IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPENING BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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TREATISES

A. Conte & H. Newberg, *Newberg on Class Actions* (4th Ed. 2002) .. 35, 37, 38, 43

The district court's 84-page class certification order speaks eloquently for itself. Exercising the broad discretion entrusted to it, the district court fulfilled the obligations imposed by Fed. R. Civ. Proc. 23: it conducted a searching and rigorous analysis of the rule's prerequisites without delving into the merits. Based upon his close study of the substantial evidentiary record, Judge Jenkins concluded that Wal-Mart possessed a uniform and highly centralized pay and promotion system and that the disputed personnel practices were amenable to class treatment under Rule 23(b)(2).

The court's opinion, drawing upon a well-established body of Title VII jurisprudence for pattern or practice actions, bears little resemblance to Wal-Mart's caricature of the court's reasoning. Indeed, Wal-Mart all but disregards the lower court's order and instead rests its appeal on two demonstrably false, but often repeated, factual assertions. Wal-Mart claims that its store managers make personnel decisions in a thoroughly independent and decentralized manner, an argument squarely at odds with both the evidence and its much-admired, highly centralized business model. Second, it trumpets that its "unrebutted" statistics prove that there was no discrimination in most stores. Those statistics were entirely discredited and their underlying factual predicate stricken from the record. In fact, Wal-Mart's female employees are paid less than male employees in

virtually *every* job in *every* one of Wal-Mart's 41 regions, even though the female employees on average have greater seniority and higher performance scores.

Stripped of hyperbole, Wal-Mart's appeal boils down to three very radical propositions:

- Plaintiffs can never challenge in a Title VII class action the policy of consistently providing managers broad discretion in decision-making that may adversely affect a protected group;
- Federal courts may not certify Title VII class actions that seek back pay or punitive damages because the employer has an absolute right to litigate class member remedial claims individual by individual, even where the defendant's own conduct would render adjudication of such claims a "quagmire of hypothetical judgments;" and
- Rule 23(b)(2) certification is never proper if plaintiffs seek either back pay or punitive damages.

No court has accepted even one of these extreme positions and this Court should decline the invitation to be the first.

The historic size of the class is not the result of any error by the district court but the predictable result of a class-wide pattern and practice of discrimination perpetrated by "the largest private employer in the world." App. 3.

While Wal-Mart is eager to reap the financial benefits conferred by its mammoth size, it must also accept accountability on the same scale when it violates the rights of its workers. Wal-Mart's plea for justice can be considered no more pressing than that of Wal-Mart's female employees who will have no remedy – and no justice – for the discrimination they have suffered, without this lawsuit. Wal-Mart's disingenuous proposal that the case instead be litigated in 3400 separate class actions is nothing more than a ploy to mask its overall pattern of discrimination while unnecessarily burdening the federal courts.

STATEMENT OF ISSUES

1. Did the district court clearly abuse its discretion when it concluded that Wal-Mart's uniform policies and practices, including the policy of providing broad discretion to managers in making pay and promotion decisions, presented questions of law or fact common to the class in satisfaction of Fed. R. Civ. Proc. 23(a)(2)?

2. Does an employer always have the right to defend each class member's claim to monetary relief through individual hearings?

3. Did the district court clearly abuse its discretion when it concluded that injunctive relief predominated over monetary relief under Rule 23(b)(2)?

4. Did the district court err when it concluded that, for promotion claims,

back pay could only be awarded to class members who had objective evidence of an application, even though Wal-Mart had no application process?

SUMMARY OF ARGUMENT

I. Wal-Mart ignores the massive evidence of common policies and practices in its workplace and the resulting disparities in earnings and promotions between men and women. Wal-Mart reduces the district court's comprehensive and far-reaching Rule 23(a) analysis to one disputed practice – the granting of broad discretion to managers to make pay and promotion decisions. While it claims that the practice cannot be challenged as a common, company-wide policy, the Supreme Court has held otherwise.

Wal-Mart did not submit a single company document nor cite any admissible testimony to substantiate its claim that Wal-Mart is fully "decentralized." Instead, Wal-Mart rests its argument before this Court *entirely* on the testimony of its expert economist, falsely claiming that her statistical conclusions were "unrebutted." Her conclusions were, in fact, thoroughly rebutted and the underlying basis for her disaggregated statistical analysis – the store manager survey – was stricken from the record. That district court order, not appealed here, prohibits Wal-Mart from relying on the survey or any expert conclusions derived from it.

The district court properly relied on the testimony of plaintiffs' sociologist, which satisfies the admissibility threshold of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and on 114 class member declarations, along with evidence of central oversight, uniform pay and promotion policies and statistical evidence, to conclude that plaintiffs satisfied the requirements of Rule 23(a).

II. There is no authority for Wal-Mart's claim to an absolute statutory and due process right to litigate each class member's entitlement to relief in individual hearings. This extraordinary proposition would make actions brought on behalf of even moderately-sized classes all but impossible. The district court acted well within its discretion to approve the use of statistical methods that draw upon Wal-Mart's extensive workforce data to determine class member remedies. The district court's order carefully ensured that only actual victims of discrimination will be entitled to receive either back pay or punitive damages and that their monetary relief will be proportional to the harm they suffered.

The nature of Wal-Mart's practices – broad subjectivity in pay and promotion decisions and a failure to maintain records to document decision-making – necessitates this statistical approach for computing remedies. Were the district court to conduct individual by individual remedial hearings, these practices

would embroil it in a hopeless effort to reconstruct the history of these challenged decisions.

III. Under the standards set by this Court in *Molski v. Gleich,* 318 F.3d 937, 950 (9th Cir. 2003), the district court acted well within its discretion to certify this case under Rule 23(b)(2), including the provision of notice and the right to opt-out to class members, where the court found that equitable relief was the primary goal of this litigation.

IV. The district court's limitation of back pay for promotion claims to class members who could produce objective evidence of an application was legal error. Because the absence of records is attributable to Wal-Mart's wrongdoing, class members should not be penalized.

STANDARD OF REVIEW

The district court's decision to certify this class is subject to "'very limited' review and will be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'" *Armstrong v. Davis,* 275 F.3d 849, 867 (9th Cir. 2001) (quoting *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 461 (9th Cir. 2000)). The district court's factual findings regarding the elements of Rule 23, none of which Wal-Mart challenged, must be accepted as true for this appeal. *See Linney v. Cellular Alaska P'ship,* 151 F.3d 1234, 1238 (9th Cir. 1998).

Wal-Mart repeatedly invokes the Rules Enabling Act in an effort to justify *de novo* review of the district court's fact-intensive determinations, rather than the more deferential abuse of discretion standard. The doctrinal facade it erects is nothing more than an effort to evade the more deferential standard of review and should be rejected.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Determining that Plaintiffs Satisfy the Requirements of Commonality

The district court closely followed the Supreme Court's admonition to conduct a "rigorous analysis" of the factual record and made factual findings central to the decision below and to this appeal. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). The district court properly exercised its discretion in determining that Rule 23(a) had been satisfied.[1]

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[1] While Wal-Mart's statement of issues purports to dispute the district court's finding that typicality was satisfied, it articulates no basis for this challenge. App. 2. Arguments not raised by a party are waived; mere inclusion of an issue in the "statement of the issues" will not preserve it. *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1179 n.8 (9th Cir. 2001). Wal-Mart offers a misleading summary of plaintiffs' individual claims, but this does not undermine the district court's conclusion that their claims are plainly typical of the class claims since all allege discrimination through the same common practices challenged by the class as a whole. ER 375-81, 1183-84; SER 427-37, 548-53, 657-62, 682-97, 707-715.

A. Wal-Mart Misrepresents the Evidence and Findings on Commonality

Wal-Mart ignores the district court's extensive analysis and findings, pretending instead that the only common policy the district court identified was "the delegation of discretion to individual store managers to make pay and promotion decisions."[2] App. 10. In contrast to the district court's detailed findings, Wal-Mart's claim that decision-making is entirely decentralized is unsupported by any evidence in the record; there is no company document nor testimony from company officials. Wal-Mart cites only to portions of its expert witness' declaration that were stricken from the record. App. 18, 20 *citing* ER 570-576; ER 1235-38, 1241.

The district court relied on evidence of:

- uniform personnel and management structure across stores, ER 1147-48, 1159;
- the Home Office's extensive oversight of store operations, ER 1149, 1158;
- company-wide policies governing pay and promotion decisions, ER

[2] Wal-Mart provides a similarly truncated and misleading description of the commonality evidence plaintiffs submitted ("plaintiffs relied on three categories of evidence: statistics, sociology, and anecdotes"), App. 22, but the evidence in the record is much more extensive. ER 1147-81.

1149-51;

- a strong, centralized corporate culture, ER 1156-60;
- consistent disparities by gender in every domestic region of the company, ER 1173;
- gender stereotyping, ER 1160-62; and
- anecdotal evidence, ER 1180-81.

