UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christine Mills *et al.,*	)	
	)	
Plaintiffs,	)	
	)	Case No. 04-cv-2205 (HHK)
v.	)	
	)	
James Billington, Librarian,	)	
Library of Congress,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION

More than five years after this case was filed, and with Plaintiffs on the cusp of moving for class certification, Defendant Library of Congress ("Defendant") has belatedly moved to dismiss Plaintiffs' claims in the Second Amended Complaint, and in the alternative moved for summary judgment. Defendant's motion is ill-timed, as the parties are in the midst of a dispute regarding Defendant's refusal to produce electronic applicant flow data. This outstanding data is critical to Plaintiffs' class certification motion, as well as individual plaintiffs' claims. *See* Rule 56(f) Declaration, ¶¶10-15.

Moreover, Defendant's motion contravenes its earlier agreement in August 2006 that "summary judgment pleadings should be deferred until after the matter of class certification is complete," and to "defer merits and damages discovery" as well. Dkt. 18, August 1, 2006 Joint Local Rule 16.3 Statement. It simply does not make sense to rule on summary judgment at this juncture, as this Court has yet to rule on Plaintiffs' Motion to Compel, while the individual plaintiffs have yet to complete discovery in keeping with the bifurcated discovery plan.

Defendant also argues that the May 28, 2004 class charge did not specify any adverse employment actions occurring within 60 days. Yet this argument is barred by the law-of-the-case doctrine. This Court's May 16, 2006 Opinion and Order noted that Defendant violated its own regulation by failing to provide Plaintiffs ten days to remedy any defects in the complaint. *See* Dkt. 15. In any event, the class charge provided Defendant ample notice of the class allegations in the Second Amended Complaint, while Plaintiff Clifton Knight was denied a promotion within 60 days of the class complaint.

Defendant's primary argument is that this case is barred by *res judicata* and collateral

estoppel based on the *Cook* Settlement. This argument is simply meritless. First, Defendant has waived both affirmative defenses by failing to plead them in its answer. In addition, the *Cook* Settlement expired on December 1, 2002, while this case accrued in 2003, and therefore involves a different "nucleus of facts" than *Cook*. Indeed, Defendant's General Counsel and Inspector General stated in a March 1, 2004 that the *Cook* settlement "expired by its own terms on December 1, 2002." Pl. Exh. 2. Defendant's reliance on this Court's September 2003 Order in *Cook* is also unavailing, as this Court never examined whether there were less discriminatory alternatives, which Plaintiffs may prove even assuming *arguendo* that Defendant's selection system was valid.

Finally, Defendant asserts what amounts to a motion to deny class certification. This request is plainly improper, as the parties' dispute over class discovery has yet to be resolved. The electronic applicant flow data Defendant is withholding is critical to Plaintiffs' pending class certification motion. This Court should defer ruling on Defendant's motion to deny until after Plaintiffs have filed their motion.

STATEMENT OF FACTS

I. THE SEPTEMBER 15, 2003 LETTER FROM PLAINTIFFS MILLS AND IJEOMAH-MILLS TO LIBRARIAN BILLINGTON AND INSPECTOR GENERAL KARL SCHORNAGEL'S MARCH 1, 2004 RESPONSE

Plaintiffs Christine Mills and Priscilla Ijeomah-Mills (along with Amy Barnes, who is no longer a party this case) submitted a letter to Librarian James Billington on September 15, 2003. The letter followed-up an earlier letter sent by Leon Turner and Howard Cook "centered around issues of favoring White employees as opposed to African American employees." Pl. Exh. 1. The September 15 letter noted that white Senior Circulation Technicians are not required to execute rotational assignments, unlike their African-American colleagues, and are given training and

grooming opportunities that are not afforded to African-Americans.

The letter further noted that a recently announced Vacancy Announcement (number AT177527) was only open to individuals that were "preselected" and was not open to all Library of Congress employees. The letter alleged that this vacancy announcement violated an Order in the *Cook* case, and requested that the Inspector General conduct an investigation, and that the Vacancy Announcement be withdrawn.

The Library responded several months later in a March 1,2004 memorandum submitted to Billington by Inspector General Karl W. Schornagel. Pl. Exh. 2. Schornagel referred to a previous July 2, 2003 letter by the Library's General Counsel, which "stated that the Cook case expired by its own terms on December 1, 2002 and that the case only covered professional, administrative and supervisory technical African-American employees of the Library," and thus did not cover employees in Collections Access, Loan and Management (CALM). Schornagel "concurr[ed] with the Library's General Counsel opinion on the nonapplicability of the Cook case." Schornagel concluded that Library management was not violating Library regulations.[1]

II. THE MAY 28, 2004 CLASS CHARGE SUBMITTED BY MILLS AND OTHERS

In response to the March 1, 2004 report, Mills, Ijeomah-Mills and Barnes submitted a "Third Party complaint" to the Library's EEO department on May 28, 2004. *See* Dkt. 6-1. The complaint was signed by over 600 African-American employees, and included sixteen paragraphs detailing the employment practices that discriminated against African-American Library employees. The

[1] Plaintiffs Mills and Ijeomah-Mills reserve the right to argue that their individual claims extend back to September 2003, as this letter to Billington constitutes a charge of discrimination under the "permissive standard" set forth in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008).

complaint also requested that the Library "take remedial action."

III. DEFENDANT'S JUNE 6, 2005 MOTION TO DISMISS AND THIS COURT'S MAY 16, 2006 ORDER DENYING DEFENDANT'S MOTION

Defendant filed a Motion to Dismiss the original complaint on June 6, 2005. Defendant argued that Plaintiffs failed to exhaust their administrative remedies by purportedly "refus[ing] to provide information about specific incidents and dates of alleged discrimination, challeng[ing] the Counselor's ability to handle the complaint, and refus[ing] to provide details about the positions held by members of the alleged class." Dkt. 6, at 10.

Defendant also maintained that "[p]roviding the Library with bare 'notice' of their allegations in the form of an informal complaint...is not enough to satisfy the administrative exhaustion requirements." *Id.* at 11. Furthermore, Defendant contended that "the 15 allegations asserted in the two administrative complaints filed with the Library's EEOCO describe no specific instances of discrimination, provide no dates when such discrimination took place, and fail to present or assert any evidence of commonality and typicality required for a class complaint." *Id.* Defendant concluded that "Plaintiffs' agents failure to provide specific information to the Library's Counselor and their general refusal to cooperate in the Library's EEO administrative process bars them from filing and maintaining a suit in this Court." *Id*. at 12.

