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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

José Parra, et al., Plaintiffs, vs. Bashas', Inc., Defendant.	No. CIV 02-0591-PHX-RCB O R D E R

I. Introduction

The original complaint in this action was filed by Plaintiffs José Parra and Gonzalo Estrada on April 4, 2002. Complt. (doc. 1). The Court granted Plaintiffs' motion to amend their complaint, and Plaintiffs filed their First Amended Complaint (doc. 116) on March 11, 2004, adding Aurelia Martinez as a named plaintiff. In their pleadings, Plaintiffs alleged that Defendant Bashas', Inc. committed civil rights violations under 42 U.S.C. § 1981 for intentional discrimination and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq*, for both disparate impact and disparate treatment. In September 2004, Plaintiffs filed their

motion for appointment of class counsel (doc. 152) and, under seal, filed their motion for class certification in this matter (doc. 159). These motions were fully briefed on November 23, 2004, and the issue of class certification was argued orally on January 24, 2005.

In response to these motions, each party filed motions to strike evidence. Defendant's Mot. to Strike (doc. 191); Plaintiffs' Mot. to Strike Evidence and Mot. to Strike Testimony (doc. 205 & 197). Also, prior to filing their motion for class certification, Plaintiffs filed a motion requesting permission to use expert analysis as a rebuttal opinion. Mot. Reb. Opin. (doc. 147). Defendant objected to Plaintiffs' request and filed a cross motion asking that the Court, in the event that Plaintiffs' motion is granted, allow them the opportunity to depose Plaintiffs' expert on the rebuttal analysis and offer a report in opposition. Resp. & Cross Mot. (doc. 179). All of these motions were fully briefed on December 30, 2004. This Court, having carefully considered the arguments presented by the parties, now rules on all of these matters.

II. Background Facts

Defendant Bashas', Inc. operates grocery stores in Arizona under three different trade names: Bashas', A.J.'s Fine Foods ("A.J.'s") and Food City. Each of the three stores provides a different format of either traditional, gourmet or price-impact grocery. Hourly workers at all of Defendant's stores have their pay set in accordance with pay scales established by Michael Proulx, current president and Chief

Operating Officer of Bashas', Inc.

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A. The History of Food City

The original Food City store was an independent neighborhood grocer established in the 1940s. Resp. (doc. 190) at 8. In January 1994, Defendant bought this original Food City store. Id. Thereafter, a Bashas' store was converted into a Food City store, based on the original Food City store design. Id. at 9. Wages of Bashas' employees at that store were not reduced after the conversion, but new hires at that store were placed on the lower Food City wage scale established at the original store. Id. In June 1996, a second Bashas' was converted to the Food City format. Id. The wages of existing employees and new hires were handled the same way as the previously converted Bashas' store. Id.

On December 15, 1996, Defendant bought sixteen Mega Foods stores, a warehouse grocery store chain. Resp. (doc. 190) at 9. Twelve of the sixteen Mega Foods stores eventually became Food City stores. Id. These stores were in vastly varying conditions; some relatively new and in good condition, while others were older and had significant facility issues. Id. The pay scales at the Mega Foods stores "compared" with existing Food City rates in 1998. Id. A decision was made to raise the pay rates in these newly-acquired stores to the wage levels at the Food City stores. Id. By the end of 2000, Defendant had twenty-six Food City stores. Resp. (doc. 190) at 9.

Around 2001, Defendant purchased a few ABCO stores, some of which were converted to Bashas' stores and some of which were converted to Food City stores. Id. Again, Defendant

contends that these stores were in a variety of different conditions. Id. at 9-10.

In November 2001, Defendant acquired twenty-two Southwest Supermarkets and converted them into Food City stores. Id. at 10. Defendant asserts that many of the stores had physical conditions which had been neglected. Id. In addition, Southwest pay scales were lower than Food City pay scales. Id. When these stores were acquired, Defendant states that it raised the wages of the Southwest employees up to the Food City scale within six months, or 780 hours of work. Resp. (doc. 190) at 10.

B. History of the Pay Scales

When the first Food City store was acquired in 1994, the hourly wages of the Food City employees were lower than the wages at Bashas' format stores. Id. at 11. Such hourly wages were not raised dramatically upon the purchase of Food City. Id. at 12. In 1997 and 1998, the pay scales between the Bashas' stores and Food City stores started to converge. Id. at 13. In 1999, Defendant went from six pay zones to four pay zones. Id. Defendant contends that in 2000 there were only four zones, and in 2000 and 2001 there was more movement toward uniformity. Id. Only after the acquisition of the Southwest Supermarkets did Defendant's management believe that Food City had become a chain in its own right and mandate a move to the higher paid, unionized grocery store wage scales. Resp. (doc. 190) at 14. Defendant contends that in 2001, the wage rates were "essentially equalized." Id.

C. Plaintiffs' Claims

In the case at bar, Plaintiffs claim that the hourly workforce at Food City stores is disproportionately Hispanic. Mot. (doc. 159) at 1. They assert that although the job positions within the different store formats are virtually identical, Defendant used a separate pay scale for Food City stores. Id. Plaintiffs further claim that from at least 1998, the written pay scale for Food City workers was consistently lower in most job positions than the same jobs in Bashas' and A.J.'s stores, and that even within Food City stores, Hispanic employees have been paid less than their white counterparts in similar positions. Id. Moreover, Plaintiffs claim that working conditions within Food City stores were inferior to those of Bashas' and A.J.'s stores, and that Defendant's senior management has long been aware of these differences. Id.

Plaintiffs challenge these alleged practices under 42 U.S.C. § 1981 for intentional discrimination and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq*, for both disparate impact and disparate treatment. Id. at 2. Plaintiffs therefore move this Court, pursuant to Federal Rule of Civil Procedure 23, to certify the class as described below and appoint class counsel. Mots. (doc. 159 & 152). Before deciding the issues of certification and appointment of counsel, the Court must first address the motions filed by the parties in relation to these matters.

III. Motions to Strike

A. Defendant's Separate Motion to Strike and Motion to Withdraw Exhibit

i. Disclosure of Witnesses

Defendant moves to strike one declaration and two affidavits proffered by Plaintiffs in their motion to certify a class. Defendant's Mot. to Strike (doc. 191) at 1. First, Defendant moves to strike a declaration from Elizabeth Lawrence[1] that presents testimony as to store conditions documented in internal inspection reports of Food City stores.[2] Id. at 1-2. Defendant argues that such evidence is inadmissible because Lawrence was never disclosed as a witness, lay or expert. Id. at 2.

The Federal Rules of Evidence allow summaries of contents of voluminous materials which cannot conveniently be examined in court. Fed. R. Evid. 1006. In the contested declaration, Lawrence identifies the documents to which she refers, the internal inspection reports, and summarizes some of their contents. In her statement, Lawrence does not offer any opinions about the documents. Instead, Lawrence discloses only information that she believes the documents convey. In addition, Lawrence attaches the summarized documents as

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[1] Elizabeth Lawrence is an attorney of record in this matter.

[2] The contested statement reads:

> I have personally reviewed all of the internal inspection reports of Food City stores produced in this litigation by defendant, attached as Exhibit D. These reports reveal dirty conditions, including rodents, roaches, substandard equipment, flies, gnats and other insects, lack of soap in restroom, etc. In the course of this litigation, we received no reports of internal inspections at Bashas' stores or A.J.'s stores.

Decl. Lawrence (doc. 177).

Exhibit D to her declaration. Exbt. D (doc. 177). Therefore, the Court concludes that Lawrence's statement is admissible as a summary for class certification purposes and considers it with the appropriate weight.

Second, Defendant moves to strike the affidavits of Joanne Huerta and Antoinetta Acuna, because Plaintiffs disclosed them as witnesses six days before they filed their motion for class certification. Defendant's Mot. to Strike (doc. 191) at 2. Defendant cites no legal authority indicating a violation on Plaintiffs' part, and does not provide the Court with any argument as to how Plaintiffs' late notice caused them ill effects.

