,1734,1753,1760), and that what they considered was all just "in their heads" or "gut feelings" of whom to promote. JA1736,1742,1758; JA1516,1520. The district court found as a fact that "decision makers rely on subjective criteria", that "an objective system to evaluate applicants is lacking" (JA8978), and that "Nucor's plant-wide promotion procedure allowing primarily white managers and supervisors to rely on subjective criteria to select candidates for promotions is evidence probative of a plant-wide employment practice discriminating against African-American employees." JA9102.

This was enough to establish an "entirely subjective" and "unfettered" promotion process. Nucor argues that it also had "objective criteria", but it is undisputed that they were *applied subjectively*. JA1515-1520,8989,9102. *See e.g. Watson*, 487 U.S. at 989; *McReynolds*, 208 F.R.D. at 332 & n. 19.

Nucor is also mistaken in arguing that "subjectivity merely serves to emphasize the multiplicity of disparate decision makers." DB at 27. The decisionmakers were the five department managers, each of whom made decisions in conjunction with the plant's General Manager whom the district court found "must approve a written change of status form and then submit the . . . form to the personnel office." JA478-479;JA812-813;JA803-804.

III. STATISTICALLY SIGNIFICANT DISPARITIES IN PROMOTIONS WERE SHOWN TO EXIST

Nucor argues that the statistics showed no significant racial disparities in promotions, but plaintiffs' experts demonstrated the following:

- Black employees were 19.24% of the promotion applicants but only 7.94% of the promotees to the jobs Nucor deemed "similarly situated" — a difference that was -2.54 standard deviations "from what would be expected if race were neutral in the selection process." JA1162; POB at 12-13.

- The promotion rate for black applicants was only 36.2% of the rate of white applicants for the same jobs, far less than the 80% disparity recognized as significant proof of discrimination in the

enforcement agencies' Uniform Guidelines On Employee Selection Procedures. JA1162; 29 C.F.R. §1607.4D.

- Black employees were 38.2% of the qualified workforce for the promotions at issue, but only 7.9% of the employees actually promoted to such jobs, a difference that was -4.94 standard deviations from what would be expected if race were not a significant factor in such promotions. JA1163-1164,1154,1501-1513,1213-1215.

Plaintiffs did not rely upon these three statistics standing alone to establish a common question of fact and law under Rule 23, but presented them in combination with the evidence of a plant-wide culture of racial hostility, expert evidence of excessive and unnecessary subjectivity in promotions, direct and anecdotal evidence of racial stereotyping, and a common plant-wide promotion procedure controlled by a central plant manager and five department managers, all of whom were Caucasians with unfettered subjective discretion in making promotions. POB at 5-14, 37-38; *Dukes v. Wal-Mart*, 509 F.3d 1168, 1179-1183 (9th Cir. 2007).

A. No Precedent Is Cited For Ignoring Promotion Decisions By The Same Decisionmakers Merely Because Defendants Destroyed Their Application Records For Those Promotions

Nucor does not dispute that the 27 promotion decisions from 1999-2000 eliminated from the statistics below involved the very same decisionmakers, jobs, and departments as the promotions that were not eliminated from the statistical analysis.

POB at 41, 46-49. It cites no precedent, however, for *eliminating* relevant promotions within the limitations period rather than *replacing* the missing applicant data with one of the alternative benchmarks approved by this Circuit and the Supreme Court. *See* POB at 43-45. The Supreme Court has required that alternative forms of statistics be used whenever a court's preferred form of statistics "will be difficult if not impossible to ascertain." *Ward's Cove*, 490 U.S. at 650-651.