This Court denied Defendant's motion on May 16, 2006. Dkt. 15. Plaintiffs pointed out that they had accepted both invitations by Claudia Withers, who the Library had retained to conduct counseling. In addition, Plaintiffs were willing to provide specific information, but Withers "was more concerned with relaying information than receiving information." *Id.* at 10.

The basis for this Court's ruling was the Library's premature cancellation of Plaintiffs' complaint "when it did not afford the class agents an opportunity to remedy whatever defects may

have existed in their complaint, as is required by LOC regulations." *Id*. Regardless of whether the dismissal was based on "lack of specificity in the class agents' complaint or their failure to prosecute their claim...LOC regulations require that the class agents be given ten-days notice of the deficiencies in their complaint and an opportunity to address those deficiencies." *Id.* This Court found based on Defendant's "numerous errors when processing plaintiffs' complaint," that Plaintiffs had "constructively exhausted their administrative remedies." *Id.* at 12.

IV. THE PARTIES AGREE IN AUGUST 2006 TO DEFER MERITS DISCOVERY AND SUMMARY JUDGMENT UNTIL AFTER RESOLUTION OF CLASS CERTIFICATION

The parties submitted a Local Rule 16.3 Report on August 1, 2006. The report initially noted that:

> The Parties agree that this case is likely to be decided by dispositive motion, and that in order to efficiently process the case that such briefing should be done after a period of discovery on class issues only. We address the issue of bifurcation below, in which the Parties agree to defer merits and damages discovery until after resolution of the matter of class certification.

Dkt. 18, Joint Local Rule 16.3 Report, at 1.

The parties also stated that "summary judgment pleadings should be deferred until after the matter of class certification is complete," and that "a briefing schedule for summary judgment matters should be set and decided at a status conference to follow a decision on class certification and related matters." *Id.* at 2. The Report also noted that the

> Parties agree to bifurcation of discovery into at least two phases, have made a specific proposal for such bifurcation and agree to consider further bifurcation after completion of the Class Certification Stage.

V. PLAINTIFFS' DECLARATIONS PROVIDE FURTHER EVIDENCE THAT THEY HAVE BEEN INJURED BY DEFENDANT'S DISCRIMINATORY PRACTICES

The plaintiffs in this case are ten current and former African-American Library employees.[2] Each plaintiff has submitted a declaration that sets out the injury he/she has incurred because of race:

• Christine Mills is a GS-8 Senior Circulation Technician. Pl. Exh. 3, ¶ 3. In 2003, Ms. Mills was denied training for an Accounts Department position, and because of this denial of training was unable to post for the position. The position was specifically posted for a white employee, Ken Henderson. Ms. Mills interviewed anyway for the position, although the Library did not abide by its policy requiring a three-person panel. ¶¶7-10.

Ms. Mills subsequently sent a letter to James Billington requesting that the vacancy announcement be withdrawn. ¶11. However, the Library's Inspector General, Karl Schornagel, responded several months later that the position assignments were not based on race. ¶12.

Even after filing the May 28, 2004 class complaint, Ms. Mills has been subject to discrimination. In 2005, Ms. Mills was detailed to a Librarian position, but was not interviewed when the position became vacant. ¶15. Instead, the Library selected four less qualified non-African-American employees who had never been employed in the Loan Division. ¶¶16-18. In 2006, Ms. Mills applied for a supervisor position and was interviewed, but was not selected. Ms. Mills was better qualified than the individuals selected, and in fact had trained them. Ms. Mills filed an EEO complaint based on this nonselection, but it was dismissed. ¶¶19-21. Ms. Mills is currently setting up accounts, which is equivalent to a GS-9 position, but she is only being paid as a GS-8. ¶22.

• Priscilla Ijeomah-Mills is a GS-8-10 Inventory Specialist. Pl. Exh. 4, ¶3. Ms. Ijeomah-Mills was a signatory to the September 15, 2003 letter to Billington involving the Accounts Section

[2] Plaintiffs do not argue that each of the plaintiffs is a class representative. Plaintiffs will designate class representatives when their forthcoming motion for class certification is filed.

position. ¶¶5-10. Ms. Ijeomah-Mills was also denied a Librarian position in 2005 despite being better qualified than two white females selected. ¶¶11-15.

• Clifton Knight was in a GS-9 position between 1982 and 2009, and is currently a GS-11 Copyright Information Specialist. Pl. Exh. 5, ¶3. Mr. Knight has applied for well over 125 positions since 2001, but has been repeatedly denied promotions. ¶4. He is subject to discrimination in his current position as well. The Library was supposed to upgrade all Copyright Information Specialist positions to GS-12, but only upgraded positions for two white employees. ¶6. The Library has also denied him opportunities for training that are directly tied to promotional opportunities. In November 2009, Mr. Knight was advised hie was ineligible for the Library's Leadership Development Program for 2010-11 on the ground that he was not a current, full-time Library employee, even though that was not the case. ¶7 Mr. Knight also points to an inequity in the grading of Information Specialist positions, which are primarily occupied by African-American employees, and Registration Specialist positions and Reference Librarian positions, which are higher-graded and predominantly white. ¶10.

• David Hubbard is a GS-9 Problem Resolutions Specialist. Pl. Exh. 6, ¶2. In September 2003, Mr. Hubbard applied for a Copyright Information Specialist Position, but was not selected. The Library instead hired David Fernandez, who had been employed by the Library for only 4-5 years, and was re-employed as a contractor. ¶6. The position was never posted, and Fernandez was placed directly into the job without competition. ¶7. Mr. Hubbard filed an EEO complaint based on this nonselection, but the Library never conducted an investigation. ¶8.

In 2008, there were three GS-11 job openings available, and two in Mr. Hubbard's department, Visual Arts Recordation. Mr. Hubbard interviewed for the positions, but was not selected. Instead, the Library selected two white females, Elizabeth Stringer and Larisa Pastuvich,

who were not working in VAR and were less qualified. ¶¶9-12. Mr. Hubbard has also been denied the same training opportunities as his white employees who attained much higher grades. ¶¶13-14. He also notes that "[m]any positions are not posted. The AVUE system also provides management discretion to change and manipulate the Avue system." ¶15.