Due to the lack of authority or arguments by either party on this matter, the Court finds that Defendant has not sufficiently shown a basis for their claim to strike the affidavits of Huerta and Acuna. As required under Federal Rule of Procedure 26(a) and 26(e)(1), Plaintiffs provided Defendant with notice of Huerta and Acuna as possible witnesses in a supplemental disclosure statement. Notice (doc. 150). Plaintiffs claim that they provided Defendant with Huerta and Acuna's names as soon as they knew of their willingness to testify in this matter and the declarations were signed. Resp. (doc. 194) at 3. Without further argument as to how Plaintiffs' supplemental notice was insufficient, the Court will consider the affidavits.

ii. Attorney-Client Privilege

Defendant contests Plaintiffs' use of an alleged privileged document, BAEMAIL 001668 ("the memo" or "the

document"). Defendant's Mot. to Strike (doc. 191). Defendant asserts that the document in question was inadvertently disclosed to Plaintiffs during a production of documents conducted in 2004 and to the public when Defendant attached it as an exhibit to its Motion to Strike, which was filed unsealed. Id. at 2-3; Mot. to Withdraw (doc. 208) at 1. According to Defendant, the document sought legal advice on matters involved in the case at bar from Bashas' attorney, Tom Kennedy, and therefore is privileged. Defendant's Mot. to Strike (doc. 191) at 4. In contrast, Plaintiffs claim that the document is not a privileged communication and assert that even if deemed to be such, Defendant has waived the privilege by disclosing the document to others in their production and motion to strike.[3] Resp. (doc. 194) at 3-6. The Court will analyze the issue of waiver first.

Plaintiffs argue that Defendant cannot assert protection of the BAEMAIL 001668 document under the attorney-client privilege, because Defendant waived the privilege through disclosure. Resp. (doc. 194) at 6. "An express waiver [of an attorney-client privilege] occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public." Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003). Inadvertence of disclosure does

[3] On December 3, 2004, Defendant filed a motion to withdraw this exhibit, recognizing its mistake in attaching the contested memo to its motion and not filing the motion under seal. Mot. to Withdraw (doc. 208).

not as a matter of law prevent the occurrence of waiver. Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981). Here, Plaintiffs assert that any attorney-client privilege with respect to the BAEMAIL 001668 document was waived by its inclusion within the stack of documents produced by Defendant in 2004 and its inclusion in Defendant's motion to strike. Resp. (doc. 194) at 6. Although Plaintiffs have argued the merits of various federal cases dealing with the issue of waiver, Defendant has provided the Court with no counter argument on the issue.

The court notes that the regional circuits have developed at least three different methods of analyzing whether an inadvertent disclosure results in a waiver of the attorney-client privilege. As summarized in Simon Property Grp., L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000) these three approaches include:

> The first might be termed the strict liability approach, so that any non-privileged disclosure, no matter how slight and no matter to whom, forfeits the privilege. The second is the subjective intent approach, so that only a deliberate disclosure forfeits the privilege. The third might be called the skeptical balancing approach, in which the court considers all the relevant circumstances.

Id., cited in United States v. TRW, Inc., 204 F.R.D. 170, 176 (C.D. Cal. 2001). This third approach, also called the "middle test," "pragmatic approach," and the "totality of the circumstances approach," has been embraced by the Ninth Circuit. TRW, Inc., 204 F.R.D. at 176; see also, Gomez v. Vernon, 255 F.3d 1118, 1131-32 (9th Cir. 2001); United States v. de la Jara, 973 F.2d 746, 749-50 (9th Cir. 1992). As a

result, it is the most persuasive test for the present analysis.

It must first be noted that the burden of establishing that the privilege applies to any document lies with the party asserting it – not the party contesting it. See Weil, 647 F.2d at 25. An element that the asserting party must prove is that it has not waived the privilege. Id.; see also, In re Grand Jury Proceedings, 517 F.2d 666, 670 (5th Cir. 1975). The mere inadvertence of a privileged document's disclosure does not, as a matter of law, prevent the occurrence of waiver. Id. at 24; see also, Underwater Storage, Inc. v. United States Rubber Co., 314 F.Supp. 546 (D.D.C. 1970). As a result, this court must consider the factors adopted by the Ninth Circuit in determining whether an inadvertent disclosure has waived the privilege.

In determining whether the privilege has been waived, the Ninth Circuit considers the totality of the circumstances in order to determine whether the producing party took sufficient steps to safeguard the privilege. The specific factors considered include:

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

TRW, Inc., 204 F.R.D. at 177; see also, Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (citing Lois Sportwear U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985). The court will analyze each of these factors below.

First, with regard to the reasonableness of the precautions taken to prevent the disclosure of the BAEMAIL 001668 document, the court must consider the circumstances in both situations where the memo was disclosed. Defendant has offered no argument as to what procedures or precautions it used to prevent inadvertent disclosure of the document.

Next, the court considers the time taken by Defendant to rectify the error. This factor focuses on the actions taken by the producing party to resolve the problem once it realizes that it has made an inadvertent disclosure. TRW, Inc., 204 F.R.D. at 180. Here, in the first instance of disclosure, Defendant did not discover its mistake until it was conducting a deposition related to this action. Defendant's Mot. to Strike (doc. 191) at 2. In the second instance of disclosure, Defendant seems to have discovered its mistake a month after filing its motion to Strike. Mot. to Withdraw (doc. 208). It is arguable that Defendant only became aware of its mistake when Plaintiffs raised the issue in their response to Defendant's motion to strike. Resp. (doc. 194) at 6.

This factor seems to contemplate the situation where a producing party does realize the error, and then makes an effort to re-acquire the disclosed document. In TRW, Inc., the court noted that the producing party immediately requested return of the documents and asked that they be sealed. 204 F.R.D. at 180. While the court considered these acts to be a "point in [the producing party's] favor," it still considered a several month delay in discovering the

error to be a factor generally favoring the receiving party. Id. Certainly, in relation to the first instance of disclosure, Defendant's request that all copies of the document be destroyed was a reasonable remedial step. See Defendant's Mot. to Strike (doc. 191) at 3. Upon the second occurrence of disclosure, Defendant's filing of a motion to withdraw was also a reasonable remedial step. See Mot. to Withdraw (doc. 208).

The third and fourth issues will be discussed together as they are interrelated. These factors require the court to consider the scope of the discovery at issue, as well as the scope of the disclosure. Here, it appears undisputed that in the first instance of disclosure, Defendant produced approximately thousands of other emails and attachments, and that the memo is a one-page document. See Defendant's Mot. to Strike (doc. 191) at 2. In the second instance of disclosure, Defendant attached the one-page document to its own nineteen-page motion to strike. Exhibit 1 (doc. 191).

In Lazar v. Mauney, 192 F.R.D. 324, 330 (N.D. Ga. 2000), a district court concluded that where 1,000 pages were produced with three privileged documents, the privilege was not waived. Likewise, in Lois Sportwear U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985), twenty-two privileged documents were produced with 16,000 documents. In the TRW, Inc. case, of the 200,000 documents produced, approximately 200-300 privileged documents were produced. 204 F.R.D. at 181. While the total number of documents produced was far greater in TRW, Inc., that court considered

the ratio of privileged documents produced in comparison to all documents was roughly similar to that in Lois Sportwear. Id. That ratio is roughly similar to the privileged documents produced in Lazar; which, in turn is similar to that in the present case, in regard to the first instance of disclosure.

While not creating a precise rule as to when the ratio is too close to constitute inadvertent disclosure, the above analysis is clearly intended to ensure that the disclosure was simply inadvertent – not reckless. One document stuck somewhere in the middle of thousands could reasonably be missed by even a careful review process. In contrast, one document attached as an exhibit to a nineteen-page document that, for the most part, argues how the exhibit is privileged and should be stricken from the record, would not likely be missed by a careful review process or inadvertently not filed under seal. Defendant argues that its attachment and unsealed filing of the memo should be deemed inadvertent because, at the time of submission, Defendant also filed several other "voluminous" pleadings. Mot. to Withdraw (doc. 208) at 1. However, the fact that Defendant filed other voluminous documents, some under seal, at the same time it filed the contested memo within a nineteen-page motion does not indicate inadvertency. In fact, such circumstances tend to weaken such an assertion since Defendant was clearly aware that many of its exhibits required filing under seal, but, although the majority of its motion to strike focused on the alleged privileged communication, chose to file the motion

and memo unsealed.