Courts following *Ward's Cove* have held that a district court errs as a matter of law when it continues to insist on a single form of statistical analysis once it has become problematic. For example, the Second Circuit has held that "it was error for the District Court to have rejected out of hand [plaintiff's] statistical analysis simply because it failed to conform to the *preferred* methodology described in *Wards Cove,* given the Supreme Court's express endorsement in that decision of alternative methodologies if the preferred statistics are "difficult" or "impossible" to obtain. " *Malave v. Potter*, 320 F.3d 321, 326-327 (2nd Cir. 2003); *see also McClain v. Lufkin Ind., Inc.*, 519 F.3d 264, 280 (5th Cir. 2008); *Carpenter v. The Boeing Co.*, 456 F.3d 1183, 1197 (10th Cir. 2006) ("Such perfection may be impossible to obtain. When reliable data regarding that pool are unavailable, a different population may be used if it adequately reflects the population of qualified persons."); *Trout v. Lehman,* 702 F.2d 1094, 1102 (D.C. Cir.1983) ("[P]laintiffs cannot legitimately be faulted for gaps

in their statistical analysis when the information necessary to close those gaps was possessed only by defendants and was not furnished either to plaintiffs or to the Court."); *Gomes v. AVCO Corp.*, 816 F.Supp. 131, 133 (D. Conn. 1993); Ramona L. Paetzold & Steven L. Willborn, THE STATISTICS OF DISCRIMINATION, §5.04 (2002) ("In some instances, where applicant data are not available, reliable, or are believed to be biased, and where statistical information regarding the labor market is difficult to ascertain, the general population might adequately reflect the population of qualified job applicants."); *see generally, Bell v. Environmental Protection Agency*, 232 F.3d 546, 553-554 (7th Cir. 2000) ("A valid statistical analysis must encompass the relevant labor market. * * * Our case law finds this type of labor market appropriate for statistical analysis.").

This Circuit has also applied the next-best available benchmark as a proxy for missing applicant percentages rather than just ignoring the relevant promotions altogether when applicant records have been destroyed. POB at 43-44 (citing Fourth Circuit precedent). Nucor's brief ignores such precedent except for *County of Fairfax*. It admits that in the latter case "this Court affirmed . . . use of census data in place of the pool of actual applicants", but then mistakenly argues that this only included "hiring" claims. DB at 39-40. The opening paragraph of the decision, however, plainly states that it involved "a pattern and practice . . . in recruitment,

hiring, *assignments and promotions.*" *County of Fairfax*, 629 F.2d at 936 (emphasis added); *see also id.* at 938 & 942. The court specifically noted that "extrapolated applicant flow data" could be used to show that "statistically significant disparities existed in a wide range of job categories" — a range that went well beyond just entry-level hiring opportunities. *Id.* at 936-937. The Court approved such "extrapolated applicant flow data" based on one year's applicant records as the application benchmark for three other years that had missing application records. *Id.*; *see also McClain*, 519 F.3d at 279-280 (citing Fourth Circuit precedent); *Moultrie v. Martin*, 690 F.2d 1078, 1082 (4th Cir. 1982) (using one year's data to extrapolate six year's disparity).

Nucor mistakenly argues that plaintiffs' expert admitted that it could not be known with certainty whether any black employees actually applied for the 1999-2000 promotions. What plaintiffs' expert actually said was much different — that it was a reasonable inference that black and white employees applied for those jobs at the same rate in 1999-2000 that they did in the next closest time period in 2001-2003. POB at 44 (citing evidence).[1] The standard text in this field states that "[w]here

[1] Nucor represents that "Plaintiffs' expert admitted this assumption skews the numbers towards a finding of disparate impact" (DB at 37), but it cites only a footnote from its own expert, Dr. Welch, not the plaintiffs' experts, Drs. Bradley and Fox. DB at 37 & n.127. Even the cited page from its own expert does not say anything about extrapolated applicant flow data "skew[ing] towards a finding of

actual applicant flow data are incomplete or flawed, courts have declined to apply the resulting statistical analysis" and "often look to 'potential applicant flow' data . . . drawn from general population data or some subset of the general population data (e.g. qualified labor market data)." Lindeman & Grossman, EMPLOYMENT DISCRIMINATION LAW, pp. 2310-2311; *see also id.* at 2290-2291 & n.77 (4th Ed. 2007).

B. Qualified Workforce Data Is Also A Second Proxy For Missing Applicant Percentages

Nucor does not address the considerable precedent for establishing promotion discrimination through "qualified workforce" benchmarks taken from the census for the type of jobs that Nucor fills by promotion. *Ward's Cove*, 490 U.S. at 650-651; *Bloomsburg Mills*, 773 F.2d at 568; *American National Bank*, 652 F.2d at 1195. The Supreme Court has held in the context of promotions that "[t]he 'proper comparison is between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.'" *Id.* (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 (1977)). There is "no requirement . . . that a statistical showing . . . must always be based on analysis of the characteristics of actual applicants." *Dothard v. Rawlinson*, 433 U.S. 321, 330

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disparate impact." *Id.*

(1977).

