

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, ET AL.,

Plaintiffs-Intervenors,

-against-

CITY OF NEW YORK,

Defendant.

Case No. CV 07 2067
(NGG) (RLM)

**PLAINTIFFS-INTERVENORS AND PUTATIVE SUBCLASS
REPRESENTATIVES' MEMORANDUM OF LAW ADDRESSING THE
IMPACT OF THE SUPREME COURT'S OPINION IN *WAL-MART
STORES, INC. V. DUKES***

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Introduction

Plaintiffs-Intervenors and Putative Subclass Representatives Roger Gregg, Marcus Haywood, Kevin Walker, Candido Nuñez and Kevin Simpkins ("Subclass Representatives") submit this, their Memorandum of Law Addressing the Impact of the Supreme Court's Opinion in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. ____ (June 20, 2011) ("Wal-Mart") on the pending motions for subclass certification pursuant to this Court's Order of June 20, 2011. (Docket # 643) As set out more fully below, the Supreme Court's Opinion in *Wal-Mart* does not impact the pending motions for subclass certification, with the exception of the Subclass Representatives' arguments in the alternative that *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 169 (2d Cir. 2001) provided grounds to certify the subclasses under Rule 23(b)(2). (Memorandum of Law in Support of Motion to Define Subclasses, Docket # 643-1, at 6.) However, the *Wal-Mart* decision does not impact the Putative Subclass Representatives' separate

argument that certification is appropriate under Rule 23(b)(3). On that basis, the Court should grant the motion for certification under Rule 23(b)(3).

Argument

**SUBCLASS CERTIFICATION OF THE PROPOSED
NON-HIRE AND DELAYED-HIRE VICTIM SUBCLASSES
REMAINS APPROPRIATE UNDER RULE 23(b)(3)**

**A. THE SUBCLASS REPRESENTATIVES SEEK CERTIFICATION ONLY
PURSUANT TO RULE 23(b)(3)**

The Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. ____ (June 20, 2011) that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.” Slip Op., at 20-21. In light of that holding, the Subclass Representatives do not propose certification of the Non-Hire and Delayed-Hire Victim Subclasses on the basis of Rule 23(b)(2), but rather, seek certification only on the basis of Rule 23(b)(3).¹

**B. THE WAL-MART DECISION DOES NOT ALTER THE CONCLUSION OF
COMMONALITY FOR THE SUBCLASSES HERE**

The Court’s opinion in *Wal-Mart* does include an extended discussion of the requirements for certification under Rule 23(a)’s commonality requirement. That discussion, which is applicable to Rule 23(b)(3) certifications, does not alter the Putative Subclass Representatives’ arguments in favor of subclass certification in this case. In fact, it supports a finding of commonality with respect to the two proposed subclasses.

¹ The *Wal-Mart* opinion also discusses various issues concerning possible certification pursuant to Rule 23(b)(2) in instances where money damages are “incidental” to injunctive or declaratory relief. Slip Op., at 26-27. But those issues, including the Court’s discussion of due-process issues and “Trial by Formula,” are only in the context of Rule 23(b)(2) certification. The Court specifically notes that the applicability of Rule 23(b)(3) was not before the Court. Slip Op., at 5, n.2.

The Supreme Court treated commonality as the “crux of the case” in *Wal-Mart*. Slip Op., at 8. The Court concluded that the class representatives in that case could not show commonality. Unlike the proposed subclasses here, in *Wal-Mart*, the Court found that the members of the class

‘held a multitude of different jobs, at different levels of Wal-Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed. . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.’ (quoting dissenting opinion below).

Slip Op., at 19.

That description stands in marked contrast to the facts of this case. Here, the Non-Hire and Delayed-Hire subclasses each involve the denial of hire, or delay in hire, to the same job title, at the same entry level, subject to two biased testing procedures applicable to all members of the subclasses. The Court in *Wal-Mart* twice noted how the facts in that case differed materially from the facts in a case involving a biased testing procedure. *See* Slip op., at 12-13.

The common questions submitted for subclass treatment here meet the *Wal-Mart* Court’s definition of Rule 23 “common questions.” They are questions that “generate common answers apt to drive the resolution of the litigation.” Slip Op., at 10. As noted in Plaintiffs-Intervenors’ Memorandum of Law in Support of Motion to Define Subclasses, the issues to be certified for class treatment include “questions surrounding the amount of subclass aggregate back pay losses, the method of distribution of the subclass back pay, lost benefits for the subclass, the amount and applicability of retroactive seniority for the subclasses, and, for the non-hire subclass, the number of priority hires.” (Dkt # 643-1, at 3) Answers to these questions are “apt to drive resolution of the litigation,” and therefore fall squarely within the Supreme Court’s test of commonality enunciated in *Wal-Mart*.

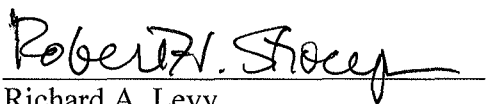
The same can be said for the issues regarding noneconomic losses. As this Court has previously noted, those common questions include “common questions of fact and law relating to the monetary value of the intangible risks and benefits of employment as a firefighter, and whether the monetary value of the intangible benefits of their interim employment should offset the value of the benefits of employment as a firefighter.” (6/6/11 Order, Dkt # 640, at 26.) These questions also meet the *Wal-Mart* commonality standard.

Conclusion

On the basis of the foregoing, the Court should certify the two proposed subclasses pursuant to Rule 23(b)(3). The Putative Subclass Representatives have shown that they meet all of the requirements for certification under that sub-section.

Dated: June 21, 2011
New York, New York

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