The rule established in the case law described above is intended to assure that the opposing party cannot take advantage of a reasonable mistake, while at the same time assuring that the privilege is safeguarded. After all, if there is no penalty to a reckless disclosure, there will be no incentive to diligently review discovery for privileged documents. This "middle test" simply recognizes that where the scope of discovery is vast in light of the narrowness of the disclosure – a reasonable mistake was probably made. Therefore, the Court finds that in Defendant's first incident of disclosure of the memo, its disclosure was inadvertent. However, Defendant's second unsealed filing of the contested document as an exhibit to its own motion is more an act of recklessness than inadvertency.[4] Due to Defendant's second act of disclosure, the Court finds that any privilege on the BAEMAIL 001668 document was waived and the document should not be stricken from the record. Based on this finding, the Court deems unnecessary any further analysis on whether the document was actually privileged, and shall deny Defendant's motion to strike (doc. 191). Consequently, Defendant's Motion to Withdraw Exhibit (doc. 208) is now moot and shall be denied.

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[4] Although the Ninth Circuit has not yet ruled on the issue, a District Court in the Third Circuit found that a party's filing of an alleged privileged document alone waives the attorney-client privilege. See McGreevy v. CSS Industries, Inc., 1996 WL 412813, *2 (E.D.Pa. 1996) (finding that the plaintiff's filing of the McGreevy Memorandum could alone constitute a waiver of the attorney-client privilege).

B. Plaintiffs' Motions to Strike Evidence and Deposition Testimony

i. Motion to Strike Evidence Submitted by Defendant

On November 30, 2004, Plaintiffs filed a motion to strike evidence submitted by Defendant. Plaintiffs' Mot. to Strike (doc. 205). Essentially, Plaintiffs claim that many of Defendant's exhibits fail to comply with the Federal Rules of Evidence and are therefore inadmissible.

a. Relevancy

Plaintiffs assert that many of Defendant's submitted declarations[5] and exhibits are irrelevant to the motion for class certification and should therefore be struck from the record.[6] Under Federal Rule of Evidence 402, evidence which is not relevant is not admissible. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]" Fed. R. Evid. 401.

In the case at bar, the Court finds that the majority of the exhibits contested by Plaintiffs for lack of relevance may make more or less probable the determination of whether Plaintiffs satisfy the requirements for class certification. An exception to this finding is Exhibit 46, which is a copy of a handwritten note in Spanish with no translation

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[5] Plaintiffs move to strike Paragraphs 2, 4, 5, 6-8, 10-14, 17, 21, 26, 27, and 33 from the Affidavit of Michael Proulx. Plaintiffs' Mot. to Strike (doc. 205) at 8-12.

[6] Due to lack of relevance, Plaintiffs move to strike Defendant's Exhibits 1, 1A, 1C-1F, 1P, 4, 5, 18, 33, 43-47, 50-135. Plaintiffs' Mot. to Strike (doc. 205).

provided. Without an authenticated translation of this document, the Court cannot understand nor rely on its contents. Consequently, Exhibit 46 will not make more or less probable the determination of whether Plaintiffs satisfy the requirements for class certification. The Court finds that except for Exhibit 46, the remaining contested exhibits are relevant. Exhibit 46 shall be stricken from the record due to a lack of relevance.

b. Lack of Foundation or Authentication

Plaintiffs argue that many of Defendant's declarations[7] and exhibits lack foundation or have not been authenticated, as is required under Rule 901(a).[8] "Before evidence may be admitted, a foundation must be laid 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1182 (9th Cir. 1988). The testimony of a witness with personal knowledge of the facts who attests to the identity and execution of the document may lay the foundation required for receipt of a document into evidence. See U.S. v. Dibble, 429 F.2d 598, 602 (9th Cir. 1970). "It is well established that unauthenticated documents cannot be considered on a motion for summary judgment." Hal Roach

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[7] Plaintiffs seek to strike Paragraphs 2, 20, 26, 28, 29, 30, 35 from the Affidavit of Michael Proulx. Plaintiffs' Mot. to Strike (doc. 205).

[8] Plaintiffs, on the basis of a lack of foundation or authenticity, move to strike Defendant's exhibits 1, 1A-1I, 1N-1P, 1R-1U, and 1W; 2-5, 7, 8, 10-17, 20, 21, 24-37, 39, 40, 43, 45, 46, 47, and 49. Plaintiffs' Mot. to Strike (doc. 205) at 1.

Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1989). Defendant, as the party offering the evidence, has the burden of presenting sufficient evidence of authenticity. Fed. R. Evid. 901(a).

Plaintiffs claim that Defendant has failed to lay a foundation or authenticate many of its declarations and exhibits, and has offered no evidence to sustain a finding that the documents are what they are purported to be. "No affidavit discloses the source of the documents...[and] [n]o one offers sworn testimony as to the authorship of any of these documents." Plaintiffs' Mot. to Strike (doc. 205) at 2. Furthermore, Plaintiffs argue that some of the listed exhibits were created only for litigation.[9] Id. at 3.

Defendant, in its response to Plaintiffs' motion to strike and request for authentication, provides the Court with the affidavits of Michael Proulx[10] and Stephanie Quincy.[11] Resp. (doc. 213) at Exbts. 1 & 2. Proulx, in his affidavit, states that many of the challenged exhibits are true and accurate and have been verified through employees whom he supervises. See Resp. (doc. 213) at Exbt. 1. Proulx also states that many of the documents are records kept in the

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[9] Plaintiffs assert these claims in relation to Defendant's Exhibits 1B, 1D, 31, 33, 35, 36, and 37. Plaintiffs' Mot. to Strike (doc. 205) at 3.

[10] Michael Proulx is the current President and Chief Operating Officer of Bashas', Inc., and has worked at Bashas' since 1966Resp. (doc. 213) at Exbt. 1.

[11] Stephanie Quincy is an attorney of record in this lawsuit.

ordinary course of business. Id. For purposes of the underlying motion, Proulx, as President and CFO of Bashas', Inc., has sufficient personal knowledge of the company's business, paid wages, store conditions, competitors, and other related information submitted in Exhibits 1A, B, C, D, E, F, G, H, I, N, O, P, R, S, T, U, 12, 13, 15, 34, 49. Proulx's affidavit swearing to the authenticity and correctness of these documents satisfies the foundation and authentication requirements of Rule 901(a) for purposes of a motion for class certification.

Plaintiffs argue that due to a lack of authenticity, Defendant's Exhibit 7, the Report of Dr. Michael P. Ward, should be stricken from the record. The report is offered as Defendant's expert's testimony, but, as Plaintiffs note, is not a sworn statement. In response to Plaintiffs' motion to strike this exhibit, Defendant offers Quincy's affidavit which states that the exhibit is a true and correct copy of Ward's report. Exbt. 2 (doc. 213) at ¶4. The same report was included as an exhibit in Defendant's response to Plaintiffs' Motion to Use Expert Analysis as Rebuttal Opinion and was cited in Plaintiffs' reply on the issue. Reply (doc. 180) at 3. Because Plaintiffs' have cited the same document in a previous filing, the Court concludes that Plaintiffs do not substantially question the authenticity of Exhibit 7. The Court finds that it is reasonable to assume authentication upon Quincy's sworn statement that Exhibit 7 is what it is purported to be.

Quincy, in her affidavit, also claims that Exhibits 39,

40, 43, 45, and 47 are true and accurate copies of certain legal documents. Exbt. 2 (doc. 213) at ¶¶11-15. Quincy asserts that Exhibits 39 and 40 are true and accurate copies of EEOC filings made by potential class members and received from the EEOC pursuant to a Freedom of Information Act request. Id. at ¶¶11-12. In addition, Quincy affirms that Exhibit 43 contains bankruptcy filings related to the bankruptcy of named plaintiff Martinez, Exhibit 45 is a legal opinion by Administrative Law Judge Gregory Z. Meyerson, and Exhibit 47 includes criminal records related to potential class member Parra obtained from publicly available records. Exbt. 2 (doc. 213) at ¶¶13-15. At this point in litigation, and without any further arguments as to why the documents are untrustworthy, it is reasonable to assume authentication upon Quincy's sworn statement that the contested exhibits are what they are purported to be.

Quincy also asserts that Exhibit 5 contains copies of pay rate records obtained from other grocery stores in response to appropriately served subpoenas. "As a part of this case, I served subpoenas upon Mercado Y Carniceria El Rancho, Inc., Carniceria El Camino, Inc., La Mexicana Supercarniceria #1, Rita Ranch Market, 99 Ranch Market, 99 cent Store Corporation, and Uruapan Carniceria." Exbt. 2 (doc. 213) at ¶3. Defendant notes that "[t]he custodians of records of these exhibits have been disclosed as witnesses and will be called at trial to authenticate the documents if Plaintiffs do not stipulate to their authenticity." Resp. (doc. 213) at 10. Again, considering this lawsuit's point in litigation,

and without any further arguments as to why the documents are untrustworthy, it is reasonable to assume authentication upon Quincy's sworn statement that the contested exhibits are what they are purported to be.