Rather than addressing such authority, Nucor argues, without citing any precedent, that "qualified workforce" statistics are "logically" limited to hiring cases because promotions are usually filled from within. This misunderstands *Ward's Cove*. Qualified workforce statistics replicate the probable *internal* qualified workforce for promotions by looking to the qualified workforce for those same promotion level jobs in the relevant external labor market. Nucor has not disputed that the "qualified workforce" data presented in this case was specifically limited to the types of jobs that Nucor fills by promotion, not hiring. *See* POB at 43 n.10; JA1161-1164. Nor has it argued any reason why the qualified workforce within its plant would be materially different than the surrounding labor market for the same jobs. The district court made no such finding, but found instead that "[t]he statistics are based on assumptions of the numbers **and skills** of the African-Americans living in the surrounding area and an estimate of the actual numbers . . . who bid on promotions in the plant", and that such assumptions "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant." JA8984-8985 (emphasis added). Assumptions are necessary with any form of statistical analysis, including actual applicant percentages which necessarily assume that the applicants are qualified. Nucor has not shown why "[t]he substitute

benchmark proffered by plaintiffs' experts [would not] involve fewer 'assumptions' than the district court's choice to simply ignore the 1999-2000 promotions." POB at 45.

C. The 80% Rule Is A Third Proxy Once Standard Deviation Analysis Has Been Undermined By The Elimination Of Relevant Promotions

The third benchmark presented as an alternative to eliminating the 1999-2000 promotions was the 80% rule standard of the federal enforcement agencies.[2] Nucor argues that the 80% rule is an unacceptable measure of discrimination even when there are obvious flaws with a standard deviation analysis. Virtually every Circuit, however, has held that the 80% rule may be used to establish racial discrimination.[3] The standard text on employment discrimination law states that "[c]ourts have applied various tests to determine statistical significance in promotion cases, including . . . the

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[2] The 80% rule is part of the federal enforcement agency's *Uniform Guidelines*, which courts have held are entitled to "great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

[3] *See e.g. Cotter v. City of Boston*, 323 F.3d 160, 170 (1st Cir. 2003); *Bushley v. N. Y. State Civ. Serv. Comm'n*, 733 F.2d 220, 225-226 (2nd Cir. 1984); *Wilmore v. City of Wilmington*, 699 F.2d, 667, 670-671 (3rd Cir. 1983); *Bunch v. Ballard*, 795 F.2d 384, 395 & n.12 (5th Cir. 1986); *U. S. v. City of Chicago*, 663 F.2d 1354, 1358 n.8 (7th Cir. 1981); *Firefighters Inst. v. City of St. Louis*. 616 F.2d 350, 356-357 (8th Cir. 1980); *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002); *Police Officers v. City of Columbus*, 644 F.Supp. 393, 432 n.13 (S.D. Ohio 1985), *aff'd* 916 F.2d 1092 (6th Cir. 1990); *Woodward v. Lehman*, 530 F.Supp. 139, 144-145 (D.S.C. 1982). *See generally, Connecticut v. Teal*, 457 U.S. 440 (1982).

four-fifths or 80% rule." Lindeman & Grossman, EMPLOYMENT DISCRIMINATION LAW, pp. 1160-1161, 2289 (4th ed. 2007); *Fickling v. New York State Dept. of Civ. Serv.*, 909 F.Supp. 185, 188 (S.D. N.Y. 1995) (describing that 80% rule as a "widely accepted benchmark for assessing disparate impact").

The district court noted that "the 80% rule is an accepted method to measure statistical results", but that it preferred standard deviation analysis as a "more reliable method." JA8985. That preference, however, was based on an error or law. Once the standard deviation analysis was compromised by the elimination of relevant promotions which artificially reduced significance from -2.54 to -1.47 deviations, the district court erred by continuing to exclude the 80% rule as an alternative statistical benchmark. Taken together with the results of the "extrapolated applicant flow" benchmark approved in *County of Fairfax* and the qualified workforce statistic approved in *Ward's Cove* and *Bloomsburg Mills*, the results of the 80% rule analysis provided sufficient statistical evidence for purposes of class certification.