• Charles Mwalimu was a Foreign Law Specialist between 1982 and February 2007, when he left the Library. Pl. Exh. 7, ¶4. In 2005, Library officials went outside the United States and hired Brian Buchner, a white male living in Hong Kong, to fill the Chief of Eastern Law Division position even though Dr. Mwalimu was the best qualified. ¶¶6-7. Before Buchner was hired, the Library had brought in another white male, James Bond to be Acting Chief. But when Library officials realized Bond was not qualified for the position, they changed the position description in such a way to qualify Buchner. ¶¶9-10.

Dr. Mwalimu subsequently filed an EEO charge after Bond was brought in. ¶11. The Library retaliated against Dr. Mwalimu by suspending him twice for reasons that were unjustified. ¶12. The Library removed Dr. Mwalimu from his position in February 2007 for "misconduct," although this decision was also in retaliation for his earlier EEO complaints alleging race discrimination. ¶13.

• Lawrence Perry is a GS-11 working in Information Technology. Pl. Exh. 8, ¶3. Mr. Perry's white colleagues have been given promotions to higher grade positions. ¶4. He is currently performing the exact same duties as his non-African-American colleagues in his unit, but is the lowest paid. ¶5. The Library has informed him that his lower pay is due to the lack of money for pay raises. ¶6. Yet this explanation is incorrect, as the Library has been consistently hiring new employees. ¶7.

In 2004, the Library hired a white male, George Wilkey as a contractor. The Library created

a "limited posting" specifically for Wilkey to a GS-12 position. Mr. Perry was better qualified for the GS-12 position than Wilkey, as he was already performing the duties of the position, but because it was a "limited posting," Mr. Perry was unable to apply for the position. ¶¶9-11.

• Runako Balondemu is currently a GS-9 Human Resources Specialist. Pl. Exh. 9, ¶2. Between 2003 and 2005, Balondemu was subject to harassment and discrimination by Allen Hatcher and Raphael Landrau, particularly before and after Mr. Balondemu underwent a surgery. ¶5. Hatcher and Landrau also gave Balondemu poor evaluations despite his exceptional performance records, and was denied cash awards in 2003 and 2004. ¶6. They also tried to demote Mr. Balondemu on the ground that he was not doing the work of a GS-9, although his white colleagues were not subject to the same treatment. Mr. Balondemu was also denied training given to his white colleagues. In 2005, Hatcher hired two white females without any experience in federal government, and provided them extensive training that Mr. Balondemu was denied. ¶8. Mr. Balondemu filed several EEO complaints based on the discrimination he experienced between August 2003 and January 2005, but each EEO complaint was cancelled. ¶9-10.

• William Rowland was employed at the Library as a GS-8 Senior Collections Improvement Assistant/Library Technician. Pl. Exh. 10, at ¶3. Mr. Rowland knew that his job was a GS-9 to GS-11 position, and that he was being underpaid for the work he was performing. ¶4. Consequently, between 2000 and 2006 Mr. Rowland repeatedly sought to get the position description reviewed by requesting a desk audit. The Library, however, dragged out the process and never performed the desk audit. ¶¶5-6. Mr. Rowland notes that his unit was predominantly African-American, and that his colleagues were also being underpaid for the work they were performing. ¶8.

• Geraldine Duncan was a GS-9 employee in Library Services as of January 2010, when she

retired from the Library. Pl. Exh. 11, ¶2. Ms. Duncan was a Cataloguer's Technician, but wa performing the work of a Cataloguer, which was a GS-12 and GS-13 position. ¶3. She and two other African-American females were the lowest paid employees in the unit. ¶5. Ms. Duncan became discouraged from applying for promotions toward the end of her career, as she had previously applied for 30 promotions, yet had not been selected. ¶7.

• Sharon Taylor was a GS-5 Copyright Clerk during her tenure at the Library. Pl. Exh. 12, ¶2. Despite meeting her performance goals, the Library alleged that she was not meeting her quotas. ¶¶3-5. This allegation was untrue, as Ms. Taylor's certificates showed her meeting her goals. ¶6. Ms. Taylor was called into the office of a white supervisor, Ms. Didant in August 2003. Ms. Taylor was informed that September 30, 2003 would be her last day on the job as she was not a good "fit." ¶8 Ms. Taylor's direct supervisor, Deandra Ham, stated that Ms. Didant should not have made that comment. ¶9. Ms. Taylor subsequently filed an EEO ground, but the Library dismissed the charge. ¶10.

ARGUMENT

I. DEFENDANT'S SUMMARY JUDGMENT MOTION IS PREMATURE BECAUSE CLASS ISSUES SHOULD BE DECIDED BEFORE INDIVIDUAL ISSUES, AND BECAUSE THE PARTIES AGREED IN 2006 TO DEFER INDIVIDUAL DISCOVERY UNTIL AFTER CLASS CERTIFICATION

Defendant seeks to dismiss the individual claims of all ten plaintiffs on the ground that they have "fail[ed] to state a cognizable claim under Title VII." Def. Brief at 42. Of course, Defendant has filed a statement of undisputed facts and relied on discovery documents outside the four corners of the Second Amended Complaint, so that its motion is actually one for summary judgment. Defendant's motion is premature for two reasons: first, class issues must be decided before individual plaintiffs' claims are addressed, and summary judgment on Plaintiffs' claims is untimely

in light of the parties' 2006 agreement to bifurcate discovery and defer summary judgment until after class certification.

A. In Pattern or Practice Class Cases, It is Inappropriate to Move For Summary Judgment on Individual Claims Before the Class Issue Has Been Decided

Plaintiffs' Second Amended Complaint alleges a pattern or practice of intentional discrimination against the Library. *See* Dkt. 28 at 2. The pattern or practice class claim is governed by the two-stage process set forth in *Teamsters v. U.S.*, 431 U.S. 324 (1977). At "Stage 1," the plaintiffs' burden is to "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer of group of employers." *Id*. at 360. The plaintiffs at this stage are "not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy," but only to "establish a *prima facie* case that such a policy existed." *Id.* If the plaintiffs prevail on liability, the court conducts "Stage 2" individual hearings on relief, in which a presumption of discrimination is established, so that "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362.

The Supreme Court in *Teamsters* noted that "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination." 431 U.S. at 361. Courts have subsequently ruled that it is inappropriate to move for summary judgment on individual employees' claims before the class issue has been decided, which is precisely what Defendant seeks here.