On similar grounds, Plaintiffs contest Defendant's submission of charts contained in Exhibits 21, 31, 33, 35, 36 and 37. The Court finds that the charts included in Exhibits 21, 31 and 37 are summaries of information that is either already admitted into evidence or obtained from voluminous business records. Exbt. 2 (doc. 213) at ¶¶5, 6, & 10; Exbt. 30 (doc. 190) at ¶9. The charts either cite to the documents they are summarizing[12] or are authenticated by an accompanying affidavit and will be considered.[13] However, the charts included in Exhibits 33, 35, and 36 lack such foundation and authentication. These contested charts seem to be an organized version of defense counsel's personal notes and arguments related to this case. Although Quincy claims these documents to be summaries, the exhibits do not cite to the documents from which the information originally came. The Court cannot be expected to scrutinize the thousands of pages of documents submitted by the Defendant to locate the origin of such information. Therefore, the Court concludes that Exhibits 33, 35, and 36 lack foundation and consequently will not be considered in connection with the underlying motion.

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[12] Specifically, Exhibits 21 and 31.

[13] Exhibit 31 is a copy of a chart that is attached to the affidavit of Tom Dominick, submitted as Defendant's Exhibit 30.

Due to the fact that Exhibit 1W is a copy of Exhibit 35, Exhibit 1W shall also not be considered.

In addition, asserting lack of authentication, Plaintiffs move to strike extracts of deposition testimony filed as exhibits by Defendant.[14] Id. at 4. Defendant, in its original filing of exhibits with its response to Plaintiffs' motion to certify class, submitted numerous deposition excerpts without the court reporter's certification. See Resp. & Notice (doc. 190 & 193). "A deposition or an extract therefrom is authenticated...when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." Orr v. Bank of America, 285 F.3d 764, 774 (9th Cir. 2002).

Both parties concede that Defendant's Exhibit 10, excerpts of Michael Gantt's deposition transcript, should be stricken from the record due to the fact that they were filed without the court reporter's certificate. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4-5; Resp. (doc. 213) at 6-7. Exhibit 10 shall not be considered in connection with the motion for class certification.

As to the remaining contested exhibits, Defendant filed the missing certificates in its response to Plaintiffs'

[14] Specifically, Plaintiffs move to strike Defendant's exhibits 2, 3, 8, 10, 11, 14, 16, 17, 20, 24, 25, 26, 27, 28, 29, and 32. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4.

motion to strike the evidence.[15] Exhibit 4 (doc. 213). Although the certificates should have been originally filed with the exhibits, the Court sees no indication that Defendant's postponed filing will cause significant harm to Plaintiffs.

Finally, Plaintiffs object to thirty-five affidavits made by Spanish-speaking affiants who are employees of Defendant.[16] Plaintiffs' Mot. to Strike Evidence (doc. 205) at 7. Plaintiffs argue that Defendant failed to establish that the statements were properly translated and they should consequently be stricken.[17] Id. In their exhibits, Defendant submitted a number of affidavits from potential class members, written and signed in Spanish. Defendant also submitted what it asserted to be English translations of the affidavits that were also signed by the affiants. Plaintiffs contest the submission of these affidavits because "Defendant has offered no certified translation to confirm that the English versions are true and accurate translations of the document signed by the affiants." Id.

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[15] The Court notes that Defendant did not attach a certificate for the deposition excerpts of Michael Gantt, Exhibit 10. Because the parties have agreed to the striking of the exhibit from the record, there is no issue concerning the appropriateness of a certification.

[16] Plaintiffs move to strike Defendant's Exhibits 50, 53, 58, 69, 70, 71, 73, 77, 79, 82, 83, 87, 88, 91, 92, 93, 94, 95, 97, 100, 101, 102, 103, 108, 109, 113, 119, 120, 122, 124, 126, 127, 131, 132, and 134.

[17] Plaintiffs move to strike exhibits 50, 53, 58, 69, 70, 71, 73, 77, 79, 82, 83, 87, 88, 91, 92, 93, 94, 95, 97, 100, 101, 102, 103, 108, 109, 113, 119, 120, 122, 124, 126, 127, 131, 132, 134. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 7.

In response to Plaintiffs' motion to strike, Defendant submitted the affidavit of W. Todd Turner. Resp. (doc. 213) at Exbt. 5. In his sworn statement, Turner describes his qualifications and expertise regarding Spanish language translation and states that he translated the contested affidavits from English into Spanish. Id. However, Plaintiffs note that Turner does not explain the circumstances under which the affiants signed affidavits in two languages (e.g., whether the affiants were advised of the content of the English-language affidavits before signing them). Plaintiffs argue that Defendant has therefore failed to lay a proper foundation for the admission of the translated affidavits. See Jack v. Trans World Airlines, Inc., 854 F.Supp. 654, 659 (N.D.Cal. 1994).

Although Turner does not explain the circumstances under which the affiants signed the affidavits, he states that the translations are true and accurate. Exbt. 5 (doc. 213) at ¶5. Since the parties have not indicated that the affiants are illiterate, it is reasonable to assume that the Spanish versions of the affidavits were read and understood by the affiants. Consequently, it is irrelevant whether the English versions were signed by the affiants. The English versions need only be authenticated by the translator's, Turner's, sworn statement to such. These affidavits will be considered.

c. Lack of Disclosure

Plaintiffs assert that many of Defendant's exhibits should be stricken, because they were not disclosed during

discovery.[18] Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4. The Federal Rules of Civil Procedure direct that a party who "without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), is not, unless such failure is harmless, permitted to use as evidence...on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c)(1). Plaintiffs move to strike specific charts filed by Defendant that were allegedly not disclosed.[19] The charts contain information about store format histories, Plaintiffs' expert's report, health department inspections, and statements by affiants about store conditions. See Exhibits 1B, 21, 31 and 37 (doc. 190). Defendant admits that it did not disclose the charts to Plaintiffs, but claims that the information contained in the charts was disclosed. Resp. (doc. 213) at 6.

Although Defendant did not disclose to Plaintiffs the exact charts that they submitted into evidence, Plaintiffs do not contest that they received the information contained in the charts in other forms. Disclosure of the information in any form put Plaintiffs on notice of what evidence and documents Defendant intended to rely upon in this matter. Exhibits 1B, 21, 31 and 37 are merely summaries of such

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[18] Specifically, Plaintiffs move to strike exhibits 1B, 1W, 21, 31, 33, 35, 36, 37, and 50-135. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4. The Court will not review Exhibits 1W, 33, 35, and 36 under this claim as they have already been deemed stricken from the record based on other grounds.

[19] Plaintiffs move to strike exhibits 1B, 21, 31 and 37. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4.

evidence. The Court finds that Defendant satisfied the disclosure requirements of Rule 26(a) or 26(e)(1).

Plaintiffs also contest Defendant's use of affidavits from eighty-five of Defendant's employees who were allegedly not disclosed as witnesses.[20] Defendant asserts, and Plaintiffs do not contest, that sixty-eight of the contested affiants were disclosed in Defendant's First Supplemental Disclosure Statement. Resp. (doc. 213) at 6. The remaining affiants are defined by Defendant as rebuttal witnesses. Id.

As Defendant disclosed the names and addresses of sixty-eight of the contested affiants in their First Supplemental Disclosure Statement (doc. 70), the Court concludes that Rule 26(a) of the Federal Rules of Procedure pertaining to disclosures, has been satisfied. The affidavits of these witnesses shall remain in the record. Under Federal Rule of Civil Procedure 26, disclosure is not required for rebuttal witnesses. Therefore, the Court concludes that the remaining affidavits shall remain in the record and only used for purposes of rebuttal, as Defendant asserts.

d. Lack of Personal Knowledge

Plaintiffs object to Defendant's Exhibits 1 and 30, arguing that their authors lack personal knowledge of the matter they discuss.[21] Defendant's Exhibit 1 is the first

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[20] Plaintiffs move to strike exhibits 50-135. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 5.

[21] Although Plaintiffs also object to Defendant's Exhibits 1W, 33, 35, and 36, the Court will not review these exhibits under this claim because they have already been stricken on other grounds.

affidavit of Michael Proulx. Plaintiffs contest the submission of many of Proulx's declarations included in the affidavit, arguing that Proulx lacks personal knowledge of the matters on which he opines. In his statements, Proulx discusses, among other things, matters involving Bashas' past history and business, store formats, wage scales, store conditions, and competitors. Proulx, as President and CFO of Bashas', Inc., has sufficient personal knowledge of these matters for purposes of the underlying motion.