This substantial record reveals common features of Wal-Mart's pay and promotion policies and their adverse effect on women employees, all of which informed the district court's 23(a)(2) determination. Wal-Mart, in contrast, evaluates each type of evidence plaintiffs submitted in isolation, and then concludes that no piece of evidence – "standing alone" – supports a finding of commonality. App. 22. The Court should consider the record as a whole, as did the district court, in determining whether the evidence supports the commonality finding. Plaintiffs do not rely solely on supervisors being granted excessive subjectivity in decision-making. Plaintiffs here allege that a highly-centralized company issues common policies within which supervisors have to operate. Those common policies offer the supervisors extensive discretion in some areas, subject to a common system of oversight. The decision-makers operating under these policies are imbued with a common culture which influences the manner in

which that subjective discretion is exercised to the detriment of women employees. Statistical evidence confirms the detrimental impact on women. The court's findings included the following:

Uniform Store Structure/Home Office Oversight – "[T]he personnel structure within each store operates in a basically similar fashion using similar job categories, job descriptions and management hierarchies." ER 1147. Wal-Mart's practice of moving managers regularly among different stores confirms this high level of uniformity. "This degree of mobility could only be efficient in a company with a high degree of store-to-store uniformity." ER 1158.

Wal-Mart's extensive scrutiny of virtually every facet of store operations also contributes strongly to the commonality finding. "Each individual store is subject to oversight from the company's Home Office," which includes "a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a *close and constant basis*." ER 1158-59 (emphasis added). Wal-Mart has a particularly high concentration of its managers located at the Home Office. ER 1159; SER 029.

Uniform Pay Policies – While there is evidence that broad subjectivity consistently plays a role in pay decisions, the evidence also shows that Wal-Mart's policies significantly constrain store manager discretion. "Managerial discretion

and subjectivity are exercised in the context of a strong corporate culture and overarching policies." ER 1168.

Wal-Mart's national pay policy applies to every store uniformly. The Home Office establishes minimum starting rates for each hourly job in the retail stores. ER 1149. While store managers have discretion to depart from the starting rate within a fixed range, any pay increase of more than 6% above the minimum rate is automatically reported to higher management and subject to their approval. ER 1149; SER 204-05, 235-51.

Wal-Mart's computer system electronically monitors and enforces its pay policies. The computer program will not allow entry of any proposed pay rate that exceeds corporate pay guidelines without an explicit store manager override. Any override triggers an "exception report" that is immediately sent to the District Manager for review and approval. SER 390-91; ER 1149. Forty percent of starting pay rates exceeded the guideline, and thus triggered this oversight. SER 204-05.

The compensation system for salaried in-store managers, which also provides for broad discretion in adjusting pay, is set by common, company-wide policy. ER 1150. The Home Office sets base pay ranges for each in-store salaried position, and subjective departures from such pay levels are made "primarily by

District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the [Home Office-based] Regional Managers." ER 1150-51.

Uniform Promotion Policies – For all selections into salaried store management positions – the primary focus of plaintiffs' promotion claim – policies and decisions are exclusively made *above* the store level. ER 1148-53. The hourly Support Manager position is the only promotion at issue for which store managers have authority to make selections.

There has been no application process for the vast majority of openings for Support Manager and higher level positions, including Management Trainee, Assistant Manager and Co-Manager. ER 1152-53. The only position for which posting regularly occurs is Store Manager. Since candidates must obtain permission from their district managers to apply for such positions, the posting does not "ameliorate the subjective nature of the promotion process." ER 1152-53. The promotion process is fundamentally a "tap on the shoulder" system. As a result of Wal-Mart's decision not to post openings, "managers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." ER 1151-53.

Centralized Corporate Culture – The managers who run the stores and

carry out Wal-Mart's company-wide pay and promotion policies are steeped in a "strong and distinctive, centrally controlled, corporate culture." ER 1157. The district court found that Wal-Mart's unique culture ("the Wal-Mart Way") supports commonality because "it promotes and sustains uniformity of operational and personnel practices" and "guide[s] managers in the exercise of their discretion." ER 1157, 1159.

Wal-Mart trains employees, beginning with orientation, in lessons on Wal-Mart culture: "[t]he inculcation of Wal-Mart culture is an ongoing process for all employees regardless of seniority." ER 1157-58. Wal-Mart's practice of "promoting from within" means that those who reach management are well-grounded in company culture. ER 1158. Frequent transfer of managers across districts and regions also "ensures that a uniform Wal-Mart Way culture operates consistently throughout all stores." *Id.*

Gender Stereotyping – There is evidence, credited by the district court, that Wal-Mart's pay and promotion systems are vulnerable to gender stereotyping. ER 1161. Evidence of gender stereotyping in the workplace was disclosed in declarations from 114 class members, many of whom recounted statements by Wal-Mart managers that characterized female employees in stereotyped ways. *See* Section I.E. Nor was use of gender stereotypes limited to store-level managers.

At Sam's Club Home Office executive meetings, senior management often referred to female store associates as "little Janie Qs" and "girls." SER 664-66.

Wal-Mart's effort, therefore, to recast the basis for the commonality determination as limited to evidence of decentralized, store-level subjective decision-making is belied by the district court's findings and the full record.

B. Subjective Decision-Making Is a Practice That May be Challenged in a Pattern or Practice Case

The Supreme Court has held that subjective decision-making can be challenged where it adversely affects a protected group. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 989 (1988); *Falcon,* 457 U.S. at 159 n. 15. Courts have long recognized that subjective decision-making is a "ready mechanism for discrimination" and appropriate for courts to carefully scrutinize. *Sengupta v. Morrison-Knudsen Co.,* 804 F.2d 1072, 1075 (9th Cir. 1986). *See Watson*, 487 U.S. at 990, 1010 n.9; *Jauregui v. City of Glendale,* 852 F.2d 1128, 1135-36 (9th Cir. 1988).

Whether a challenge to subjective decision-making should be certified as a class action is a fact-specific inquiry. Indeed, the cases upon which Wal-Mart relies acknowledge that certification of classes challenging excessive subjectivity would have been appropriate under facts similar to those present here. *See, e.g.,*

Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 670 (N.D. Ga. 2001). Many Title VII class actions challenging the use of subjective selection criteria have been certified.[3]

Wal-Mart wrongly contends that the practice that plaintiffs challenge must be *per se* unlawful and busily collects cases confirming the uncontroversial proposition that subjective decision-making is not *per se* unlawful.[4] App. 17-18. Plaintiffs may challenge an employment practice, such as the use of particular employment tests, on a class-wide basis even though the tests are not *per se* unlawful. 42 U.S.C. § 2000e-2(h); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-

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[3] *See, e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 485 (D. Minn. 2003); *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428, 441 (D.D.C. 2002); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608 (D. Minn. 2000); *Daniels v. Federal Reserve Bank of Chicago*, 194 F.R.D. 609, 615 (N.D. Ill. 2000); *Orlowski v. Dominick's Finer Foods, Inc.*, 172 F.R.D. 370 (N.D. Ill. 1997); *Stewart v. Rubin*, 948 F. Supp. 1077, 1093 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (table); *Wagner v. Nutrasweet Co.*, 170 F.R.D. 448, 451 (N.D. Ill. 1997); *Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Stender v. Lucky Stores*, 803 F. Supp. 259, 331 (N.D. Cal. 1992); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 622-23 (N.D. Ill. 1989); *Allen v. Isaac*, 99 F.R.D. 45, 54 (N.D. Ill. 1983).

[4] Wal-Mart largely relies on individual disparate treatment cases in which plaintiffs argued that the use of subjective criteria was evidence of discriminatory intent. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000); *Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001).

35 (1971). Subjective decision-making may similarly be challenged on a class-wide basis, whether or not its use is ultimately proved unlawful.

As a corollary, Wal-Mart argues that when managers engage in subjective decision-making at different facilities, there can be no common practice because the case simply devolves into a multitude of individual, disparate decisions. But, this Court has already rejected this argument. *See Staton v. The Boeing Co.*, 327 F.3d 938, 956 (9th Cir. 2003). The presence of multiple decision-makers located in multiple facilities does not preclude finding Rule 23(a) commonality where the subjective decision-making is practiced consistently pursuant to a common policy. Like this case, the *Staton* evidence revealed "a complex of company-wide discriminatory practices" established centrally, as well as local decision-making for some employment practices at issue. *Id.* at 953. This Court rejected the contention that making decisions locally in multiple facilities makes a case unsuitable for class treatment. "The unsurprising fact that some employment decisions are made locally does not allow a company to evade responsibility for its policies." *Id.* at 956; *see also Caridad,* 191 F.3d at 291-93 (a class action may properly challenge the practice of delegating discretion). Were Wal-Mart's "decentralization" argument correct, large companies would never be subject to class actions challenging discriminatory pay or promotion practices since

personnel decisions must, by necessity, be made by numerous managers.

Wal-Mart wrongly argues that subjective decision-making "by definition" affects everyone differently, leading to idiosyncratic and individualized decisions. App. 21. Here, however, common oversight and culture, combined with statistical evidence, show that subjectivity has been exercised in a consistent manner – to the detriment of women employees.

Wal-Mart raised these same arguments below and the district court concluded that the evidence *in this case* supports a finding of commonality:

> To clarify, the evidence indicates that in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system. These subjective decisions are not, however, made totally in isolation. Rather, the company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion over in-store personnel decisions. The evidence suggests that the company relies also on its strongly imbued culture to guide managers in the exercise of their discretion. . . . It is clear, however, that given the evidence regarding strong uniform culture and policies, the degree and impact of this practice is *a significant question of fact common to the class as a whole.*

ER 1159-60 (citations omitted and emphasis added).