For example, in *Thiessen v. General Electric Capital Corp*., 267 F.3d 1095 (10th Cir. 2001), the district court decertified the class and entered summary judgment against the lead plaintiff on individual grounds. The Tenth Circuit reversed, holding that:

> During the first stage of a pattern-or-practice case...a summary judgment motion (whether filed by plaintiffs or defendants) *must focus solely* on whether there is sufficient evidence demonstrating that defendants had in place a pattern or practice of discrimination during the relevant limitations period. *See Teamsters*, 431 U.S. at 357-61, 97 S.Ct. 1843.Until the first stage is resolved, we question whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e., whether individual plaintiffs are entitled to relief).

Thiessen, 267 F.3d at at 1109 (emphasis added).

This Court has likewise cautioned that summary judgment is inappropriate prior to resolution of the pattern or practice class claim. In *Hyman v. First Union Corp*., 980 F.Supp. 46 (D.D.C. 1997)(Lamberth, J.), the defendant moved for summary judgment against three plaintiffs. This Court noted that:

> Where individual and collective claims are brought contemporaneously, as in the instant case, courts should consider the collective claim prior to turning their attention to the individual claims due to the fact that if the collective claim has merit, the named and unnamed individual class members are entitled to the burden-shifting presumption of *Teamsters*.

Hyman, 980 F.Supp. at 51.

The defendant's summary judgment was denied as "inappropriate at this time." *Id.* at 52. *Hyman* describes this case's procedural posture to a "t."[3] Defendant has prematurely moved for summary judgment on the individual claims before Plaintiffs have even moved for class certification. In so doing, Defendant has subverted the *Teamsters* method of proof.

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[3]Defendant's citation to *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159 -160 (2d Cir. 2001) on page 44 of its brief is absolutely fatal to its summary judgment argument. As *Robinson* noted, the question of whether individual class members have incurred adverse employment actions should only be resolved "at the remedial stage of a pattern-or-practice claim." Given that the parties have not yet litigated the *first* stage of a pattern or practice claim, it is inappropriate to skip ahead to the second stage, as Defendant seeks.

Defendant makes two additional errors. First, Defendant claims that Plaintiffs have not identified a specific employment. But the D.C. Circuit held in *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) that

> plaintiffs' pattern or practice disparate treatment challenge to the employment system as a whole may also implicate disparate impact analysis...Though a plaintiff class will initially seek to show a disparity among the comparably qualified in order to prove disparate treatment, an employer may seek to defend by pointing to a specific, arguably nondiscriminatory, employment practice as the cause of the observed disparity. In such situations the defendant may appropriately be required to demonstrate the business necessity of the practices causing the disparity because the court will have before it all the elements of a traditional disparate impact claim

Segar, 738 F.2d at 1266; *see also Palmer v. Schultz,* 815 F.2d 84, 114, fn.21 (D.C. Cir. 1987)("[A] disparate treatment claim can turn into a disparate impact claim if a defendant rebuts an allegation of discriminatory intent by claiming that a facially neutral selection criterion caused a disparity in selections."). *Segar* and *Palmer* make clear that the nature of Plaintiffs' disparate impact claim will depend on Defendant's rebuttal to Plaintiffs' pattern or practice case. It is only at that point that the disparate impact claim will be joined.[4]

The second error lies in Defendant's contention that this Court's September 2003 Order in *Cook* establishes the Library's "legitimate, nondiscriminatory reason" under the proof method set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). Def. Brief at 48-49. Yet the Supreme Court specifically noted that *McDonnell-Douglas* involves "the order and allocation of proof in a private, *non-class action* challenging employment discrimination." 411 U.S. at 800 (emphasis

[4] In addition to this binding D.C. Circuit precedent, Plaintiffs will be better positioned to define any disparate impact claim once they have evaluated the applicant flow data that Defendant is currently withholding.

added); *Thiessen*, 267 F.3d at 1106 (pattern or practice order of proof "differ[s] dramatically" from individual claims).

Because this case is a putative class action, Defendant's rebuttal burden under *Teamsters* is far more demanding than its *de minimis* burden of production under *McDonnell-Douglas*. The D.C. Circuit explained in *Segar* that once plaintiffs establish a *prima facie* pattern or practice case

> the strength of the evidence sufficient to meet [the defendant's] rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing.

Segar, 738 F.2d at 1269-70.

The Court later explained in *Palmer* that the defendant must isolate a non-discriminatory factor that accounts for the statistical disparity in the plaintiffs' proof. *Palmer*, 815 F.2d at 101. Moreover, Defendant's purported "legitimate, nondiscriminatory reason" would not suffice to rebut Plaintiffs' disparate treatment claims even if *McDonnell-Douglas* applied. As noted below, the Uniform Guidelines and the Civil Rights Act of 1991 both emphasize that a business necessity defense (which Defendant has yet to prove anyway) is irrelevant to an intentional discrimination claim. *See infra* at 29.

B. Summary Judgment is Inappropriate in Light of the Parties' Current Discovery Dispute, as Well as the Parties' August 2006 Agreement to Defer Individual Discovery and Summary Judgment Motions Until After Class Certification

Defendant's motion for summary judgment on each individual plaintiff's claims is particularly troubling given that the parties are in the midst of a year-long dispute over Defendant's refusal to produce easily accessible electronic "applicant flow" data. Such data is not only critical to Plaintiffs' class claim, but it is also essential to the nonpromotion claims of plaintiffs Mills, Ijeomah-Mills, Hubbard, Knight, Perry and Malimu.

It is well-settled that a court should not grant summary judgment while a motion to compel discovery is pending. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987)(error for district court to deny motion to compel as "moot" after granting summary judgment, as requested discovery was essential to show that similarly situated firefighters were treated differently due to race). Defendant's attempt to prevent Plaintiffs from obtaining the discovery necessary to prove their individual claims is wholly unwarranted. As one judge has aptly noted, "[t]he ancient Hebrew expression, 'They tie our hands and then reproach us that we do not use them,' gives sufficient response here." *Green v. McDonnell-Douglas Corp*., 463 F.2d 337, 344-45 (8th Cir. 1972)(Lay., J., concurring), *vacated on other grounds*, 411 U.S. 792 (1973).