Defendant's Exhibit 30 is the affidavit of Tom Dominick. Dominick is the current Vice President of Food Safety and Sanitation for Bashas' and has handled food safety for the company since 1998. Exbt. 30 (doc. 190) at ¶3. In his affidavit, Dominick makes statements about his experiences with food safety and sanitation at Bashas' stores. Due to his position at Defendant's company, Dominick has sufficient personal knowledge of these matters to be considered on a motion for class certification.

ii. Motion to Strike Deposition Testimony of Paul Joe Pedraza

Plaintiffs also move to strike the testimony of Paul Joe Pedraza, Exhibit 38, submitted by Defendant in its response to Plaintiffs' motion for class certification. Mot. to Strike Test. (doc. 197). Essentially, Plaintiffs claim that the exhibit is the transcript of a deposition that was taken by Defendant without notice to Plaintiffs, as required under Federal Rule of Procedure 30(b)(1) and 32(a). Id. at 1. In contrast, Defendant asserts that the testimony is an

affidavit that does not require notice and should not be struck. Resp. (doc. 212) at 6.

Although the Ninth Circuit has not reviewed this issue in relation to motions for class certification, the matter has been reviewed in regard to motions for summary judgment. The Ninth Circuit has held that a witness' statement taken in question and answer form, which had neither been subject to cross examination nor signed, was admissible under Rule 56(c). In re Sunset Bay Associates, 944 F.2d 1503, 1510 (9th Cir. 1991) [hereinafter Sunset Bay]. The court in Sunset Bay based their decision on the holding of a previous case, Hoover v. Switlik Parachute Co., 663 F.2d 964 (9th Cir. 1981), where it concluded that similar documents met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. Id. at 965-66.

> [T]he logic of *Hoover* implies that an unsigned deposition should be admissible where, as here, the deponent was *sworn*. The approach of *Hoover* is pragmatic, looking to see if the deposition testimony is at least as reliable as an admissible affidavit. Because there is no reason to believe that the sworn answers to questions are less reliable that an affidavit, to the extent that the content of the deposition testimony is otherwise admissible, that testimony should be admissible on summary judgment.

Sunset Bay, 944 F.2d at 1510. In a later case, the court held that a statement was admissible under the same rule despite the fact that the party objecting to the admission of the statement had not been present at the time it was taken. Curnow v. Ridgecrest Police, 952 F.2d 321, 324 (9th Cir.

1991). The court in Curnow simply found the statement admissible "because [the witness'] answers to the questions were given under oath...[and the statement] was at least as reliable as an affidavit." Id.

An affidavit shall "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Similar to the above described cases, the contested exhibit in the case at bar contains statements taken in a question and answer form that were not subject to cross examination nor signed. See Exhibit 38 (doc. 190). Although Pedraza's statements were taken under oath, Plaintiffs argue that the sworn answers are less reliable than an affidavit because they are inadmissible under the Rules of Evidence. Reply (doc. 218) at 8-9. Plaintiffs object to the majority of Pedraza's statements by asserting that they are inadmissable hearsay or lay opinion testimony, lack personal knowledge or foundation, are prejudicial or irrelevant, or are responses to leading questions.[22] Id.

The statements included in Defendant's Exhibit 38 contain testimony concerning Pedraza's own employment history and work experience with the United Food and Commercial Workers

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[22] In their Reply (doc. 218), Plaintiffs object to numerous statements contained in Pedraza's testimony, many of which were not included in the excerpted transcript filed by Defendant as Exhibit 38. Due to the fact that Plaintiffs' motion to strike specifically moves to strike Defendant's Exhibit 38, the Court only reviews the claims related to statements submitted in that exhibit, not the transcript in its entirety.

Union ("UFCW"). See Exhibit 38 (doc. 190). Such information comes from Pedraza's personal experience and knowledge, and is admissible under Ninth Circuit case law. The Court does not find such statements to be inadmissible under any of Plaintiffs' theories. In addition, the exhibit contains remarks involving Pedraza's lay opinions about individuals and events related to this lawsuit. Id. Specifically, Pedraza makes statements involving Bashas' business decisions,[23] other individuals' fear of a certain person and their reasoning for signing certain documents,[24] and Bill McDonough's involvement in this lawsuit.[25] Opinion testimony of this type is admissible under Federal Rule of Evidence 701. Accordingly, the Court concludes that Defendant's Exhibit 38 is at least as reliable as an affidavit and need not be stricken from the record.

IV. Plaintiffs' Motion to Use Expert Analysis as Rebuttal Opinion

On September 7, 2004, Plaintiffs filed a Motion for Permission to Use Previously-Disclosed Expert Analysis as Rebuttal Opinion and Request for Expedited Decision. Mot. Reb. Opin. (doc. 147). The Court, finding no grounds for expedited treatment on the issue, denied Plaintiffs' request for an expedited decision. Order (doc. 149). The Court agreed

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[23] Defendant's Exhibit 38 (doc. 190) at 11, line 19-20.

[24] Defendant's Exhibit 38 (doc. 190) at 22, line 7-8.

[25] Defendant's Exhibit 38 (doc. 190) at 26, line 23-24; Defendant's Exhibit 38 (doc. 190) at 27, line 3-23.

to consider the matter in connection with Plaintiffs' motion to certify class, heard oral argument on the issue on January 24, 2005, and is now ready to rule. Id.

In their motion, Plaintiffs ask the Court to allow them to use analysis produced by their previously-disclosed expert as a rebuttal opinion. Mot. Reb. Opin. (doc. 147). Specifically, Plaintiffs seek the Court's permission to allow their disclosed statistical expert, Dr. Richard Drogin,[26] to present an opinion in rebuttal to an opinion expressed by defendant's expert, Dr. Michael Ward.[27] Mot. Reb. Opin. (doc. 147) at 2. The analysis at issue is Drogin's study of the rates of pay at hire for whites and Hispanics within Food City stores. Id. Defendant's expert, in his report, expressed the opinion that there cannot be discrimination in the pay between whites and Hispanics in Food City stores because all employees are paid according to one pay scale. Exbt. 7 (doc. 190) at 8-9. To rebut Ward's assertion, Plaintiffs would like to submit a two-page report created by Drogin that includes an analysis of the actual pay received at initial hire for white and Hispanic employees within Food City stores. Exbt. 1 (doc. 148).

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[26] Dr. Drogin is an Emeritus Professor in the Department of Statistics at California State University, Hayward and is a partner in a statistical consulting firm. See Decl. Drogin (doc. 160) at Exbt. 1, ¶¶ 1-2.

[27] Dr. Ward has a Ph.D. in economics from the University of Chicago, is Senior Vice President of a consulting firm specializing in economic and statistical research, and is a senior economist at a research firm that performs grant and contract research for the Federal Government. See Exbt. 7 (doc. 190) at ¶¶1-2.

Defendant contests the submission of Drogin's initial hire pay analysis as a rebuttal opinion because the analysis is a new, previously undisclosed and unpled theory. Resp. (doc. 179) at 1. Defendant asserts that Drogin's analysis is a new theory of the case, requiring further depositions and analysis by their own expert on the same issue. Id. at 4-9. In connection with their opposition to Plaintiffs' motion, Defendant filed a cross motion requesting that if the report is admitted as a rebuttal opinion, Defendant be granted additional time to conduct another deposition of Drogin and have their own expert analyze the same matter and create a rebuttal report in response. Cross Mot. (doc. 179) at 10.

Plaintiffs wish to submit the contested opinion to counter Ward's claim on the impossibility of pay discrimination in Defendant's stores. Mot. Reb. Opin. (doc. 147) at 5. Consequently, the analysis more closely resembles a rebuttal than a new case theory. Therefore, the Court will allow Plaintiffs to submit Drogin's analysis as a rebuttal to Ward's report. The Court will only review the analysis as rebuttal in relation to Plaintiffs' motion for class certification. Because the report will be reviewed for such limited purposes and Defendant has not indicated how further questioning of Drogin and an additional study will aid the Court in determining the issue of certification, Defendant's requests for an additional deposition of Drogin and time to submit a rebuttal report of its own are unnecessary.

. . .