In contrast, the cases upon which Wal-Mart relies were based on decidedly different facts.[5] None of them stands for the proposition that, *as a matter of law,*

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[5] In *Stastny v. Southern Bell Telephone and Telegraph Co.*, 628 F.2d 267, 279 & n.19 (4th Cir. 1980), the court noted basic evidence that was missing from

local subjective decision-making cannot present a common question under Rule 23(a) or that its presence precludes a finding of commonality.

Wal-Mart next posits that the Supreme Court's decision in *Falcon* mandates a higher level of proof for class certification where subjective decision-making practices are challenged. App. 18-19 (asserting plaintiffs "bore the burden of adducing, *before* the class could be certified, 'significant proof' that Wal-Mart used discretionary decision-making to further a corporate policy of sex discrimination." (emphasis in original)). Wal-Mart relies on selected language from *Falcon,* which provides in relevant part:

> Significant proof that an employer operated under a general policy of discrimination conceivably *could justify a class of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective

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the record: "There was no showing by direct evidence that a statewide practice or policy, either objectively or subjectively administered, existed," yet named plaintiffs, who all worked at a single facility, relied solely on statewide statistical evidence. *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) involved employees from four different companies, three subsidiaries and one parent company, each with a different management structure and its own separate policies, and the employees included ranged from entry level laborers to skilled professionals seeking senior management positions. *Id.* at 703-05, 715-16. The Eleventh Circuit noted that class certification would still be acceptable if plaintiffs could make a "showing that the discrimination sustained was either part of an overarching pattern and practice of intentional discrimination on the part of the defendants or the result of the discriminatory disparate impact of a facially neutral employment policy," but concluded that, due to inadequate statistical evidence, plaintiffs had failed to do so. *Id.* at 716.

decisionmaking processes.

Falcon, 457 U.S. at 159 n.15 (emphasis added). By its terms, and in context, the footnote only applies when a class is proposed to include *both* employees and outside applicants, and it reflects the Court's skepticism of so-called "across-the-board" class cases. *See Staton*, 327 F.3d at 955 (the "hypothetical class in Falcon's footnote 15" combined employees and applicants). The present class is by no stretch an "across the board" class case. ER 1141. It includes only employees and attacks just two practices – pay and promotion.

Even if plaintiffs are subject to Wal-Mart's alleged "significant proof" standard, they plainly satisfy it. Plaintiffs produced significant evidence of centralized company policies and culture, which provide a nexus between the subjective decision-making and the substantial statistical evidence demonstrating a pattern of discriminatory pay and promotions for female employees. Plaintiffs' expert and anecdotal evidence further substantiates that delegation of subjective decision-making to local managers presents the danger that they will employ "subconscious stereotypes and prejudices." *Watson*, 487 U.S. at 990.

C. Plaintiffs' Statistical Analysis Supports a Finding of Commonality

In a detailed, 18-page analysis, the district court closely scrutinized the

statistical evidence and concluded that plaintiffs' statistical analysis raises "an inference of company-wide discrimination in both pay and promotions." ER 1218.[6] Contrary to Wal-Mart's assertion, the court evaluated the evidence from *both* sides' experts and, notwithstanding the defense expert's challenges to plaintiffs' statistical analyses, it found plaintiffs had submitted admissible evidence from which a jury could conclude that the challenged practices adversely affected members of the class. This finding was well within its discretion.

Wal-Mart attacks the district court for failing to make a specific finding that plaintiffs' statistics were "more probative" than Wal-Mart's own. App. 25. However, Wal-Mart fundamentally misconstrues the function of the court at the class certification stage. Its role is to ensure there are common issues, not to resolve them. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974). Faced with statistical evidence and competing expert claims, the court is likewise not required, nor permitted, to resolve the competing "statistical dueling" among experts. *Caridad,* 191 F.3d at 292. The issue at class certification is "whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence ultimately

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[6] Wal-Mart limits its attacks on the statistical analysis to evidence showing gender pay disparities for *hourly* employees. It does not challenge the statistical evidence of disparities either in pay for management employees or in promotions.

will be persuasive." *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001).

The competing expert presentations – and even Wal-Mart's arguments before this Court – demonstrate that this evidence raises numerous questions of law and fact common to the class, such as the appropriate statistical model to be used, the level of data aggregation that is appropriate, and the variables that should be included in a statistical model.

1. Plaintiffs' Statistical Analyses Amply Demonstrate Common Issues

As the district court found, the only "uncontested" statistics in this case were plaintiffs' descriptive statistics. ER 1164. This data showed that female employees were paid less than men in virtually every job position *in every region* of Wal-Mart, and that the salary gap between women and men hired into the same jobs at the same time increased over time. *Id.* These observed differences existed even though female employees at Wal-Mart generally have *more* seniority and *better* performance ratings than do male employees. ER 173, 175-80, 182.

Plaintiffs' statistical expert, Dr. Richard Drogin, also prepared extensive multiple regression analyses of hourly pay, controlling for factors such as seniority, job position, status (part time/full time), performance rating and store

location.[7] He conducted separate regressions for each year from 1996 through 2001. These regressions showed, in every iteration, that women were paid significantly less than men. Moreover, as the descriptive statistics showed, this pay gap increased each year. This pattern was consistent across all of Wal-Mart's 41 regions. ER 1165.

Wal-Mart argues that Dr. Drogin should have performed a store-by-store analysis of pay. In his rebuttal declaration, which Wal-Mart omitted from its excerpts, Dr. Drogin explained why his analytic approach was more sound: a store-by-store analysis would fail to capture the effect of district, regional and company-wide control over the uniform compensation policies and process and the uniformity resulting from the frequent movement of store managers. SER 204-05. Wal-Mart's strong corporate culture further supported his regional and company-wide analyses. ER 1167.

Thus, Dr. Drogin's comprehensive analysis included use of a store location variable, separate analyses for the 41 different regions – each of which showed statistically significant disparities – and identification of factors justifying analysis at the regional and company-wide level. In contrast, the cases cited by

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[7] Contrary to Wal-Mart's suggestion, Dr. Drogin's model took into account potential local variations that theoretically could arise based on local markets or store type. SER 211.

Wal-Mart are inapposite because they involved marked differences between districts or regions, no attempt to consider whether there were any such differences, or other facts undermining commonality.[8]

2. Wal-Mart's Statistical Analyses *Were* Thoroughly Rebutted and Their Theoretical Foundation Undermined

Wal-Mart repeatedly asserts that there was no discrimination at "over 90% of the stores," which it claims to have "measured on a store-by-store basis," and that this assertion was "unrebutted." App. 7, 23. This claim is false on all counts: Wal-Mart's expert never conducted a store-by-store analysis, the factual basis for the analysis it *did* conduct was stricken by the district court, and its conclusion was rebutted.

Instead of a store-by-store analysis, Wal-Mart's expert, Dr. Haworth,

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[8] *See, e.g., Stastny,* 628 F.2d at 279 (plaintiffs offered only statewide totals and instances of discrimination at a single facility, and did not seriously contest facility level autonomy); *Garcia v. Veneman*, 211 F.R.D. 15, 22 (D.D.C. 2002) (plaintiffs offered generalized statistics, which were not broken down by state or county); *Abram v. UPS, Inc.*, 200 F.R.D. 424, 431 (E.D.Wis. 2001) ("even plaintiffs expert admits that in a majority of the districts he could find no statistically significant difference in pay between African-American and white supervisors"); *Beck v. Boeing*, 203 F.R.D. 459, 463-64 (W.D.Wa. 2001), *aff'd in part, vacated in part*, 60 Fed.Appx. 38 (9th Cir. 2003) (class certified, but limited to region encompassing approximately 29,000 women spread across multiple facilities where that region showed statistically significant disparities, but excluding other regions, with different policies, which showed less or no statistical significance).

arbitrarily sub-divided each store into as many as eight separate units for analysis, and conducted a separate regression for each of these sub-units. In all, she conducted over 7500 separate regressions. ER 1165; SER 203. The predictable effect of this disaggregation, which in many cases created pools too small to yield any meaningful statistical analysis, was to preclude comparison of women and men who work in different sub-units or departments in the same store. SER 203, 206, 215. *See Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654-656 (5th Cir. 1983) (rejecting disaggregation of data to "the point where it was difficult to demonstrate statistical significance"). This extreme disaggregation was wholly at odds with Wal-Mart's compensation policy and management practices, which do not distinguish among, or even identify, these sub-units or separate departments as a factor in setting pay. SER 203-206.

Moreover, the primary justification for Wal-Mart's model was defense counsel's "survey" of store managers. ER 489, 491, 570-76, 613, 1167, 1235-38, 1241. Wal-Mart's brief fails to inform this Court that the survey, and the portions of Dr. Haworth's declaration which relied upon it, were stricken from the record. ER 1224-41. That order, which has not been appealed, precludes Wal-Mart from relying on the survey either to attack plaintiffs' expert or "as support for her decision to conduct a disaggregated analysis." ER 1238. In violation of the lower

court's order, Wal-Mart repeatedly relies on this data to support its arguments before this Court. *See, e.g.*, App. 23-29.[9]

Finally, while Wal-Mart's "slice and dice" analysis tends to mask real discrimination, even the overall pattern of results from Wal-Mart's extremely disaggregated analysis showed that the differences in pay by gender *are* statistically significant.[10] SER 342.