Defendant's motion for summary judgment also ignores its prior agreement in 2006 to defer individual discovery and any summary judgment motions until after class certification. Dkt. 18. The ten individual plaintiffs have yet to complete individual discovery because the parties previously agreed to bifurcate discovery. It is inexcusable for Defendant to seek summary judgment against the individual plaintiffs in light of its prior agreement. It is only after class certification has been decided that Plaintiffs' individual claims should be addressed.[5]

II. THIS COURT SHOULD ALSO DEFER DECISION ON DEFENDANT'S MOTION TO DENY CLASS CERTIFICATION UNTIL AFTER PLAINTIFFS HAVE MOVED FOR CLASS CERTIFICATION

[5]Even if this Court determines that a ruling on summary judgment is appropriate at this juncture, Plaintiffs submit that additional briefing should be ordered. The limited data Defendant has produced points to statistically significant pay disparities. Plaintiffs asked Dr. Lance Seberhagen, an industrial psychologist, to analyze Defendant's annual salaries of major occupations. Dr. Seberhagen found that the average salary of white employees was greater than the average salary of black employees in 13 out of 15 major occupations, with this disparity statistically significant at 2.68 standard deviations. Pl. Exh. 13, Second Declaration of Lance W. Seberhagen, ¶7 These significant disparities provide all the more reason for Defendant to produce applicant flow data involving promotions, with supplemental briefing to follow.

Defendant concludes its motion with the equivalent of a motion to deny class certification. Def. Brief at 50-57. Although such "preemptive" motions are not uncommon, Defendant's motion is both premature and misguided. The D.C. Circuit explained in *Wagner v. Taylor*, 836 F.2d 578 (D.C. Cir. 1987) that statistical evidence is sufficient to establish commonality under Rule 23(a). The Court noted that "[s]tatistical evidence...may suffice if the disparities in treatment are significant." *Id*. at 592. There is absolutely no basis for Defendant to short-circuit Plaintiffs' pending motion for class certification when the parties' dispute over class discovery has yet to be resolved. *Chappell-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2007).

The majority rule is that a district court "should defer decision on certification pending discovery if the existing record is inadequate for resolving the relevant issues." *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library Inc*., 586 F.2d 962, 966 (2d Cir. 1978) (citations omitted); *see also* 7AA Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure Civil* § 1785.3 (3d 2005)(the practice employed in the overwhelming majority of class actions is to resolve class certification only after an appropriate period of discovery). This Court should defer ruling on Defendant's motion to deny class certification until after the dispute over class discovery has been resolved, and Plaintiffs have filed their motion for class certification. As one court has noted:

> As for defendants' motion to deny class certification, we agree with plaintiff that the motion is premature....Defendants proceed to argue against class certification before plaintiff has even moved to certify the class. Defendants attempt to foreclose any discovery on the issue of class certification, even though 'the predominant view is to allow discovery before the motion for certification'

Thomas v. Sheahan, 370 F.Supp.2d. 704, 714 (N.D. Ill. 2005)(citation omitted).

Defendant contends that Plaintiffs' argument is a "red-herring," Def. Brief at 54, fn. 8, but

its rebuttal is both nonsensical and meritless. First, Defendant asserts that Plaintiffs' interrogatory answers produced no evidence to satisfy the Rule 23 factors. It is unclear what Defendant is specifically referring to. Plaintiffs' declarations pinpoint disparities in pay and promotion that are ripe for class treatment. Defendant also maintains that applicant flow data would not "verify that the Library's hiring system results in a disparate impact to minority applicant [sic]." Yet Plaintiffs are not challenging Defendant's "hiring system" at all. Moreover, the applicant flow data is unquestionably relevant to Plaintiffs' pattern or practice disparate treatment claim, which Defendant does not appear to dispute. Finally, Plaintiffs' declarations call into doubt whether Defendant's selection process is indeed valid and nondiscriminatory. *See infra* at 28.

There are further reasons to stay decision on Defendant's premature motion to deny class certification. Defendant contends that Plaintiffs' class definition is not ascertainable. Def. Brief at 50-51. Yet Plaintiffs have repeatedly informed this Court in their status reports that once Defendant produces the electronic discovery at issue, Plaintiffs will have the ability to further refine their class claim. *See* Dkt. 166, Plaintiffs' February 26, 2010 Status Report, at 4 ("[T]he written discovery served in May 200[9] that is the subject of Plaintiffs' motion to compel is designed to give plaintiffs the data necessary to refine the class definitions and determine which practices will be the subject of the class motion.").

Defendant also asserts that Plaintiffs have not met the requirements of Rule 23(a) and 23(b). Def. Brief at 51-57. Given that Plaintiffs have not yet designated class representatives, Defendant's contention that as-yet-unnamed class representatives do not satisfy Rule 23's criteria is specious. In sum, Defendant has failed to provide a compelling reason to rule on the merits of class certification at this juncture.

III. THIS COURT HAS ALREADY REJECTED DEFENDANT'S CONTENTION THAT PLAINTIFFS DID NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES

A. This Court Ruled in its May 16, 2006 Opinion and Order That Plaintiffs Had Exhausted Their Administrative Remedies, and That Ruling is Law of the Case

Defendant argues that Plaintiffs failed to exhaust their administrative remedies, asserting that the May 28, 2004 class charge did not specifically identify any discrete employment actions occurring within sixty days. Def. Brief at 33-36. This is not the first time Defendant has lodged this objection. Defendant's first motion to dismiss, filed on June 6, 2005, averred that Plaintiffs' agents failed to cooperate in the EEO counseling process by, *inter alia*, "refus[ing] to provide information about specific incidents and dates of alleged discrimination...and refus[ing] to provide details about the positions held by members of the alleged class," so that the "formal administrative complaint, like the earlier informal administrative complaint, is vague and lacks specificity and detail." *See* Dkt. 6, Defendant's Motion to Dismiss, at 10.

This Court denied Defendant's motion to dismiss, ruling that Plaintiffs "constructively exhausted their administrative remedies." *See* Dkt. 15, Order of May 16, 2006, at 12. The ruling was based on the undisputed fact that Defendant "prematurely cancelled plaintiffs' complaint when it did not afford the class agents an opportunity to remedy whatever defects may have existed in their complaint, as is required by LOC regulations." *Id.* at 10. This Court noted that, by prematurely cancelling the complaint without providing Plaintiffs notice, Defendant violated LCR 2010-3.2 § 6(D), which provides that "[i]f an allegation lacks specificity and detail, the Complaints Examiner shall afford the agent10 workdays to provide specific and detailed information." *Id.* at 11.