V. Class Certification

Plaintiffs ask this Court to certify a class consisting of:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged pay policies and practices and disparate working conditions.

Mot. (doc. 159) at 17. Federal Rule of Civil Procedure 23 governs class certification and has two parts. A party seeking certification must successfully meet all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186, amended, 273 F.3d 1266 (9th Cir. 2001).[28] A party seeking class

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[28] Fed. R. Civ. P. 23(a) requires:
(1) that the class be so numerous that joinder of all members is impractical,
(2) there are questions of law or fact common to the class,
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,
(4) the representative parties will fairly and adequately protect the interests of the class

Fed. R. Civ. P. 23(b) requires:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications...or
(B) adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of other members not parties...or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods of the fair and efficient adjudication of the controversy.

certification bears the burden of proving facts sufficient to meet these criteria. See id. In determining a motion for class certification, a court must determine based upon a "rigorous analysis," whether each of the requirements of Rule 23 have been satisfied. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 161 (1982)."Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). While a court's analysis must be rigorous, Rule 23 confers "broad discretion to determine whether a class should be certified, and [allows a court] to revisit that certification throughout the legal proceedings[.]" Armstrong v. Davis, 275 F.3d 849, 872 n. 28 (9th Cir. 2001).

A. Rule 23(a)

i. Numerosity

First, Rule 23(a) requires that the proposed class be so numerous that "joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In the case at bar, Defendant does not contest certification based on failure to meet this condition. Moreover, as a class with thousands of members, this requirement is satisfied. Mot. (doc. 159) at 18; Decl. Drogin (doc. 160) at Exbt. 1.

ii. Commonality

Second, in order for a class to be certified, there must

be "questions of law or fact common to the class..." Fed. R. Civ. P. 23(a)(2). The element of commonality specifically refers to the group characteristics of the class as a whole. See Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 144-45 (N.D. Cal. 2004). To find commonality, "[a]ll questions of fact and law need not be common to satisfy the rule." Hanlon v. Chrysler, 150 F.3d 1011, 1019-20 (9th Cir. 1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Id. Generally, the element of commonality should be construed permissively, but a "mere allegation of individualized discrimination on the basis of race, coupled with proof that other people of color work in the same environment, is insufficient to establish commonality." Donaldson v. Microsoft Corp., 205 F.R.D. 558, 565 (W.D. Wash. 2001).

In this instance, Plaintiffs base their discrimination claims on Defendant's pay policies, the alleged disproportionality of Hispanics employed at Food City stores verses Defendant's other stores, and Defendant's alleged common practice of maintaining inferior store conditions at Food City locations. F. Amend. Complt. (doc. 116) at 4-7. Plaintiffs present extensive evidence to support their contention that there are factual and legal questions common to all class members with respect to whether Defendant has engaged in company-wide discrimination against Hispanic employees in pay and working conditions. This evidence can be grouped into three categories: (1) facts and expert opinion

supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide race disparities attributable to discrimination; and (3) anecdotal evidence from class members.

First, Plaintiffs present evidence that Defendant's policies governing compensation are similar across all stores due to the fact that all of Defendant's stores use company-established pay schedules to determine rates of pay. Mot. (doc. 159) at 4. Defendant concedes that such pay schedules are used, and that past pay schedules established for Food City stores contained lower pay ranges than those utilized at Bashas' and A.J.'s stores. Resp. (doc. 190) at 11; Exbt. 7 (doc. 190) at ¶10. However, both parties concede that over the past several years the contested pay scales have merged and, for the most part, are now identical. Mot. (doc. 159) at 7; Resp. (doc. 190) at 14-15. Consequently, some class members may now receive pay that is equal to that of their counterparts in Defendant's other stores, while other class members may not. Thus, although Defendant's system for compensating hourly employees is similar across all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members.

Plaintiffs also present statistical evidence of class-wide race disparities. Decl. Drogin (doc. 160) at Exbt. 1. "Use of statistical analysis to raise an inference of class-wide discrimination and satisfy commonality is well accepted." Dukes, 222 F.R.D. at 154. Plaintiffs rely primarily on the

expert testimony of Dr. Drogin who concludes that there are statistically significant disparities between the workforce make-up of Defendant's Food City stores and its other stores, and between the compensation provided to Defendant's Hispanic employees verses employees of other races. Decl. Drogin (doc. 160) at Exbt. 1, ¶ 32.

Defendant argues that Drogin's analysis is incorrect and that there is no statistical pattern of discrimination at its stores. Resp. (doc. 190) at 19. Defendant relies on the testimony of its own expert economist, Dr. Ward, who provides a critique of Drogin's analysis. Id. at 19-27. Specifically, Defendant asserts that Drogin wholly disregarded Defendant's "actual" pay practices. Id. at 20 (arguing that Drogin failed to consider "that during the time in question, hourly workers at all formats were paid according to published pay scales...[and Drogin] failed to understand...the history of the [store] formats and wage scales.").

The Court may delve into the substance of expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create commonality. See Dukes, 222 F.R.D. at 154. A party challenging statistical evidence "cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics." EEOC v. General Telephone Co. of the Northwest, Inc., 885 F.2d 575, 581 (9th Cir. 1989). Rather, the party challenging the statistical analysis must "produce credible evidence that curing the alleged flaws would also cure the statistical disparity[.]" Id. at 583.

Here, Defendant points out numerous flaws in Drogin's analysis but fails to put forth sufficient evidence that fixing the defects would cure the statistical disparity. Moreover, Dr. Ward and Defendant concede to three of Dr. Drogin's conclusions: (1) Food City Stores have a higher percentage of Hispanic employees compared to Bashas' or A.J.'s stores, (2) the pay scales at Bashas' and A.J.'s stores were higher than those at Food City during the period 1998-2000, and (3) Hispanic employee hourly rates were lower in similar jobs. Resp. (doc. 190) at 19; Exbt. 7 (doc. 190) at ¶10. However, these concessions alone do not indicate commonality among all the class members, as Defendant's pay scales, implemented at Food City and Bashas' stores, are now almost identical. Mot. (doc. 159) at 7; Resp. (doc. 190) at 14-15.

Finally, Plaintiffs submit anecdotal evidence in order to show commonality. Anecdotal evidence of discrimination is often used in Title VII pattern and practice cases to bolster the statistical proof by bringing "the cold numbers convincingly to life." Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977). Here, Plaintiffs have submitted declarations from each of the class representatives, as well as declarations from class members. See Decl. G. Estrada (doc. 176); Decl. Martinez (doc. 163); Decl. Acuna (doc. 166); Decl. Lopez (doc. 173); Decl. J. Estrada (doc. 164); Decl. Arriaga (doc. 175); Decl. Salazar (doc. 172); Decl. Gutierrez (doc. 171); Decl. Urbina (doc. 165); Decl. Parra (doc. 168). The declarants testify to their employment experiences and pay histories with Bashas' Inc., and the sub-

standard conditions they witnessed in Food City stores. This anecdotal evidence, in combination with the other evidence previously discussed, supports an inference that Defendant's policies on working conditions have affected Plaintiffs in a common manner.

Although members of the proposed class may incorporate different factual circumstances in their claims, as current and former employees at Defendant's stores, they each have been subject to Defendant's stores' working conditions. Their claims all stem from the same source: the alleged existence of common discriminatory practices conducted by Defendant.[29] Therefore, on the issue of working conditions, the proposed class shares sufficient commonality to satisfy the minimal requirements of Rule 23(a)(2). The Court does not find sufficient commonality among the class members on the issue of pay. Thus, due to its inability to satisfy Rule 23(a)(2), the Court shall deny certification of the proposed class on the issue of discriminatory pay policies.[30]

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[29] Defendant challenges the commonality of the proposed class by asserting that the class is simply too diverse. Resp. (doc. 190) at 36-45. Specifically, Defendant raises concerns with the diversity of the positions listed on the contested pay schedules, the employment experience of class members, and the locations of Food City stores. Id. Many of these arguments go to the merits of Plaintiffs' discrimination claims instead of the issue of class certification. Here, although the Court may consider the substance of a case when considering the commonality and typicality of a class, the Court need not make a complete determination as to the merits of Plaintiffs' claims in order to rule on these elements.