Nucor is mistaken in arguing that 80% rule evidence is "inadmissible in this Circuit." DB at 15, 45-46. Neither case it cites supports that proposition. *Moultrie* did not address the 80% rule and involved a criminal grand jury pool, not a promotion case brought under Title VII. Nucor's other case, *Deshields*, is an unpublished opinion that is "disfavored" under Local Rule 32.1. It only held that "violation of the

[80%] rule does not ***alone*** establish a prima facie case of discrimination." *Deshields v. Baltimore Fire Dept.*, 1989 WL 100664 (4th Cir. 1989) (emphasis added). Both cases dealt only with the level of proof necessary to establish race discrimination *on the merits*, not the use of the 80% rule to establish commonality under Rule 23. DB at 45-46. Proof of commonality does not have to rise to the level of a *prima facie* case on the merits. The merits of a pattern-or-practice is proven through the totality of the evidence taken together, not in isolated pieces. *Teamsters*, 431 U.S. at 340.

D. The Elimination Of Relevant Promotions Arbitrarily Reduced The Odds For Detecting Racial Discrimination Even When It Exists

Nucor "concede[s] that . . . a decrease in the amount of data available for statistical analysis decrease a plaintiff's odds at showing statistical significance." DB at 33. It mistakenly argues, however, that it is not an abuse of discretion so long as the sample size was not "decreased to the point [it was] ***statistically impossible*** to detect disparate impact even if it existed." DB at 33 (defendant's emphasis). "Statistical impossibility" is not the legal standard. No precedent is cited for it, and an abuse of discretion can obviously occur by eliminating relevant promotions that artificially reduces statistical significance unnecessarily. POB at 41-45.

Nucor concedes that statistical significance was shown at -2.54 standard deviations *before* the 27 promotions for 1999-2000 were eliminated by the district court, but could not be shown after such elimination. It is mistaken in arguing,

however, that the district court "never 'segmented'" the data in this way and that it "thoroughly analyzed the full range of each of the plaintiffs' statistical analyses under Rule 23." DB at 32. The full range of statistics could never be presented below because of the gerrymandered data and the elimination of the 1999-2000 promotions. JA406-409; *see also* JA399,400,1161,1171; 23; POB at 47-49. Plaintiffs' expert submitted an extensive affidavit describing exactly why the elimination of promotions in the same jobs and departments, and with the same department manager decisionmaker, was "inadequate to allow proper statistics to be computed." JA399-400, 406-409,1161,1171,1501-1508.

E. Exclusion Of Post-Lawsuit Promotions Is Not "Disingenuous"

Plaintiffs' experts carefully explained why pre-lawsuit promotions are reliable and post-lawsuit promotions are not. JA1505. The district court credited that evidence, finding that "the most reliable statistics are those gathered from promotion data occurring before this action was filed in December 2003." JA8986 at n.4. It is non-sensical for Nucor to argue that the suspect post-lawsuit promotions should be *included* to make up for the district court's *exclusion* of the pre-lawsuit promotions. That *compounds* the problem by eliminating the most reliable pre-suit promotions and substituting the unreliable promotions from the post-suit time period. As plaintiffs have shown, the promotions in 1999-2000 were "the most probative of racial

discrimination because they were the only ones that occurred before EEOC Charges began to be filed in early 2001." POB at 45. Nucor does not contest this point except to say it was not argued below, which is obviously *untrue*.