Defendant is rehashing the very same argument in the instant Motion, yet Defendant's second go-round is proscribed by the law of the case doctrine. The Supreme Court has emphasized that

"when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816 (1988). The D.C. Circuit has likewise held that "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996)(*en banc*). Defendant's attempt to have a "second bite at the apple" is plainly improper.

Indeed, it appears that Defendant is *still* attempting to "evad[e] the regulation's strictures." May 16, 2006 Order at 11. This Court pointed out in 2006 that the Library violated its regulations by a) failing to provide Plaintiffs any notice of the impending cancellation of their complaint, and b) failing to provide Plaintiffs ten days to correct any lack of specificity and detail in the complaint. Dkt. 15, at 11. The argument Defendant presents in this motion - that the May 28, 2004 class charge did not provide specific enough information - is completely beside the point even if Defendant was correct, as Defendant never provided Plaintiffs the opportunity to remedy any defect in the complaint. In other words, Defendant cannot "unring the bell" with respect to violating its own regulations.

Defendant will likely reply that the law-of-the-case doctrine does not apply, as its first motion to dismiss focused on Plaintiffs' interactions with the EEO counselor, while the current motion concentrates on the May 2004 charge's specificity. But this change in emphasis is immaterial as a matter of law. *Strigliabotti v. Franklin Resources, Inc*., 398 F.Supp.2d 1094, 1098 (N.D. Cal. 2005)(second motion to dismiss that is "essentially the same, but with a different emphasis" than first motion is barred by law of the case). Were it otherwise, parties could file a limitless succession of motions to dismiss, each with a different emphasis. Defendant has not pointed to any intervening

change in law, or the discovery of any new facts, that warrant a reversal of this Court's May 16, 2006 ruling. There is simply no good reason for this Court to revisit the exhaustion issue five years into this case.

B. Plaintiffs' May 2004 Charge Provided Defendant Notice of the Class Allegations in the Second Amended Complaint

Even if Defendant's exhaustion argument was properly before this Court, it would still be contrary to law. Defendant protests that Plaintiffs did not identify a discrete employment action occurring within 60 days of the May 28, 2004 charge. Yet Defendant ignores the fact that Plaintiffs are bringing a putative class action.[6] The 2004 charge provided sixteen paragraphs articulating the policies and practices that have harmed African-American Library employees. *See* Dkt. 6-1, Third Party Complaint of Christine Mills, *et al.* The charge provided Defendant with notice that it was facing class-wide liability, and Defendant can hardly dispute that the class allegations in the Second Amended Complaint are "like or reasonably related to the allegations of the charge and growing out of such allegations." *Park v. Howard Univ*., 71 F.3d 904, 907 (D.C. Cir. 1995)(citation omitted).

The holding of the U.S. Court of Appeals for the D.C. Circuit in *Schuler v. PricewaterhouseCoopers*, 514 F.3d 1365 (D.C. Cir. 2008) is dispositive. The district court construed the plaintiff's complaint as alleging two discrete failure-to-promote claims, and dismissed the case for failure to file an EEOC charge within 300 days of his nonpromotion. *Id.* at 1370. The D.C. Circuit reversed, noting that the plaintiff's complaint had alleged a "pattern and practice" of age discrimination based on PwC's discriminatory nonpromotion decisions, not two discrete

[6] Defendant also asserts that "the mere assertion of a class action in court does not relieve any plaintiff from the requirement of exhausting administrative class action remedies[.]" Def. Brief at 34. But it is indisputable that the May 28, 2004 *charge* asserted class allegations.

nonpromotion claims. *Id.* at 1371. Because the plaintiff was alleging an ongoing pattern or practice of discrimination, he was allowed to challenge PwC's policies going back to the date of his original injury in 2000. *Id.*

Schuler instructs that when a party files a pattern or practice class-action charge, it is erroneous to focus on whether the charge (and the resulting complaint) allege discrete acts.[7] *See Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876 (1984)(noting "manifest" difference between "an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination"). The bottom line is that the May 2004 class charge provided ample notice that Plaintiffs were challenging company-wide policies affecting African-American employees.

Along with *Schuler*, the *Cook* case, ironically enough, supports Plaintiffs' position. The Library had argued that 31 individual plaintiffs who had not filed administrative charges could not intervene. The D.C. Circuit disagreed, and allowed these individuals to "piggyback" onto the class action administrative complaint:

> Since the existence of [] systemic discrimination is precisely what the Library denied in its final decision in the administrative class action brought by Cook and the BELC, *there would appear to have been no substantial possibility that any of the individual claims might have been settled administratively*. In the circumstances of this case, therefore, the exhaustion requirement has been fully satisfied for all of the appellants.

Cook v. Boorstin, 763 F.2d 1462, 1466 (D.C. Cir. 1985)(emphasis added).

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[7]The Court noted in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, fn.9 (2002) that "[w]e have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants," further underscoring the distinction between discrete employment actions and pattern or practice cases.

C. Plaintiff Knight Has Identified Nonpromotions Occurring Within Sixty Days of the May 28, 2004 Class Charge

This Court need not look beyond the four corners of the May 28, 2004 class charge to find that Plaintiffs have exhausted their administrative remedies. Yet Defendant's argument fails even on its own terms. Plaintiff Clifton Knight notes in his declaration that he has applied for more than 125 promotions since 2001. The list of applications appended to his declaration notes that he applied for eight positions between April 16, 2004 and May 20, 2004. Pl. Exh 5, ¶4. The other plaintiffs and class members may therefore "piggyback" onto his claim. *Foster v. Gueory*, 655 F.3d 1319, 1322-23 (D.C. Cir. 1981); *see also Holowecki v. Federal Express Corp*., 440 F.3d 558, 569 (2d Cir. 2006), *aff'd*, 552 U.S. 389 (2008).

Defendant asserts that Knight's nonpromotions do not exhaust his administrative remedies, as he was not a party to the December 2004 complaint. Def. Brief at 36, fn.4. As an initial matter, Knight was a signatory to the May 28, 2004, as he points out in his declaration. Pl. Exh. 5, ¶5. Defendant also ignores Fed. R. Civ. P. 15 (c)(1)(B), which states that "an amendment to a pleading relates back to the date of the original pleading when...the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out...in the original pleading." Defendant can hardly deny that Knight's claim "arose out of the conduct...set out...in the original pleading." *See also Meijer, Inc. v. Biovail Corp*., 533 F. 3d 857, 866 (D.C. Cir. 2008)("The underlying question is whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint."). Because the First and Second Amended Complaints "relate back" to the original December 2004 complaint, it is beside the point that Knight was not a named plaintiff in the original pleading.