[30] Due to this determination, the Court has not reached the other requirements for class certification on this issue, and further expresses no opinion on whether Plaintiffs could satisfy such requirements.

iii. Typicality

Third, to be certified as a class, Rule 23 requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class..." Fed. R. Civ. P. 23(a)(3). As the Supreme Court has explained:

> The commonality and typicality requirements... tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982). Typicality refers specifically to the individual characteristics of the named plaintiffs in relation to the class as a whole. See Dukes, 222 F.R.D. at 144-45. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanlon,150 F.3d at 1020. It is sufficient for the plaintiffs' claims to "arise from the same remedial and legal theories" as the class claims. See Dukes, 222 F.R.D. at 166, quoting Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 449 (N.D. Cal. 1994).

Here, the named Plaintiffs selected to represent the proposed class are Gonzalo Estrada and Aurelia Martinez.[31] Mot. (doc. 159) at 21. Both Estrada and Martinez are Hispanic and

[31] Plaintiffs notify the Court that José Parra has withdrawn as a named plaintiff in this case. Reply (doc. 207) at n. 27.

are current or former employees of a Food City store owned and operated by Defendant. Decl. Estrada (doc. 176) at 1; Decl. Martinez (doc. 163) at 1.

Estrada was employed at Food City from April 1999 until July 2002. Decl. Estrada (doc. 176) at 1. While employed with Defendant's company, he worked in the deli and meat departments, and was an hourly-paid employee. Id. at 2-3. Estrada claims that during his tenure at Food City, he was aware of the pay schedule differences between Food City stores and Defendant's other stores. Id. at 3. Estrada also claims that he witnessed unclean working conditions at the Food City store in Mesa, Arizona where he worked. Id. at 3-4. In the case at bar, Estrada has articulated claims for pay disparity and disparate working conditions. He exhausted his administrative remedies before filing this lawsuit under Title VII by filing an EEOC charge in November 2001. Id. at 5. Because Estrada suffered from the same alleged disparate working conditions as the potential class members, the Court finds that he sufficiently satisfies the typicality requirement of Rule 23 for this issue.

Martinez has been employed at a Food City store in Phoenix, Arizona since 1991. Decl. Martinez (doc. 163) at 1-2. Throughout her employment at Food City, she has worked only in the Tortilleria department. Id. at 2. Martinez states that she is an hourly-paid employee and claims that she has witnessed unclean working conditions at the store and in the department where she works. Id. 2-6. In the case at bar, Martinez has articulated claims for pay disparity and disparate working

conditions. Despite the fact that she has not filed an EEOC charge, and therefore not exhausted her administrative remedies under Title VII, Martinez may "piggyback" onto Estrada's efforts and go forth with her Title VII claim. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

Defendant contests Martinez's typicality, arguing that the position in which she is employed is not comparable to a position located within the Bashas' or A.J.'s stores. Resp. (doc. 190) at 59-61. In contrast, Plaintiff argues that in certain company documents,[32] Defendant lists Martinez's position as an equivalent to a donut fryer position. Reply (doc. 207) at 27. Without further information on this issue, the Court cannot determine whether Martinez's position has a comparable counterpart in Defendant's other stores. Regardless, Martinez claims she has suffered from the same alleged disparate working conditions as the proposed class members. While close, the Court finds that she sufficiently satisfies the typicality requirement of Rule 23(a)(3) on that issue.

iv. Adequacy

Fourth, the party moving for class certification must show that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4).[33] Like the commonality and typicality

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[32] Plaintiffs note the written pay scales and a document used to recruit new employees for Bashas' stores. Reply (doc. 207) at 27.

[33] Since the revision of Rule 23 in December 2003, the adequacy of class counsel is now evaluated pursuant to Rule 23(g)."Rule

requirements, it assures that shared interests between the representative plaintiffs and the class as a whole are present, but it also functions to ensure competency and the absence of conflicts. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-26 (1997).

Defendant challenges Plaintiffs' adequacy, arguing that their alleged private, ulterior motives and actions show they are not adequate representatives of all class members. Resp. (doc. 190) at 47-52. Specifically, Defendant asserts that the named Plaintiffs are pursuing this case on behalf of the UFCW and are merely puppets of the organization. Id. at 47-48. Defendant argues that this ulterior motive indicates that the named plaintiffs have no individual claims and do not have the same interests as their class members. Id. at 48, 54.

The Court is not convinced that the named plaintiffs are inadequate due to Defendant's allegations of ulterior motives. Both proposed named plaintiffs, Estrada and Martinez have expressed their ability and willingness to represent the class. Decl. Estrada (doc. 176) at ¶13; Decl. Martinez (doc. 163) at ¶21. The interests of the class and those of the named plaintiffs are the same as both seek to prove that Defendant's working conditions discriminate against Hispanic employees. Both also seek the same result of an order of injunctive relief eradicating any discriminatory policies. Therefore, the

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23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the class certification process." Fed. R. Civ. P. 23 Advisory Committee note.

Court finds that the named plaintiffs satisfy the element of adequacy required of Rule 23(a)(4). Concluding that Plaintiffs have satisfied the threshold elements of class certification enumerated in Rule 23(a) on the working conditions issue, the Court will now analyze the proposed class under the requirements of Rule 23(b).

B. Rule 23(b)

Certification under Rule 23(b) requires satisfaction of one of three elements. Here, Plaintiffs argue that they satisfy two of the possible elements listed in Rule 23(b).

i. Rule 23(b)(2)

First, Plaintiffs assert that they satisfy the requirements of Rule 23(b)(2), mandating that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed. R. Civ. P. 23(b)(2); Mot. (doc. 159) at 23. "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. Amchem Prods., 521 U.S. at 614.

Here, Plaintiffs argue that certification under Rule 23(b)(2) is appropriate because Defendant has acted and refused to act on grounds generally applicable to the entire class. Mot. (doc. 159) at 23. Plaintiffs allege that Defendant has acted in a discriminatory manner generally applicable to the class, and plaintiffs have sought declaratory and injunctive relief with respect to the class as a whole.

Amended Complt. (doc. 116) at 7-8.

> This declaratory and injunctive relief would include, *inter alia*:...4) enjoining the maintenance of unequal terms and conditions of employment for class members, including the safety and cleanliness of the stores; and 5) a declaration that the challenged practices violate Section 1981 and Title VII.

Mot. (doc. 159) at 23.

On the issue of disparate working conditions, Defendant challenges Plaintiffs' ability to certify the class under Rule 23(b)(2), arguing that Plaintiffs' complaints do not support injunctive relief. Resp. (doc. 190) at 66. "They have not identified a specific policy or practice of discrimination to be enjoined[.]" Id. Defendant relies on the ruling in Monreal v. Potter, 367 F.3d 1224 (10th Cir. 2004) to support its argument.

In Monreal, seven management-level Hispanic postal employees sought to represent a class of Hispanic management employees who had "suffered race discrimination with respect to the terms and conditions of their employment, or promotions, or retaliation[.]" 367 F.3d 1234. The plaintiffs offered statistics "to show that Hispanics constitute a proportionately lower number of managers than do whites." Id. at 1235. They also offered ninety-three declarations from members of the proposed class, complaining of discrimination in promotions, compensation, evaluations, job shifting and assignments, discipline, disrespectful treatment, training and advancement, a hostile and retaliatory environment that deterred Hispanic Postmasters and managers from seeking advancement and making or supporting Title VII charges, and

serial retaliation on Hispanic Postmasters and managers who made or supported Title VII charges. Id. at 1234-35. The Tenth Circuit affirmed the district court's denial of class certification under Rule 23(b)(2), because the plaintiffs had "not articulated a policy--besides generalized non-compliance with Title VII--that could be the subject of injunctive or declaratory relief," and the plaintiffs' complaint did not request "any specific relief of this type." Id. at 1236. Defendant argues that the same analysis should apply here. Resp. (doc. 190) at 67.

Despite the fact that this Court is not required to follow the Tenth Circuit's conclusions in Monreal, the claims here do not significantly resemble those of the Tenth Circuit case. In the case at bar, Plaintiffs claim that Defendant acted in a discriminatory manner by maintaining disparate working conditions in their stores. Unlike the numerous claims of discrimination articulated by the plaintiffs in Monreal, Plaintiffs here allege one main claim of a discriminatory practice or policy. Although the facts of each individual complaint may differ according to where and in what position the class member worked, viewed together they form a general claim that Defendant holds a discriminatory policy or practice in relation to working conditions offered in its Food City stores. Moreover, Plaintiffs seek specific declaratory and injunctive relief on this matter, defined as:

> 4) enjoining the maintenance of unequal terms and conditions of employment for class members, including the safety and cleanliness of the stores; and 5) a declaration that the challenged practices violate Section 1981 and

Title VII.