3. Acceptance of Aggregated Statistics to Support Commonality is Not Legal Error

Wal-Mart asserts that the dispute between the parties over aggregation level "was not primarily factual (or statistical) but *legal*: Should the data be examined on an aggregated basis or not." App. 25. Even if Wal-Mart were correct, it has simply identified a common legal issue which should be resolved as part of a

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[9] The analyses of Wal-Mart's expert were also riddled with errors and flaws and utilized many variables that were either likely tainted by discrimination, or simply never explained or justified. SER 359-62; *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 274 (D.C. Cir. 1998); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 332 (5th Cir. 1977).

[10] *See Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984) (rejecting defendant's practice of repeatedly disaggregating data until the resulting groups were too small to generate statistical significance, and ruling that where such separate analyses were done, the overall significance of the disaggregated analyses should be calculated). The district court's later order striking a "minor portion" of Dr. Drogin's analysis does not undermine his conclusion, since he still found an overall disparity after aggregating Dr. Haworth's analyses. ER 1232-33; SER 342.

merits determination. *See Paige v. State of California,* 291 F.3d 1141, 1149 (9th Cir. 2002). In fact, Wal-Mart's claim is erroneous – whether data should be aggregated is an intensely factual question. *Paige*, 291 F.3d at 1148 ("It is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data.").

There is no legal requirement to use disaggregated statistics. This Court has cautioned against the use of disaggregated statistics where it results in small sample sizes that may "render any findings not statistically probative." *Paige*, 291 F.3d at 1148. Aggregated data may offer "a more complete and reliable picture" of the effects of defendant's practices. *Eldredge v. Carpenters 46 Northern California Counties,* 833 F.2d 1334, 1339 n. 7 (9th Cir. 1987). It was well within the district court's discretion, therefore, to credit plaintiffs' aggregated data.

Wal-Mart asserts that "it is an error of law not to use the Chow test, or some other statistical test, where there is evidence that aggregation of statistics masks relevant dissimilarities." App. 26. There has *never* been a reported case applying the "Chow test" as a requirement for class certification, or even holding its use is mandatory at the merits phase. Not surprisingly, Wal-Mart cites no case law in support of its position. More to the point, Wal-Mart never showed that "failing" the Chow test in fact undermines commonality. The district court properly found

that the Chow test did not undercut a finding of commonality. ER 1167-68.

D. The District Court's Decision to Admit the Testimony of Plaintiffs' Sociologist Was Not Clearly Erroneous

Plaintiffs offered the expert analysis of sociologist Dr. William Bielby who provided three opinions, only one of which Wal-Mart challenges here. ER 289-90.[11] Wal-Mart attacks the district court's reliance on the opinion that Wal-Mart's personnel policies and practices make pay and promotion decisions vulnerable to gender bias.[12] It claims the testimony fails to meet the standards of *Daubert,* 509 U.S. 579.

The district court rejected Wal-Mart's motion to strike Dr. Bielby's testimony on *Daubert* grounds, because the application of a full *Daubert* inquiry at class certification would necessitate an improper inquiry into the merits. ER 1225. The district court followed numerous other courts in applying a lower standard, concluding that the testimony was "sufficiently probative to assist the Court in

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[11] Wal-Mart does not challenge Dr. Bielby's opinions that Wal-Mart's "[c]entralized coordination, reinforced by a strong organizational culture. . . sustains uniformity in personnel policy and practice" or that "there are significant deficiencies" in the company's EEO policies and practices. ER 289-90.

[12] Dr. Bielby's conclusion that Wal-Mart's practices increase the risk of gender stereotyping tends to show why, in the specific circumstances of this case, there is a common question as to whether subjectivity is "a ready mechanism for discrimination." *See Sengupta,* 804 F.2d at 1075.

evaluating the class certification requirements at issue in this case." ER 1225, 1228; *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives and Composites, Inc.*, 209 F.R.D. 159, 162-163 (C.D. Cal. 2002); *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68, 77 (E.D.N.Y. 2000), *aff'd* 280 F.3d 124 (2d Cir. 2001); *Midwestern Machinery v. Northwest Airlines, Inc.*, 211 F.R.D. 562, 565-66 (D. Minn. 2001). Wal-Mart cites no case authority for the proposition that a district court must apply the *Daubert* test at the class certification stage.[13]

That dispute need not be resolved, however, since Dr. Bielby's testimony easily meets the full *Daubert* test. Dr. Bielby employed a well-accepted social science methodology for his opinions, ER 1226, and the testimony has a "reliable basis in the knowledge and experience of [the relevant] discipline." *Daubert,* 509 U.S. at 592. The Supreme Court has endorsed reliance on expert testimony regarding gender stereotyping in discrimination cases. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989). Federal courts routinely admit such testimony. *See, e.g., Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 881 (D.

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[13] Wal-Mart cites three cases, none of which holds that the *Daubert* inquiry is required at class certification. *West v. Prudential Sec., Inc,* 282 F.3d 935, 938 (7th Cir. 2002); *Cooper v. Southern Co.,* 390 F.3d 695, 712 (11th Cir. 2004); *Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d at 135. These cases stand for the proposition that the district court must rigorously analyze the evidence submitted in support of class certification, a proposition that plaintiffs embrace.

Minn. 1993); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1503 (M.D. Fla. 1991); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997) (Dr. Bielby's testimony admitted for class certification); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 301-303, 327 (N.D. Cal. 1992) (Dr. Bielby's testimony admitted on the merits).

Wal-Mart faults Dr. Bielby's testimony for failing to quantify the number of employment decisions that were the product of stereotyped thinking. App. 30. There is, however, no requirement that expert testimony be quantifiable. Courts routinely admit the expert testimony of psychologists and social scientists. *See United States v. Rahm,* 993 F.2d 1405, 1412 (9th Cir. 1993). Indeed, in *Price Waterhouse,* the Supreme Court approved the admission of expert testimony about gender stereotypes even though the expert admitted that she "could not say with certainty whether any particular comment was the result of stereotyping." 490 U.S. at 236. Nor does the district court's recognition that "Dr Bielby's opinions have a built-in degree of conjecture" undermine their admissibility. ER 1162. This Court has explained that "[e]xperts ordinarily deal in probabilities, in 'coulds' and 'mights,'" and "particularly in matters of the mind." *Rahm,* 993 F.2d at 1412.

Even if a full *Daubert* inquiry had been legally required, the district court's

failure to do so was harmless error since Dr. Bielby's testimony meets the *Daubert* test. 28 U.S.C. § 2111.

E. Anecdotal Evidence Supports the Commonality Finding

One of the many types of evidence upon which the district court relied in making its Rule 23(a) determination was "over a hundred declarations by designated class members showing common subjective practices across the country." ER 1156.[14]

As the district court noted, anecdotal evidence in a Title VII pattern and practice case "brings the cold numbers convincingly to light." *Int'l. Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977). It also can support a finding of common policies and practices. The class member declarations illustrate how Wal-Mart has applied its pay and promotion practices to the detriment of its female employees, from unequal pay for the same work to ever-shifting subjective criteria for promotion. SER 399-411, 505-13, 531, 539-41, 555-56, 573-78, 609-20, 621-31. They provide examples of stereotyped remarks attributed to Wal-Mart managers, which reflect the kind of gender stereotypes that Dr. Bielby predicts would infect Wal-Mart personnel decision-making. SER 395,

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[14] The suggestion that the district court relied on only three declarations in support of its commonality determination is demonstrably false. ER 1156.

415, 421, 439, 512-13, 540, 531, 546, 580-81, 606, 612, 677. Their sworn accounts, including of uniform and centralized control of operations, are remarkably similar even though the declarants worked in different jobs, at stores located in 30 different states, providing further support for the commonality finding. SER 388, 622-26, 629-31, 419-20, 506-7, 543-44, 545-46, 673-74.

Wal-Mart's argument that plaintiffs' declarations represent only one instance of discrimination for every 13,000 class members is wholly off-base. There is no requirement that class member witnesses either comprise a statistically significant sample or prove individual claims of discrimination. Finally, Wal-Mart argues that none of the declarations "attempts to establish a common, company-wide policy of discrimination," implying inaccurately that each, standing alone, must prove plaintiffs' entire case. App. 32. The declarations are simply one more piece in the enormous record that, considered cumulatively, fully satisfies Rule 23(a).