Contrary to Nucor's argument, exclusion of post-lawsuit promotions does not indicate any belief that race discrimination ended at that time, but only that the gerrymandered promotions produced from the post-lawsuit period showed a suspiciously different pattern than the pre-lawsuit promotions. JA399-400,406-409,1161,1171.[4]

F. Rule 23(f) Permits Interlocutory Review Because The Error Of Allowing Nucor To Gerrymander The Promotion Data Caused Class Certification To Be Denied

The district court's denial of class certification was largely based on the small number of promotions that Nucor produced, and the resulting lack of statistical significance. This was not just a discovery issue, but a ground for denial of class certification. The district court's finding that "[t]he data demonstrates a disparity resulting in 1.48 standard deviations" is the direct product of the small number of

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[4] The plaintiffs in a separate case against Nucor's Arkansas plant did not exclude post-lawsuit promotions because, unlike the plant here, they did not appear to have been proportionally different from the pattern of pre-suit promotions. JA1501-1508. More importantly, Nucor was not allowed to gerrymander the Arkansas promotions based on its own view of which promotions it thought were "similarly situated." Unlike here, all promotions in the liability period were ordered produced in Arkansas.

promotions that Nucor was allowed to handpick for production. POB at 41-50. Rulings that become the basis for denial of class certification, or are otherwise embedded in the denial of class certification, are appealable under F. R. Civ. P. 23(f). *See e.g., In Re Lorazepam*, 289 F.3d 98, 108 (D.C. Cir. 2002).

Nucor does not dispute that it withheld several hundred promotions by the *same decisionmakers* in the *same jobs* and departments as the promotions it elected to produce for statistical analysis. POB at 46-50. It argues instead that this was permissible under *Ardrey v. UPS*, 798 F.2d 679, 682 (4th Cir. 1986). *Ardrey*, however, addressed only discovery for individual claims, not discovery or statistics for class certification. Class certification was bifurcated and then abandoned before appeal in *Ardrey*. *Id.*; *see* POB at 50. Nothing in *Ardrey* approves production of only *part* of the promotions made by a given decisionmaker.

Nucor has still not explained the basis upon which it choose just a few of the hundreds of promotions made by the same decisionmakers as the promotions it produced. POB at 46-50. Plaintiffs' experts showed that Nucor was allowed to pick and choose promotions "without any valid basis for distinguishing between the promotions produced and those withheld." POB at 47. Nucor's brief in this appeal still provides no answer to this riddle. The district court found that the named plaintiffs were denied promotions in four of the production departments, (JA477-

478,486-488), but still allowed Nucor to withhold several hundred promotion decisions made by those department managers. JA399-400,406-409,1161,1171, 1501-1508.

G. Plaintiffs Did Not Waive Appeal Of The Gerrymandered Data

Plaintiffs did not waive appeal of the small number of promotions considered by the district court in finding a lack of statistical significance. Nucor selectively misquotes plaintiffs' counsel's statement at the class certification hearing, making it appear that the only thing said was "[w]e don't think we need more discovery at the moment", when in fact such counsel argued that the plaintiffs had been forced to go forward with the truncated data when the district court repeatedly denied production of all the promotions by the same decisionmakers:

> Mr. Wiggins: * * * We, in fact, came back to you to get more discovery, and you said you wanted to stick to the similarly situated for the moment. That's three or four months ago.
>
> * * *
>
> * * * [W]e then had to go forward and prove similarity through the evidence we had. And we think we've done that.
>
> We think that that initial definition of similarly situated has proved to be much too narrow. What we now know is that the same decision makers for those jobs were the decision makers for the other jobs in those same departments.
>
> * * *
>
> So we believe that the initial definition has been shown to be too narrow. And that is based on that similarly

situated group alone.

> And we are asking the Court to include all the jobs that are under those same decision makers and those same departments, and not limit it to just this subset that the defendant carved out unilaterally at the discovery stage. We don't think we need more discovery at the moment, we are willing to stand on the record. But we do think we are allowed to show the pattern for those other jobs through the qualified workforce statistic, and the EEO 1 statistic that you have had in your initial order. And our experts took that order and said, Okay, the Judge said do X, Y, Z and they went and did it.
>
> And when they did it, both for the similarly situated group and for the larger group of the department as a whole, they got a significant pattern that cannot be explained through qualifications; it can only be explained by race.
>
> We have regressed out all the other factors that could be causing this. And we believe that that establishes that we have a common issue of fact of law, at least to take [to] trial.