Mot. (doc. 159) at 23. Thus, the Court concludes that Plaintiffs satisfy the requirements of Rule 23(b)(2) on the working conditions claim.

C. Conclusion

The Court concludes that regarding their claim of disparate working conditions, Plaintiffs have satisfied the requirements of Rule 23(b)(2), and determines that a further analysis of Rule 23(b)(3) and Plaintiffs' hybrid claim are unnecessary. Consequently, the Court finds that on the issue of disparate working conditions, Plaintiffs have satisfied all of the requirements of Rule 23, and therefore grants in part and denies in part the certification of the requested class.

Plaintiffs have requested that the Court order that class members be provided notice and an opportunity to opt out, akin to that provided by Rule 23(b)(3). Mot. (doc. 159) at 26. Minimum due process requirements apply where the monetary relief sought in a class action lawsuit is "substantial." Molski, 318 F.3d at 948. The Molski court concluded that "notice and the right to opt-out [] must be provided to bind absent class members when substantial monetary damages are involved." Id. The court further indicated that a claim for punitive damages is "substantial." Id. at 951. Pursuant to Rule 23(d), the Court is permitted to order notice and opt-out plans as it deems necessary. Fed. R. Civ. P. 23(d). However, in light of the fact that Plaintiffs seek no monetary damages in relation to their claims of disparate working conditions,

there is no reason for any opt-out notification.

VI. Appointment of Class Counsel

Rule 23(g) governs the standards and framework for the selection of class counsel for a certified class. Fed. R. Civ. P. 23(g).[34] The rule articulates four criteria that the court must consider in evaluating the adequacy of proposed counsel. The four mandatory considerations are (1) the work counsel has done in identifying or investigating potential claims in the action, (2)_counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. Fed. R. Civ. Pro. 23(g)(1)(C)(i). The court is also free to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. Pro._23(g)(1)(C)(ii). "No single factor should necessarily be determinative in a given case." Fed. R. Civ. P. 23(g) Advisory Committee note.[35]

In the case at bar, the law firm Davis, Cowell & Bowe and The Impact Fund[36] seek to be appointed counsel of the proposed

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[34] Rule 23 was amended on December 1, 2003 and, as part of the revision, added subsection Rule 23(g).

[35] Fed. R. Civ. Pro. 23(g)(2)(B) sets forth the standards to be followed by the court in selecting among competitive candidates to serve as class counsel. As this Court is not aware of any other attorneys interested in serving as class counsel in this case, this matter will not be reviewed.

[36] The Impact Fund is a non-profit legal foundation, which supports complex public interest litigation. Decl. Lawrence (doc. 154) at ¶ 3. Currently, The Impact Fund serves as lead counsel in the

class. Mot. for Appt. (doc. 152). Davis, Cowell & Bowe and The Impact Fund assert that they each satisfy the criteria articulated in Rule 23(g). Davis, Cowell & Bowe argue that they have already spent over three years identifying and investigating potential claims in this action, and associated The Impact Fund as co-counsel to further assist with their investigation. Decl. Lawrence (doc. 154) at ¶¶10-13. "Attorneys and staff of The Impact Fund have communicated with class members and assisted with the litigation of this action." Mot. for Appt. (doc. 152) at 4; Decl. Lawrence (doc. 154) at ¶ 11. Plaintiffs' counsel also assert that they have extensive experience with class action lawsuits and cases involving similar claims, and therefore have extensive knowledge of the applicable law. Mot. for Appt. (doc. 152) at 5. Plaintiffs note that Davis, Cowell & Bowe and The Impact Fund were recently appointed class counsel in Dukes v. Wal-Mart Stores, 222 F.R.D. 137 (N.D. Cal. 2004). Mot. for Appt. (doc. 152) at 4.

Defendant challenges the appointment of Davis, Cowell & Bowe and The Impact Fund as class counsel. Resp. (doc. 189). Defendant questions Davis, Cowell & Bowe's dedication to the proposed class due to the fact that the firm also represents the UFCW. Resp. (doc. 189) at 3-7. Defendant argues that if the UFCW decides that this lawsuit is not in its best interests, the attorneys and named plaintiffs in this class

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Dukes v. Wal-Mart Stores litigation. 222 F.R.D. 137 (N.D. Cal. 2004); Mot. for Appt. (doc. 152) at 4.

action lawsuit will drop the case, to the detriment of the proposed class members. Id. at 3-4. Defendant also questions whether the attorneys have sufficient resources to litigate a class action suit.[37] Id. at 7. Moreover, Defendant argues that Plaintiffs' motion for appointment of class counsel is premature and should not be determined until after a determination concerning class certification has been made by this Court. Id. at 2.

Since it has been determined that the proposed class in this matter may be certified on the working conditions claim, the Court does not find that an appointment of class counsel is premature. See Rule 23(c)(1)(B) (providing that an order certifying a class action must appoint class counsel under Rule 23(g)). The law firm of Davis, Cowell & Bowe and The Impact Fund each have committed significant time and effort to investigating potential claims in this action. Davis, Cowell & Bowe has interviewed numerous Food City workers, reviewed corporate and public records, and, since the first complaint was filed, have taken and defended over thirty depositions, reviewed numerous documents, and litigated many motions. Decl. Lawrence (doc. 154) at ¶¶ 11 & 14. Since March 2004, The Impact Fund has communicated with class members and assisted Davis, Cowell & Bowe with this litigation. Id. at ¶ 11. Each have also shown sufficient experience with employment claims and class action litigation, indicating that they both hold

[37] Defendant, citing The Impact Fund's website, asserts that the organization consists of only two attorneys. Resp. (doc. 189) at 7.

significant knowledge about the law applicable to the claims at hand.[38] Although The Impact Fund may house only a couple of attorneys, the Court is satisfied that that organization, working together with the law firm of Davis, Cowell & Bowe, will have sufficient resources and manpower to manage the class action lawsuit. Furthermore, despite Defendant's allegation that Plaintiffs' counsel will drop this case at the requests of the UFCW, the class action, once certified, cannot be dismissed or settled without the approval of the Court. Fed. R. Civ. P. 23(e). Therefore, the Court concludes that the law firm of Davis, Cowell & Bowe and The Impact Fund satisfy the criteria of Rule 23(g) and may be appointed class counsel to the class certified in this order.

Therefore,

IT IS ORDERED that Defendant's Motion to Strike Evidence From Plaintiffs' Motion to Certify Class (doc. 191) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Withdraw Exhibit (doc. 208) is DENIED as moot.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Evidence (doc. 205) is GRANTED IN PART and DENIED IN PART in accordance with this order. Defendant's Exhibits 1W, 10, 33, 35, 36 and 46 are stricken.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike

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[38]Davis, Cowell & Bowe has handled numerous individual employment discrimination claims as well as a number of class actions. Decl. Lawrence (doc. 154) at ¶ 5. Impact Fund attorney Jocelyn Larkin has practiced employment discrimination law since 1987 and has served as class counsel in approximately 18-20 employment class actions. Decl. Larkin (doc. 153) at ¶ 4.

Deposition Testimony of Paul Joe Pedraza, Exhibit 38 (doc. 197) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Permission to Use Previously-Disclosed Expert Analysis as Rebuttal Opinion (doc. 147) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Cross Motion to Depose Expert as to New Theory and Offer Expert Report in Opposition (doc. 179) is DENIED.

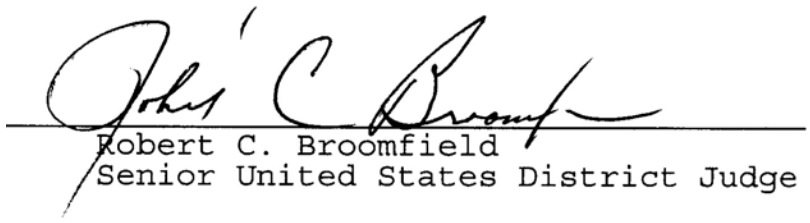
IT IS FURTHER ORDERED that Plaintiffs' Motion for Class Certification (doc. 159) is GRANTED in part and DENIED in part. The Court certifies a class as follows:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged disparate working conditions.

Plaintiffs' motion is denied, without prejudice, as to the issues of the challenged pay policies and practices.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Appointment as Class Counsel (doc. 152) is GRANTED.

DATED this 29th day of August, 2005.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record