II. The District Court Properly Held that Applying Statistical Methods to Determine Relief Is More Appropriate than Individualized Hearings In This Case

A. Individual Back Pay Proceedings Are Not Always Required

1. *Teamsters* Does Not Mandate Individualized Hearings

A well-developed body of case law governs Title VII pattern or practice

cases and underlies the district court's decision here. *See, e.g., Teamsters*, 431 U.S. at 359-60; *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876 n.9 (1984); 42 U.S.C. § 2000e-6. *Teamsters* articulated the standards for bifurcated litigation of Title VII "pattern or practice" cases. *Teamsters*, 431 U.S. at 359-60. "[A]t the liability stage of a pattern-or-practice trial the focus often will *not* be on individual hiring decisions, but on a pattern of discriminatory decision-making." *Cooper*, 467 U.S. at 876 (emphasis added) (quoting *Teamsters,* 431 U.S. at 360 n.46). Once liability is established, all class members are entitled to a presumption that they are eligible for monetary relief. *Teamsters,* 431 U.S. at 361-62. Relief for class members is normally determined in a separate remedial stage. *Id.*

In structuring remedial or "Stage II" proceedings, the remedial purposes of Title VII provide the guiding principles. *Teamsters*, 431 U.S. at 364-365. Title VII was enacted to "make persons whole for injuries suffered on account of unlawful employment discrimination" and the trial court has the duty to fashion "the most complete relief possible." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The district court has discretion to be flexible and to "'fashion such relief as the particular circumstances of a case may require to effect restitution.'" *Teamsters*, 431 U.S. at 364 (quoting *Franks v. Bowman Transportation Company*, 424 U.S. 747, 764 (1976)); *cf. Carnegie v. Household*

Int'l., Inc, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues.").

Wal-Mart attempts to turn the *Teamsters* flexible approach on its head, claiming that it confers an absolute right on employers to defend the remedial claims of each class member in separate, individual hearings. Yet all *Teamsters* held was that "a district court must *usually* conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Teamsters*, 431 U.S. at 361 (emphasis added). Wal-Mart provides no basis for its interpretation that the phrase "additional proceedings" equates to "individual hearings" or that "usually" means "always." App. 36-37. Thus, further proceedings are not required in all cases, and even when there are "additional proceedings," those proceedings need not be individual mini-trials as Wal-Mart claims. *Teamsters* "does not mandate individualized hearings in every case;" it requires only "some demonstration that the individual class members receiving compensation were likely victims of illegal discrimination." *McKenzie v. Sawyer*, 684 F.2d 62, 76 (D.C. Cir. 1982).[15]

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[15] The relief requested in *Teamsters*, instatement with retroactive seniority, raised particularly sensitive issues, implicating the rights of non-class employees. 431 U.S. at 347-48. Where only back pay is sought, however, no third-party rights

In *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984), this Court recognized that *Teamsters* did not require individual hearings in all cases, and that Stage II relief should be tailored to the facts in the case before it. Rather than prescribing a single method for awarding such relief, this Court noted that the determination of back pay "could proceed along any of several avenues." *Domingo*, 727 F.2d at 1444. The district court followed this guidance in identifying the appropriate avenue for this case.

Courts have held that individualized hearings are not required, nor warranted, where the employer's conduct would reduce efforts to reconstruct individually what would have happened in the absence of discrimination to a "quagmire of hypothetical judgments." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).[16] In such cases, particularly where the employer's system has been infected with subjective decision-making and the

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are implicated.

[16] Wal-Mart cites a law review article for the proposition that *Pettway* authorized only a formula determination of the total back pay fund, but required individual hearings to determine class member's entitlement. App. 40. The decision held otherwise. *Pettway*, 494 F.2d at 263 n. 154. The Eleventh Circuit vacated the district court's order requiring individual hearings, rejected the employer's due process argument and remanded with specific direction that the lower court consider a class-wide award, making no reference to even limited individual hearings to determine eligibility. *Pettway v. American Cast Iron Pipe Co. (Pettway V)*, 681 F.2d 1259, 1266 (11th Cir. 1982).

employer lacks records to justify employment decisions, courts have concluded that allocating relief based upon statistical analyses "has more basis in reality . . . than an individual-by-individual approach." *Id.* at 263. Seven circuits have explicitly accepted this approach. *See Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *Hameed v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988); *Pettway v. American Cast Iron Pipe Co. (Pettway V)*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984).

Class actions cases outside the Title VII area have likewise upheld class monetary remedies. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996); *see generally* A. Conte & H. Newberg, *Newberg on Class Actions* (4th Ed. 2002), Chapter 10.[17]

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[17] Wal-Mart cites *Lewis v. Casey*, 518 U.S. 343, 349 (1996) and *Mayweathers v. Newland*, 258 F.3d 930, 934 (9th Cir. 2001) for the proposition that "even in class cases, individual relief. . . must be proven individually." App. 44. These cases, not brought under Title VII, held only that there must be a showing of "widespread" injury to justify broad injunctive relief in prisoner access cases.

Wal-Mart argues that, even where statistical models are used in the remedial stage, individualized eligibility hearings are still required. App. 38-40. Wal-Mart has simply ignored the numerous cases that have not required such hearings. *Segar*, 738 F.2d at 1289-91; *EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 880 n.9 (7th Cir. 1994); *EEOC v. Chicago Miniature Lamp Works,* 640 F. Supp. 1291, 1298-1300 (N.D. Ill. 1986) and 668 F. Supp. 1150, 1151, 1153 n.7 (N.D. Ill. 1987); *Liberles v. County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983); and *Shipes*, 987 F.2d at 316. Moreover, *Teamsters* and *Domingo* involved promotion and hiring claims, where questions of whether an employee or applicant had been an actual or deterred applicant for the position were arguably at issue. However, in discriminatory pay cases, there is no issue of application or interest. "[C]ourts can safely assume that all employees uniformly desire equal pay for equal work." ER 1211. These circumstances present an even stronger case for using statistical models rather than individual hearings. *See Shipes*, 987 F.2d at 315-19; *Liberles*, 709 F.2d at 1136; *Brennan v. City Stores, Inc.*, 479 F.2d 235, 242 (5th Cir. 1973); *McKenzie*, 684 F.2d at 76.

2. Statistical Approaches Can Be More Accurate than Individual Hearings

Data-driven statistical methods can often be far more accurate than other

methods for determining class member remedies. "[A]ggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss." *Newberg on Class Actions,* § 10.2. Where an employer relies on undocumented subjective determinations affecting a large class, as this case alleges, an individualized damage process would be fraught with uncertainty and subject to the risk of inconsistent results. Cases outside of the Title VII field have also recognized statistical evidence may be superior to alternatives. *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999) ("Statistical methods could provide a decent answer – likely a more accurate answer than is possible when addressing the equivalent causation question in a single person's suit."); *In re Simon II Litig.*, 211 F.R.D. 86, 149-55 (E.D.N.Y. 2002).

This Circuit and several others have accepted the validity of statistical methods for determining monetary relief and rejected arguments that individualized determinations are always required. *Ratanasen v. State of California*, 11 F.3d 1467, 1470-71 (9th Cir. 1993) (collecting cases); *Hilao*, 103 F.3d at 783-85; *Simon*, 211 F.R.D. at 150-51 (collecting cases); *cf. U.S. v. Fior D'Italia, Inc.* 536 U.S. 238, 248 (2002) ("Nor has Fior D'Italia convinced us that individualized employee assessments will inevitably lead to a more 'reasonable'

assessment of employer liability than an aggregate estimate."); *Newberg on Class Actions* § 10.5 (when aggregate proof of damages is sought to be proved on behalf of a class, no special or unique rules of evidence are involved). Statistical evidence is simply a form of circumstantial evidence, which the Supreme Court has said may be "more certain, satisfying and persuasive than direct evidence." *Desert Place v. Costa*, 539 U.S. 90, 100 (2003). In short, the foundation for Wal-Mart's argument, that statistical evidence is inherently less valuable or probative than other forms of evidence, has long been rejected by the courts.

While remedies based upon statistical analyses are often called "formulaic," that label does not mean that every class member must receive the same amount or that non-victims are awarded windfalls. Statistical formulas can incorporate detailed information about each individual from employee databases, as was proposed below, to calculate whether, and in what amount, a specific individual has been underpaid.[18] ER 1211-15. Moreover, the allocation of relief need not be perfect; when computing a back pay award, "unrealistic exactitude is not required and all doubts should be resolved against the discriminating employer." *Shipes*,

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[18] Indeed, contrary to Wal-Mart's suggestion that all women regardless of injury would receive money, the court found that Wal-Mart maintains substantial computer-readable personnel and payroll data which would permit identification of "not only the *potential* victims but also the *actual* victims" of discrimination with a "sophisticated use of data." ER 1212.

987 F.2d at 317; *Domingo*, 727 F.2d at 1445. *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.").

Wal-Mart argues that formula approaches to relief are only appropriate in relatively small class cases with few facilities. App. 42-43. Wal-Mart has it backwards. Individualized analyses are more appropriate "if the class is small," but "when the class size or the ambiguity of promotion or hiring practices. . . calls forth the quagmire of hypothetical judgment, a class-wide approach" is preferred. *Pettway*, 494 F.2d at 261; *cf. Carnegie*, 376 F.3d at 660 ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation.").