IV. PLAINTIFFS HAVE BOTH ALLEGED AND PROVIDED EVIDENCE OF INJURY IN FACT TO CONFER STANDING

Defendant next contends that Plaintiffs have "failed to satisfy standing requirements" because they "identified no personal injury." Def. Brief at 37. Defendant is wrong. The governing standard is set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992):

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."...In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true.

The Second Amended Complaint provides sufficient "general factual allegations" regarding disparities in training, discipline, classification, and other policies affecting career advancement, to confer standing. *See* Dkt. 28, Second Amended Complaint, ¶¶15-23. *See also Williams v. Boeing*, 517 F.3d 1120, 1127 (9th Cir. 2008)(class allegations involving "less pay as a result of Boeing's discriminatory compensation practices" sufficient to establish standing).

Even under the summary judgment standard, Plaintiffs have provided sufficient facts to establish injury-in-fact. Plaintiff Knight applied for several positions, and has clearly established standing. It is well-settled that "[a]t least one *named* plaintiff must satisfy the actual injury component of standing in order to seek relief on behalf of himself or the class." *Williams*, 517 F.3d at 1127 (citation omitted)(emphasis in original).

The other plaintiffs have also established Article III standing, as evidenced by the attached declarations. *See* Pl. Exhs. 3-12. Each plaintiff has identified an injury resulting from the Library's policies and practices. Many plaintiffs have identified class claims involving discrimination in pay

and promotional opportunities. Other plaintiffs have identified individual, non-class claims over issues such as discriminatory discharge and harassment. Defendant's assertion that Plaintiffs had not established standing was incorrect before this brief was filed, and it is indisputably in error now.

Defendant also asserts that "general allegations related to alleged discriminatory policies and practices are insufficient to maintain standing absent injury." Def. Brief at 39. This assertion once again misses the point. As noted above, it is only after Defendant produces the electronic applicant flow data that Plaintiffs will be able to further refine their class claim. In the meantime, there is no question that Plaintiffs have identified specific instances of nonpromotions and unequal pay that are sufficient to confer standing.

V. DEFENDANT HAS WAIVED ITS *RES JUDICATA* AFFIRMATIVE DEFENSE, AND IN ANY EVENT THIS CASE DOES NOT INVOLVE THE SAME "NUCLEUS OF FACTS" AS *COOK*, WHICH ENDED IN DECEMBER 2002

A. Defendant's Failure to Plead *Res Judicata* and Collateral Estoppel as Affirmative Defenses in its Answer Waives Both Defenses

Fed. R. Civ. P. 8(c)(1) expressly states that "[i]n responding to a pleading, a party *must* affirmatively state any avoidance or affirmative defense, including...estoppel [and]...*res judicata*[.]" (emphasis added) The D.C. Circuit held in *Harris v. Secretary, U.S. Dept. Of Veterans*, 126 F.3d 229, 345 (D.C. Cir. 1997) that Rule 8(c) "means what it says." A defendant may not raise an affirmative defense in a dispositive motion, so that "[a] party's failure to plead an affirmative defense...generally 'results in the waiver of that defense *and its exclusion from the case*.'" *Harris*, 126 F.3d at 343 (citation omitted)(emphasis added). The D.C. Circuit's rule is noticeably stricter than other circuits, which do allow affirmative defenses to be raised in dispositive motions. *Id*. at 344

(collecting cases from other circuits).[8]

Defendant's pre-answer motion to dismiss filed on June 6, 2005 did not say a word about *res judicata* or collateral estoppel. Likewise, Defendant's answer to the original complaint, as well as the answers to the First and Second Amended Complaints, did not plead either affirmative defense. *See* Dkts. 17, 26, 29. Defendant has waived the assertion of either affirmative defense, and they are consequently "exclu[ded] from the case."

Harris did note that a defendant may cure its waiver by filing an amended answer pursuant to Fed. R. Civ. P. 15(a). *Harris*, 126 F.3d at 344. Of course, Defendant has made no effort to cure its defective pleading. And even if Defendant did move to amend its answer, it would have no sound basis. When an amended complaint is the result of "undue delay" or would cause "undue prejudice to the opposing party," it should not be granted. *Harris*, 126 F.3d at 344 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Defendant could have raised both affirmative defenses five years ago; any effort to do so at this late date would constitute "undue delay." Moreover, Plaintiffs have expended significant time and resources throughout the past six years litigating this case. It would be wholly prejudicial to allow Defendant to terminate this case by asserting a defense that could have been raised at the very outset.

B. Because This Case Involves a Different Time Period and Different Set of Facts Than *Cook*, *Res Judicata* and Collateral Estoppel Do Not Apply

Defendant's argument is sorely deficient even if it was properly before this Court. The D.C. Circuit has explained that:

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[8] Any argument by Defendant that *Harris*'s holding does not extend to *res judicata* would be frivolous. Even before *Harris*, the D.C. Circuit held that "*[r]es judicata* must be pleaded as an affirmative defense. Failure to so pled constitutes a waiver of the defense." *Poulin v. Bowen*, 817 F.2d 865, 869 (D.C. Cir. 1987).

> Under the doctrine of *res judicata*, or claim preclusion, a subsequent lawsuit will be barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction.

Smalls v. United States, 471 F.3d 186, 192 (D.C. Cir. 2006)

The question is whether *Cook* constitutes the "same...cause of action" as this case. The Circuit has noted in this regard that:

> "Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.'" *Drake [v. FAA*], 291 F.3d at 66 (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)). In pursuing this inquiry, the court will consider "'whether the facts are related in ***time***, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 949 n. 5 (D.C. Cir. 1983) (quoting 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.410[1] (2d ed. 1983)).

Apotex, Inc. v. Food & Drug Admin., 393 F.3d 210 (D.C. Cir. 2004)(emphasis added).

There can be no dispute that the time periods in this case and *Cook* do not overlap. *Cook* was filed in 1982, and settled in 1994. The Settlement Agreement bars only those claims that "arise out of events *occurring up to* Final District Court approval of the Agreement." Def. Exh. 4, at 22 (emphasis added).[9] Defendant also concedes, as it must, that the oversight period in *Cook* ended on December 1, 2002. Def. Brief at 5. Yet Plaintiffs brought their administrative class charge on May 28, 2004 - nearly *ten years* after *Cook* settled, and after the oversight period ended.