JA9015:4-6,9015:19-25,9017:1-23. Even that limited statement came only after plaintiffs had been repeatedly denied access to all the promotions by the same department managers. JA89-106,233-256,397,475-488,489-496,557-576,589-612,9059-9080,9091-9098,9107-9142. Such statement also came well before the court had disclosed that it would further reduce the number of promotions by eliminating the 27 promotions occurring in 1999-2000, causing the number of standard deviations to fall from -2.54 to -1.47. *Id.* Plaintiffs immediately repeated that if relevant promotions were to be excluded for any reason, including the fact that

Nucor had destroyed its application records for 1999-2000, then the court should not have allowed it to handpick only a handful of promotions to produce. JA9059-9080;9091-9098.

H. The District Court Went Too Far Into The Merits By Choosing Between Statistical Alternatives That Were Each Found To Be "Reasonable"

Plaintiffs do not contend that a district court must blindly accept their statistics as true, but only that once they are found to be "reasonable", as they were below, the Court cannot go further to usurp the jury's role in choosing between the parties' competing statistics or the weight to be accorded to each side's evidence. Weighing the evidence goes too far into the merits — further than necessary to decide if there is a common *triable* issue of fact.

IV. NO CONFLICT HAS BEEN ALLEGED OR FOUND FOR THE HOSTILE ENVIRONMENT CLASS AND ONLY A FEIGNED CONFLICT AFFECTING TWO OF SEVEN NAMED PLAINTIFFS HAS BEEN ALLEGED FOR THE PROMOTION CLASS

No conflict or inadequate representation has been alleged for the hostile environment class. Nucor's adequacy of representation argument is limited to the promotion class. Even that alleged conflict is limited to just two class members and two of the seven representatives of such class — Alvin Simmons and Jason Guy. DB at 53; JA289-297. Nucor does not allege that any of the other five representatives ever bid on the same promotion as did a putative class member. The face of the bid

sheets show no such potential overlapping or conflicting promotion bids. JA 261-335.

On fifteen occasions, the named plaintiffs were the only African-American bidder, and so had no overlapping bid with any unnamed class members. JA287,301,303,305,307,309,311,313,315,317,319,321,325-333. Jacob Ravenell and Sheldon Singletary never bid on the same promotion as another class member (JA319,321,1047-1058); Ramon Roane did not bid against another African-American in three of his four promotion bids, and *never* bid against any unnamed class member (JA299,305,323); Gerald White bid against no other African-American in two of his three bids, and only bid against a named plaintiff, Roane, on the third one (JA303,323-325); Guy had five promotion bids in which no other African-Americans had overlapping bids and two that overlapped with two class members (JA301,309,311,313,317); and Simmons had three bids with no African-American bidders and one that overlapped with Mike Blanco. (JA287,307,315). Thus, the entire universe of class members involved in the alleged conflict was two class members and two named plaintiffs — 4% of a class of 100. The two promotions that potentially overlap for these four individuals were in *entry-level* jobs that are not likely to be a part of any Stage II proceeding in this case. If such an overlapping claim arose at Stage II, the district court would simply exercise its supervisory

responsibility to manage the potential conflict or appoint the two class members an attorney of their own for the two promotions that potentially overlap. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1177-1178 (5th Cir. 1978).

Nucor cites no precedent for finding inadequate representation when two ***promotion*** candidates bid on the same job. It cites only two cases involving a *hiring* class represented by existing employees having only a promotion claim — *Falcon* and *General Telephone v. EEOC*. *See* POB at 57. Neither case, however, considered disallowing a *promotion* plaintiff to represent a *promotion* class, which is a much different thing. Disallowing a promotion plaintiff from representing a hiring class still leaves that class with potential representation by one of its own members who was not hired, but disallowing promotion plaintiffs from representing their own promotion class leaves such a class with no class representatives at all. No court has ever gone that far.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested and necessary. The issues in this appeal require oral argument because: (1) the appeal is not frivolous; (2) the dispositive set of issues presented have not been recently authoritatively decided; (3) the facts and legal arguments cannot be adequately presented in the briefs and record; and (4) the decisional process will be significantly aided by oral argument.

Respectfully submitted this 28th day of July, 2008.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 08-1247 ***Brown, et. al. v. Nucor, et al.***

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32 (a) (7)(B) (ii) because:

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Date: July 28, 2008

CERTIFICATE OF SERVICE

I certify that on July 28, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit the required copies of the this reply of Appellants, and further certify that I mailed this same date the required copies to opposing counsel.

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