3. The Civil Rights Act of 1991

Wal-Mart's assertion that the "mixed motive" provision of the Civil Rights Act of 1991 mandates individual Stage II hearings for each class member is also

without merit. 42 U.S.C. § 2000e-5(g)(2)(B).[19] Title VII now recognizes two avenues for proving intentional discrimination.[20] Plaintiffs may prove discrimination by demonstrating that an employment action was taken "because of" plaintiffs' sex. 42 U.S.C. § 2000e-2(a). The 1991 Act codified an alternative method of proving intentional discrimination: plaintiffs may seek to establish liability for a "mixed motive" violation. 42 U.S.C. § 2000e-2(m). The Act permits a complainant to prove that impermissible discrimination was a "motivating" factor in the challenged employment decision. If a plaintiff chooses to prove her case in this manner, and the employer shows that it would have made the same decision in the absence of the impermissible factor, the plaintiff prevails but her remedies are limited. The Supreme Court has held that the mixed motive theory is an alternative method of proof, *not* an affirmative defense. *Costa,* 539 U.S. at 94. ("The first [provision] establishes an *alternative* for proving that an

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[19] Wal-Mart's assertion that the "mixed motive" provision codified *Teamsters* is flatly untrue. App. 37. The legislative history makes clear that the mixed motive standards, including the provision Wal-Mart cites, were specifically enacted to alter the substantive liability standards adopted in *Price Waterhouse*, not to adopt rules on the remedial stage from *Teamsters*. *Landgraf v. USI Film Products,* 511 U.S. 244, 251 (1994).

[20] Plaintiffs also allege discrimination based on adverse impact theory. 42 U.S.C. § 2000e-2(k). Wal-Mart does not contend that a mixed motive defense applies to this claim.

'unlawful employment practice' has occurred.") (emphasis added).[21]

The plaintiff elects whether to proceed under the mixed motive method of proof or under the traditional intentional discrimination standard; an employer may not force the plaintiff to proceed under the mixed motive theory. *Bogle v. McClure*, 332 F.3d 1347, 1357 (11th Cir. 2003) (defense cannot invoke mixed motive analysis where plaintiff established claim under higher standard); ER 1217. Here, plaintiffs have elected to prove their case under the single-motive standard: that discrimination occurred "because of" plaintiffs' sex. 42 U.S.C. § 2000e-2(a).[22] Wal-Mart cannot require plaintiffs to invoke a different theory for proving discrimination.

Moreover, nothing in the language of the "mixed motive" provisions refers to class actions nor how an individual's entitlement to remedies must be proven in a class action. There is, of course, a large body of case law establishing how Title

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[21] Even if Wal-Mart were correct that the provision in theory allows for an affirmative defense of mixed motive, which it plainly does not, Wal-Mart failed to plead it. SER 383-85.

[22] Notwithstanding Wal-Mart's misleading citation of the statutory provisions, the statute makes clear that the limitation on remedies in 2000e-5(g)(2)(B) applies only to claims proven under the "mixed motive" burden of proof. Nor does the Ninth Circuit's *en banc* decision in *Costa* support a determination that the defense is available to Wal-Mart here. *See Costa v. Desert Palace*, 299 F.3d 838, 857 (9th Cir. 2002) (noting "[i]n some cases, the employer may be entitled to the . . . affirmative defense instruction. In others, it may not.").

VII violations can be proven on a class-wide basis, including numerous cases which authorize the use of statistical formulas to award back pay. *See supra* at 32-36. Wal-Mart cites no authority for the proposition that, by conferring on victims of discrimination an *additional* method of proof, Congress intended to abrogate *sub silencio* 25 years of Title VII class action jurisprudence.[23]

Wal-Mart also argues that Section 1981a(b)(1), which permits punitive damages for "malice [or] reckless indifference to the federally protected rights of an aggrieved individual," requires an individual-by-individual remedy proceeding. App. 36, 48. Nothing in this language, or in the legislative history of the Civil Rights Act of 1991, precludes a class-wide remedy. Title VII refers to an "aggrieved person" or "person aggrieved" extensively in other contexts. 42 U.S.C. § 2000e-5(b), (c), (e)(1) and (f); *see also,* 42 U.S.C. § 2000e(a) (a person is defined as "one or more individuals."). Reference to "person" or "individual" has never before been read to preclude class claims under Title VII or to require their

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[23] Where a statute is amended to alter relief provisions, but says nothing about its application in class actions, courts presume that Congress was aware of the statute's application to class actions and intended to leave the case law intact. *Shook v. El Paso County*, 386 F.3d 963, 970 (10th Cir. 2004) ("The text of the PLRA says nothing about the certification of class actions. Based on the statute's absence of direction in that area, we presume that Congress intended to leave Rule 23 intact.") (*citing Dep't of Hous. & Urban Dev. v. Rucker,* 535 U.S. 125, 133 n.4 (2002) and *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 117-18 (2002)).

adjudication individual-by-individual. *See Paige v. State of California,* 102 F.3d 1035, 1041 (9th Cir. 1996); *see also Califano v. Yamasaki,* 442 U.S. 682, 698-99 (1979) (language in Social Security Act authorizing suit by "individual" did not preclude class relief).[24]

4. Due Process Does Not Require Individual Hearings

Wal-Mart argues that a remedial stage based on statistical methods violates its right to procedural due process. App. 45. No case has so held.[25] "Challenges that . . . aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis." *Newberg on Class Actions*, §10.5.

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[24] Indeed, the Supreme Court has determined that, in enacting the Civil Rights Act of 1991, Congress intended to expand available remedies *without* diminishing existing remedies. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001). Thus, Wal-Mart's "mixed motive" and "aggrieved individual" arguments, both of which presume that the Act limited available relief in class actions, are inconsistent with the legislative purpose.

[25] The Third Circuit's 1976 opinion in *Western Electric Co., Inc. v. Stern,* 544 F.2d 1196 (3d Cir. 1976), does not – as Wal-Mart suggests – provide that an employer has a due process right to dispute the claim of each employee class member individually. This case simply affirms that either party can use anecdotal evidence at the liability stage. Wal-Mart also relies on cases in which a party was *completely* barred from appearing, filing any pleadings, raising any objections, or seeking any relief. App. 44-45, citing *Degen v. United States*, 517 U.S. 820 (1996); *Hovey v. Elliott*, 167 U.S. 409, 413-14 (1897); *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-68 (2000). This is plainly not what the district court contemplated or required here. ER 1203 n.49.

Wal-Mart claims that the use of statistical methods deprives it of any defenses in the case. Not so. First, at the liability phase, Wal-Mart may put on evidence that it did not engage in class-wide discrimination, and to challenge plaintiffs' statistical model for liability, as it did at the class certification hearing. It is free to argue that business necessity justified subjective criteria, and to contest the factors considered in determining whether there is a pattern and practice of discrimination. Second, at the remedial stage, Wal-Mart may argue and present evidence pertaining to the appropriate model for relief, such as the factors to include and the proper measure of damages.[26]

Wal-Mart makes no effort to apply – nor does it even mention – the standards for evaluating potential due process violations. Due process is not "a fixed content unrelated to time, place and circumstances." *Connecticut v. Doehr*,

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[26] Wal-Mart attempts to conjure up a Seventh Amendment argument based on the court's suggestion that a Special Master might assist in mining Wal-Mart's databases in order to craft a formula. App. 46; ER 1206 n.50. This passing reference does not implicate the Seventh Amendment. Neither plaintiffs nor the district court suggested a special master would supplant jury fact-finding. The class back pay formula, whether calculated by a Special Master, as Wal-Mart presupposes will be done, or in competing calculations from the parties' experts, can be presented to the jury for its review and verdict. This Circuit has approved such a process in *Hilao*, 103 F.3d at 786. *See also, In re Peterson,* 253 U.S. 300, 309-310 (1920) (Brandeis, J.) ("New devices may be used to adapt the ancient institution to present needs and to make of [trial by jury] an efficient instrument in the administration of justice.").

501 U.S. 1, 10 (1991). In order to determine whether procedures meet due process requirements, courts consider the interests of each of the parties (and the government even if it is not a party), and the "risk of erroneous deprivation through the procedures under attack and the probable value of additional safeguards." *Doehr*, 501 U.S. at 11; *see also*, *Ratanasen*, 11 F.3d at 1470-71; *Hilao*, 103 F.3d at 786. Consideration of these factors demonstrates that the district court protected due process.

Wal-Mart's legitimate interest is limited to ensuring that it pays no more in lost wages or punitive damages than that to which the class is legally entitled. *Hilao*, 103 F.3d at 786; *In re Agent Orange Product Liability Litig.*, 597 F. Supp. 740, 839 (E.D.N.Y. 1984) (defendant has no valid objection so long as it is "liable for no more than the aggregate loss fairly attributable to its tortious conduct."). Wal-Mart presents no basis to believe that the processes proposed by the district court present any risk of "erroneous deprivation." Courts have found statistical methods of proof more accurate than relying upon individual anecdotes in many circumstances. *See supra* at 36-39.