[9] Defendant's brief is misleading by selectively quoting the Settlement Agreement to state that "the class as a whole and each class member [were] bound by the doctrines of res judicata and collateral estoppel with respect to all such claims." Def. Brief at 6. Defendant leaves out the previous sentence stating that the Agreement only applies to "events occurring up to Final District Court approval of the Agreement."

There is no authority supporting Defendant's attempt to extend *res judicata*. The D.C. Circuit has consistently recognized that unlawful conduct occurring after a prior judgment or settlement is not barred by *res judicata*. *Drake*, 291 F.3d at 66 (*res judicata* did not bar second lawsuit, which was based on agency's subsequent determination that airline violated regulation that was at issue in first lawsuit); *Page*, 729 F.2d at 820 (order dismissing 1972 lawsuit barred subsequent suit for activities up to 1972, but not for activities occurring through 1980).

This case by definition involves a "nucleus of facts" that occurred after the *Cook* settlement and oversight period, so that *res judicata* cannot bar Plaintiffs' claims. Defendant's argument - that the *Cook* settlement extends in perpetuity to bar subsequent Title VII class action claims - is devoid of logic and supporting authority. Were Defendant's argument to prevail, an employer could re-implement unlawful employment activities once a consent decree or settlement agreement was no longer enforceable, and the parties to the original agreement would have no remedy. Nothing in Title VII or the principles underlying *res judicata* allow such a perverse result.

For the same reason that *res judicata* does not apply, collateral estoppel also does not bar Plaintiffs' claims. The D.C. Circuit has held that collateral estoppel "must be confined to situations where the matter raised in the second suit is *identical in all respects* with that *decided* in the first proceeding." *Whelan v. Abell*, 48 F.3d 1247, 1256 (D.C. Cir. 1995)(citing *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948)(emphases added). Defendant cannot credibly argue that the issues in this case beginning in 2004 are "identical in all respects" to the issues that were "decided" in the 1994 settlement agreement.[10]

[10]The primary case Defendant cites, *Martin v. Dep't of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007), is easily distinguishable. The plaintiff had previously filed a FOIA lawsuit seeking a complete, unredacted document submitted to the FDIC, which a district court dismissed. The

Defendant's primary contention is that this Court's September 2003 Order somehow bars Plaintiffs from challenging Defendant's selection procedures and criteria. Def. Brief at 42, 49. There are any number of problems with Defendant's argument, but three will suffice. First and foremost, this Court recognized during oral argument a few months ago that AVUE does not select employees. AVUE is merely computer software. Plaintiffs' argument is that Defendant does not abide by the system it has implemented, and that it continues to favor non-African-American employees for selection.

Plaintiffs' declarations demonstrate how this works. Plaintiff Mills noted that she interviewed for a position in 2005 with her supervisor, rather than with a three-person panel that the Library's regulations require. Pl. Exh. 3, ¶10. Several plaintiffs noted that the Library still "preselects" individuals for certain promotions without posting them on AVUE, even though the *Cook* settlement was supposed to rectify this discriminatory practice. These facts directly undermine Defendant's claim that its selection system is validated, and strongly counsel against Defendant's collateral estoppel argument.

Even if Defendant was correct that AVUE was validated (which is not the case), this Court's September 2003 Order would still not provide refuge. Under the disparate impact burden-shifting framework, plaintiffs can rebut an employer's showing of job relatedness by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)(citation omitted); 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Plaintiffs

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D.C. Circuit held that the plaintiff was estopped from seeking the complete 1991 report again based on the prior ruling. *Id.* at 454.

will still be able to rely on applicant flow data to show that less racially discriminatory alternatives exist.

Finally, the Uniform Guidelines note that "[t]he principles of disparate or unequal treatment must be distinguished from the concepts of validation." 29 C.F.R. § 1607.11. The Civil Rights Act of 1991 likewise states that "[a] demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter." 42 U.S.C. § 2000e-2(k)(1)(C)(2). Of course, Defendant has failed to "demonstrate" any business necessity to begin with.

Defendant simply cannot rebut Plaintiffs' pattern or practice disparate treatment claim by hanging its hat on this Court's September 8, 2003 Order. The D.C. Circuit noted in *Palmer v. Schultz,* 815 F.2d at 101, that once plaintiffs make out a *prima facie* pattern or practice case, a defendant

> cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion.

In other words, once Plaintiffs point to statistically significant disparities in pay and promotion between African-American and white employees at the Library, Defendant must introduce evidence (such as differences in qualifications, for example) that provides a non-discriminatory explanation for these disparities. The Uniform Guidelines would be of no relevance to a pattern or practice rebuttal.

C. Defendant's Contention That the *Cook* Settlement Forecloses This Lawsuit is Directly Contrary to Its Position in March 2004, When it Informed Plaintiffs Mills and Ijeomah-Mills That *Cook* Did *Not* Apply

Courts often judicially estop a party from asserting a position that is inconsistent with a

position asserted in a prior proceeding. The purpose of judicial estoppel is to prevent parties from "blow[ing] hot and cold as the situation demands." *Pennycuff v. Fentress County Bd. Of Educ*., 404 F.3d 447, 453 (6th Cir. 2005)(citation omitted). Although judicial estoppel is not directly applicable in this case, there can be no question that Defendant has "blow[n] hot and cold" on the issue of *res judicata*.

Plaintiffs Mills and Ijeomah-Mills stated in their September 15, 2003 letter that the posting of vacancy announcement AT177527 was a violation of the *Cook* case. Pl. Exh. 1 The Library's Inspector General, Karl Schornagel, responded in a March 1, 2004 that he "concur[s] with the Library's General Counsel opinion on the nonapplicability of the *Cook* case." Pl. Exh. 2. Yet Defendant is now contending that not only does *Cook* apply, it also forecloses Plaintiffs' claims.

One can hardly find a more brazen example of a party asserting flatly inconsistent arguments as the situation demands. Plaintiffs could not agree more with Defendant's *own General Counsel*, who stated in a July 2, 2003 letter to the Cook Class Steering Committee members "that the Cook case expired by its own terms on December 1, 2002." Pl. Exh. 2. That Defendant has shifted one-hundred-eighty-degrees from this prior position is simply deplorable.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2010, the foregoing Memorandum was filed via Electronic Case Filing. A true and correct copy of the foregoing was served, via ECF, upon:

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