Plaintiffs' interest is to ensure that the court employs the most accurate and manageable process for obtaining complete relief for the class. In a large class case, Wal-Mart's insistence on individualized determinations would, as it intends,

likely render the remedial phase of the litigation unmanageable, denying monetary relief to all members of the class. The *interests of the judiciary* likewise are served by the adoption of a manageable and efficient remedial process. Wal-Mart's alternative – 3400 separate class actions, each involving several hundred individual hearings – would clog courts across the United States for years to come. App. 49-50. While Wal-Mart professes to want nothing more than "the same right as every other litigant," *no defendant* has the right to choose the form or forum in which cases against it are filed. Wal-Mart's store-by-store litigation approach would mask real patterns of invidious discrimination by limiting courts to reviewing one small piece of the puzzle at a time, rather than the entire assembled picture. Nor is such a result fair to the court system, as the burden of such litigation would be far greater than the case plaintiffs seek to pursue.

5. The Record Fully Supports the District Court's Decision to Use Statistical Methods at Stage II

The district court's approach to Stage II remedies was well within its discretion. The court found that Wal-Mart awarded differential pay increases in a subjective manner, usually without documenting the reasons. ER 1149-51. Based on an extensive factual record, the district court concluded that "this is precisely the kind of case in which 'a class-wide approach to the measure of back-pay is

necessitated.'" *Id.* Any person-by-person attempt to reconstruct the career paths or quantify the lost earnings of affected employees would call forth the "quagmire of hypothetical judgments." ER 1202.

The district court noted the wealth of objective computerized data at Wal-Mart that could identify the actual victims of discrimination. ER 1212-15. Use of a statistical approach here does not mean that the process will compensate class members who have not been injured by discrimination. Because the data exists here to make carefully calibrated individual calculations, the district court distinguished its approach from cases that had used cruder formulas to allocate lump sums per capita among class members. An appropriate formula would result in *individualized* back pay awards to class members based on their job history, seniority, ratings, status, store location and other factors. ER 1212.[27]

B. The Proposed Procedure for the Award of Punitive Damages Does Not Violate Due Process

Wal-Mart contends that a class-wide award of punitive damages would run afoul of due process because it would allegedly punish legal conduct and award damages to uninjured victims. App. 46-47. This claim is without merit.

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[27] The district court rejected Wal-Mart's claim that its database does not capture sufficient factors to make statistical back pay analyses meaningful. ER 1213.

Wal-Mart's due process argument relies primarily on the Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003), an action on behalf of *one* individual under *state law.* The punitive damage award was based, in part, on defendant's similar conduct against other policyholders in states where the conduct was legal. Unlike *State Farm,* there is no danger here that Wal-Mart will be punished for conduct that is legal where it occurred, since Title VII is a federal law which applies to every Wal-Mart store in the United States.

Moreover, the district court's order specifies that any punitive damages award will be "based solely on evidence of conduct that was *directed toward the class.*" ER 1192 (emphasis added). The punitive damage award will be calibrated to the specific harm suffered by plaintiff – here the total harm suffered by the plaintiff class. *State Farm*, 538 U.S. at 422.

The district court imposed two additional due process protections. First, recovery of punitive damages will be limited "to those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct." ER 1192. Second, allocations of punitive damages to individual class member must be "in reasonable proportion to individual lost pay awards." *Id. See BMW v. Gore,* 517 U.S. 559, 580-81 (1996)

(the ratio of actual to punitive damages as one of several factors in determining whether a punitive damage award comports with due process). While Wal-Mart may well face a punitive damage award for the conduct at issue in this case, the district court has taken steps to ensure that any award will comply with due process.

III. THE COURT PROPERLY CERTIFIED THE CLASS UNDER RULE 23(b)(2) BECAUSE INJUNCTIVE RELIEF PREDOMINATES

The district court found that Rule 23(b)(2) certification was appropriate because plaintiffs' primary goal is injunctive relief. ER 1190. This finding is fully consistent with the law of this Circuit and not an abuse of discretion.

Certification under Rule 23(b)(2) is appropriate when a defendant "has acted or refused to act on grounds generally applicable to the class," thus making injunctive relief or declaratory relief appropriate for the class as a whole. Fed. R. Civ. P. 23(b)(2). The Supreme Court has described "[c]ivil rights cases against parties charged with unlawful, class-based discrimination" as particularly appropriate for Rule 23(b)(2) certification. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). This Court has acknowledged that the drafters of Rule 23(b)(2) specifically contemplated that employment discrimination actions would be certified under that provision. *Domingo*, 727 F.2d at 1443 n.11.

This Court's decision, in *Molski v. Gleich,* 318 F.3d 937, 950 (9th Cir. 2003), confirms that 23(b)(2) certification is appropriate if the primary goal of the litigation is injunctive relief, even if damages are sought. Contrary to Wal-Mart's fanciful reading of *Molski*, this Court expressly rejected the holding and rationale of the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) and its "incidental damages" approach. *Molski*, 318 F.3d at 949-50.

The district court's conclusion is fully supported by the record and consistent with *Molski*. The named plaintiffs' uncontradicted testimony is that "their central motivation" for bringing the action is "to improve opportunities for women at Wal-Mart." ER 1190. The court found that the injunctive relief claims "would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide. . ." *Id.* Plaintiffs' decision to forego seeking compensatory damages is further evidence of the primacy of injunctive relief. *Id. Cf. Molski,* 318 F.3d at 950 (finding injunctive relief the primary goal "[p]articularly in light of the fact that claims of physical injury were [excluded from proposed settlement]."). [28] In

[28] Wal-Mart suggests that, by waiving compensatory damages, the named plaintiffs are inadequate class representatives, an argument not raised below. App. 53 n.3. Had plaintiffs sought compensatory damages, Wal-Mart would no doubt

contrast to the injunctive relief, the court noted that the punitive damage claims – which are subject to more demanding proof requirements – are inherently too speculative to be the primary motivation for the case. It properly concluded that the punitive damage claims are "secondary to their primary goal of achieving broad equitable relief." *Id.*

A. Certification Under Rule 23(b)(2) Is Appropriate Because Equitable Relief Predominates

In the face of these findings, Wal-Mart advances several arguments that are not supported by the record or case law. First, it offers its now familiar refrain about its "unrebutted" statistics to claim there is no pattern of discrimination justifying injunctive relief. This factually inaccurate and merits-driven argument finds no support in the case law. As *Molski* makes clear, the question is not whether plaintiffs will ultimately prevail, but whether their primary goal in bringing the action is to seek injunctive relief. *Molski*, 318 F.3d at 950.

Second, Wal-Mart contends that injunctive relief cannot predominate because some class representatives and class members are former employees.

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cite this as an additional reason that class treatment was inappropriate. This false "Catch-22" was easily avoided in this case, because plaintiffs proposed, and the district court ordered, opt-out rights for class members. Wal-Mart also asserts that there is a conflict between management class members and the class. This claim was properly rejected below. ER 1182-83. *See Staton*, 327 F.3d at 957.

App. 52. Wal-Mart cites no case upholding its "head count" approach. Indeed, since all employers have turnover, any class case seeking injunctive relief will include class members who have left the defendant's employment. In many cases, as in this case, named plaintiffs leave because of the very discrimination challenged or as a result of retaliation for having objected to discriminatory treatment. SER 552-53, 661. It is undisputed that two named plaintiffs are current employees who have standing to seek injunctive relief on behalf of the class.[29] Plaintiffs need show nothing more under Rule 23(b)(2).

Third, Wal-Mart asserts, without citation to the record, that plaintiffs' monetary claims "amount to billions of dollars." App. 54. The potential monetary

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[29] Plaintiff Gunter, who no longer works at Wal-Mart, alleged an interest in returning if she could be assured of a non-discriminatory working environment. SER 429. Under these circumstances, even a former employee has standing to seek injunctive relief. Wal-Mart's reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), an individual police misconduct case challenging the use of a "choke-hold," is misplaced. This Court has repeatedly noted the limitations and exceptions to the holding of that case, such as where *class claims* are made, a *pattern* of illegal conduct is shown, and there is no issue of federal intervention into local law enforcement matters. *See e.g. LaDuke v. Nelson*, 762 F.2d 1318, 1324-25 (9th Cir 1985). *See also Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040-1041 (9th Cir. 1999) (standing issue in *Lyons* turned on plaintiff's ability to avoid engaging in illegal conduct). More applicable is the Supreme Court's recent decision of *Gratz v. Bollinger,* 539 U.S. 244, 260-262 (2003), where the Court found standing satisfied for a plaintiff denied college admission who went on to another school and alleged that he intended to apply for a transfer when the defendant ceased its discriminatory policy.

relief in this case, however, is largely a function of Wal-Mart's size, and says nothing about whether monetary relief predominates. If anything, the size of the class underscores the significance of the injunctive relief, which will benefit millions of current and future employees. If, as Wal-Mart argues, the amount of potential punitive damages drives the predominance analysis, the more egregious and widespread a defendant's conduct, the less likely that class treatment will be found appropriate. As the district court explained below, such a result "hardly squares with the remedial purposes of Title VII." ER 1190. In any event, under *Molski*, the proper analysis is not the theoretical monetary exposure, but the primary goal of the litigation.

B. Back Pay Is Properly Treated as a Form of Injunctive Relief Under Title VII

Wal-Mart faults the district court for failing to treat back pay as a form of monetary relief that weighs against 23(b)(2) certification. App. 54. Yet, it is well-established that back pay is an equitable, make-whole remedy under Title VII that is fully consistent with 23(b)(2) treatment. *Gotthardt v. Nat'l. R.R. Passenger Corp.*, 191 F.3d 1148, 1152-55 (9th Cir. 1999) (back pay is equitable relief); *Allison*, 151 F.3d at 415 (back pay has "long been recognized as an equitable remedy under Title VII . . . [that] conflicts in no way with the limitations of Rule

23(b)(2)"); *see also Salinas v. Roadway Express, Inc.*, 735 F.2d 1574, 1578 (5th Cir. 1984).

Ignoring this overwhelming precedent, Wal-Mart asserts that a request for back pay must be treated as a form of monetary relief weighing *against* (b)(2) certification. App. 55. The *Great-West Life* case, upon which it relies, underscored that back pay under Title VII is an "integral part of the equitable remedy." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002). Wal-Mart itself concedes that 23(b)(2) certification may be appropriate where plaintiffs seek back pay. App. 55 citing *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir. 1982). The decision in *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997), which it also cites, did not hold that back pay is inconsistent with 23(b)(2) treatment; rather it explained that, under some circumstances, a claim for back pay "may" require an opt-out right – exactly what the district court ordered here. ER 1193.

C. A Rule 23(b)(2) Class May Seek Punitive Damages

Wal-Mart suggests a claim for punitive damages is "wholly inconsistent" with 23(b)(2) certification, a view that has not been adopted by this Circuit, and which is at odds with the *Molski* mandate to look to the plaintiffs' primary intent

in bringing the action.[30]

Wal-Mart's contention that punitive damages depend on "each class member's individual circumstances" misapprehends the nature of the punitive damage inquiry. App. 55-56. The focus of punitive damages is defendant's state of mind and conduct. *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 536 (1999); *Barefield v. Chevron, U.S.A., Inc.*, No. C-86-2427 THE, 1988 WL 188433 at *3 (N.D. Cal. Dec. 6, 1988) ("Because the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, any claim for such damages hinges, not on the facts unique to each class member, but on the defendant's conduct toward the class as a whole"). Its purpose is to "punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Where, as here, plaintiffs allege a class-wide pattern and practice of discrimination, the punitive damage inquiry is whether Wal-Mart acted in reckless disregard of the rights of the class. Such relief

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[30] Wal-Mart cites *Williams*, 665 F.2d at 928-29, and *Zinser v. Accufix Research Inst., Inc,* 253 F.3d 1180, 1195 (9th Cir. 2001) for the proposition that a class action alleging punitive damages cannot be certified under Rule 23(b)(2). Neither case so held. Rather, under the very different facts of each case, this Court merely held that it was not an abuse of discretion for the lower court to deny (b)(2) certification.

is entirely consistent with (b)(2) certification.[31]

Finally, the district court's decision to certify a (b)(2) class with an opt out right protects the interests of any class member who wishes to pursue punitive damages on an individual basis.[32]

CROSS-APPEAL

IV. The District Court Erroneously Limited the Back Pay Remedy for Many Promotion Claims

The district court correctly certified class-wide promotion claims for liability and injunctive relief purposes. It concluded, however, that back pay relief for the promotion claim "would be limited to that subset of the class for whom objective applicant data exists." ER 121. This limitation is impossible to reconcile with the court's basic factual finding:

> Because most positions were not posted, class members had no ability to apply for, or otherwise formally express their interest in, openings as they

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[31] Nor is the "aggrieved individual" language in Title VII inconsistent with the award of class-wide punitive damages. See discussion at Section II.A.3.

[32] Wal-Mart urges the Court to rule that monetary relief will threaten the "cohesion and homogeneity" of the class, *citing Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). The Supreme Court's reference to (b)(2) certification in *Ticor* was not a holding, only a brief comment in an order that dismissed a grant of certiorari as improvidently granted. At most, *Ticor* can be read to require an opt out right where substantial damages are sought. *Molski,* 318 F.3d at 948. Here, of course, there is an opt out right, which ensures that class members' due process rights are protected.

> arose. As a result, managers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process.

ER 1153. It further found that Wal-Mart's lack of application procedures, combined with "the subjectivity built into Wal-Mart's promotion system," made this case "the type of situation a formula approach was intended to address." ER 1202.

Yet, believing itself constrained by *Domingo*, the court rejected relief for the portion of the class most injured by Wal-Mart's discriminatory practices – those denied promotion by the tap-on-the-shoulder system characterized by no posting, no application procedures and excessive subjectivity.

The district court's limitation on the relief that many members of the promotion class may seek was legal error. Neither *Teamsters* nor *Domingo* requires individual proof of interest to establish eligibility for back pay at Stage II in all circumstances; rather each court tailored the relief process to the facts and remedies sought in each case. In both *Teamsters* and *Domingo,* for example, the employers had an application process, which has not been the case at Wal-Mart for the positions at issue here. *Teamsters,* 431 U.S. at 338; *Domingo,* 727 F.2d at

1445.[33] There is likewise no indication in *Domingo* that plaintiffs ever argued that class members should get back pay even in the absence of evidence of an application or evidence the class member was deterred from applying. Indeed, the *Domingo* Court recognized that *Teamsters* authorized alternative methods of conducting remedial stages, and held that, under the facts of the case, "it can be assumed that all . . . employees were aware of discriminatory hiring practices" and that "denial of past applications, even in years prior to those at issue here, is more than enough proof of deterrence in later years." *Domingo*, 727 F.2d at 1445.

Where an individualized process for determining relief in Stage II cannot be utilized because it would lead to a "quagmire of hypothetical judgments," as the court found below, the *Teamsters*-hearing approach is particularly inappropriate. In such circumstances, the scope of Wal-Mart's back pay exposure should be commensurate with the harm its discrimination has caused. If the trier of fact finds there was no application or posting process, and accepts plaintiffs' statistical analysis, Wal-Mart's liability for a total amount of back pay should follow from these findings. Thereafter, in allocating that total amount among class members, Wal-Mart has no due process or statutory right to require either an expression of

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[33] In *Domingo*, while hiring occurred via word-of-mouth, an employee who managed to hear of a position could apply. *See Domingo v. New England Fish Co.*, 445 F. Supp. 421, 435 (W.D. Wa. 1977).

interest or an application from class members. ER 1203, *Hilao*, 103 F.3d at 786; *Pettway V*, 681 F.2d at 1266; *Hameed*, 637 F.2d at 520-522.

By denying make-whole relief to much of the class, the court's order has an unintended consequence at odds with the purposes of Title VII. Retroactive relief should act as a "spur or catalyst which causes employers . . . to . . . endeavor to eliminate, as far as possible, the last vestiges" of their discriminatory practices. *Teamsters*, 431 U.S. at 364, *quoting Albemarle,* 422 U.S. at 417-18. The lower court's determination turns this goal on its head, rewarding Wal-Mart for maintaining a fully discriminatory system by eliminating any back pay exposure when it lacked application and posting procedures. Ironically, Wal-Mart only faces monetary exposure when it takes steps, however limited, to implement a posting system.

Women who were denied promotions under the "tap on the shoulder" system are left with no remedy in this case. Their alternatives are to opt out and file individual cases to obtain relief, thus undermining the efficiencies of Rule 23, or to stay in this case to support the liability finding, only to undermine the remedial goals of Title VII because they will be denied relief despite the clearly discriminatory policy.

The district court's concern that there were insufficient proxies for interest

was misplaced. ER 1206. The "proxies" that the court sought are unavailable *because of* Wal-Mart's discriminatory conduct. If a pattern or practice of discrimination is found, then Wal-Mart, not the class, should be penalized for this gap in the data. *Segar*, 738 F.2d at 1291.

Moreover, there is a manageable way to discern which class members should receive a share of the relief. Contrary to the district court's assumption, the court is not limited to using the same feeder pools utilized in making a liability determination at the relief stage. ER 1207. The court may use a variety of methods to achieve the "rough justice" in distributing back pay that is the necessary goal of any approach. *Segar*, 738 F.2d at 1292-1293; *Pettway*, 494 F.2d at 262-63; *Domingo*, 727 F.2d at 1444-45. Feeder pools can be further narrowed by a variety of factors, such as limiting eligibility to those class members who most closely fit the profile of successful applicants or considering other documentary evidence. The court could also consider further limiting back pay to the class members who file claim forms. Full development of the record will shape these factors and final adjudication will define the contours of liability. The district court, therefore, erred in limiting eligibility for Stage II promotion remedies.

CONCLUSION

The district court's class certification order should be affirmed, except for the limitation of back pay relief for promotion claims, which should be reversed.

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CERTIFICATE OF COMPLIANCE PURSUANT WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(7)(B) because it contains 13,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I hereby certify that I know of no related cases pending in this Court.

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PROOF OF SERVICE

I hereby certify that on this 29th day of December, 2004, I caused two copies of the principle brief for appellees and cross-appellants and one copy of the Supplemental Excerpts of Record to be served by UPS, overnight delivery, with a courtesy copy of the foregoing brief by electronic delivery, to:

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Furthermore, on December 29, 2004, the principle brief for appellees and cross-appellants was filed with the Ninth Circuit by sending the original and fifteen copies by first class mail, postage pre-paid to the Clerk, Ninth Circuit Post Office Box 193939, San Francisco, California 94119-3939.

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