
**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

GEORGE McREYNOLDS et al.,)	
individually on behalf of themselves)	Answer in Opposition to
and all others similarly situated,)	Petition for Rule 23(f) Appeal
)	from the United States
Plaintiffs-Petitioners,)	District Court for the
)	Northern District of Illinois
v.)	
)	No. 05-C-6583
MERRILL LYNCH, PIERCE, FENNER)	
& SMITH, INCORPORATED,)	Judge Robert W. Gettleman
)	Magistrate Judge Gilbert
Defendant-Respondent.)	

**DEFENDANT-RESPONDENT MERRILL LYNCH'S ANSWER IN OPPOSITION TO
PLAINTIFFS' PETITION FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f)**

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Plaintiffs’ petition rests on the false premise that the district court applied, as a categorical rule, a “wholesale ban” on certifying class actions that challenge “uniform policies and practices” of “employers operating in multiple facilities with multiple supervisors.” Pet. 2-3. Plaintiffs’ assertion that Judge Gettleman applied a “district ‘consensus’ against company-wide employment class actions” (Pet. 12) is unrecognizable as a description of what occurred here. Judge Gettleman understood that it is “possible in an appropriate case to certify a company-wide class involving multiple branch offices across the country,” but emphatically stated that “this is not the appropriate case.” App. 17. Like other judges in this district who have allowed class actions in some multi-facility cases and denied them in others, Judge Gettleman studied the record and briefs and concluded that *this* case is not about uniform application of uniform policies across different facilities. Rather, it concerns frequently changing national policies that left considerable discretion to thousands of managers in over a hundred offices around the country who supervised the 700-plus members of the putative class of African American financial advisors over the course of a decade. And the impact of those policies depended not only on the cabined discretion of thousands of managers, but also on the individual decisions of 15,000 FAs about, for example, whether and with whom to team, whether to accept or reject an account distribution, and whether to take action to improve the FA’s rank under Merrill Lynch’s account distribution policy.

It is that distinction—between uniform practices that affect employees in the same way, which are “well-suited to class adjudication,” and “decentralized” subjective decisionmaking, which fragments a proposed class—that forms the true consensus in this district and elsewhere. *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 422, 424 (N.D. Ill. 2003).¹ That consensus flows

¹ See, e.g., *Gorence v. Eagle Food Ctrs.*, 1994 WL 445149, at *9 (N.D. Ill. Aug. 16, 1994) (no commonality where claimants worked in multiple units, each with “its own distinct management hierarchy and decisionmaking process”); *Adams v. R.R. Donnelley*, 2001 WL 336830, at *3-*4, *10-*12 (N.D. Ill. Apr. 6, 2001) (40 divisions in five business units each with its own management decisionmakers resulted in

directly from the Supreme Court's requirement in *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982), that common questions be "applicable in the same manner to each member of the class."

After presiding over this case for five years, receiving voluminous briefing, and considering thousands of pages of record materials (including plaintiff declarations and depositions, Merrill Lynch manager testimony and documentary evidence, and numerous expert reports), Judge Gettleman rendered a detailed opinion denying class certification that applied this Court's latest precedents. He concluded that plaintiffs' experiences were too diverse to display the class "cohesion" that is the touchstone of Rule 23. *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). Far from applying a blanket presumption that multi-facility suits cannot be certified, he found that *this* case involves "decentralized procedures" by which "numerous, independent decision-makers" implemented Merrill Lynch's policies taking into account "subjective factors." App. 9. Plaintiffs "had totally different experiences" as "the result of countless decisions made by themselves, other FAs in their branch offices, their branch managers," and others up the "chain of command," necessitating "individual inquiries" in which "different witnesses and proofs" would be needed to resolve "each individual putative class members' claim." App. 9, 15-16.

After entertaining additional briefing and argument on plaintiffs' motion for reconsideration, Judge Gettleman reaffirmed that because plaintiffs' claims rest on "subjective decisions"

"considerable variation"); *Tooley v. Burger King Corp.*, 1995 WL 170016, at *2 (N.D. Ill. Apr. 7, 1995) (no commonality where each "manager made his or her own decisions regarding hiring, discharge, discipline, wage increases, promotions, demotions, and job assignments"); *Bennett v. Roberts*, 2000 WL 781868, at *4 (N.D. Ill. June 15, 2000) (no commonality where "each building principal uses his or her discretion in determining the criteria for selecting" candidates); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 460-61 (N.D. Ill. 2009); *Betts v. Sundstrand Corp.*, 1999 WL 436579, at *6-*7 (N.D. Ill. June 21, 1999); accord *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Bacon v. Honda of Am.*, 370 F.3d 565, 570-74 (6th Cir. 2004); *Monahan v. City of Wilmington*, 49 F. App'x 383, 384-85 (3d Cir. 2002); *Allison v. Citgo Petroleum*, 151 F.3d 402, 418 (5th Cir. 1998); *Stastny v. S. Bell Tel.*, 628 F.2d 267, 275-79 (4th Cir. 1980); *Randall v. Rolls-Royce*, 2010 WL 987484, at *8 (S.D. Ind. Mar. 12, 2010); *Abram v. UPS*, 200 F.R.D. 424, 428 (E.D. Wis. 2001). Compare, e.g., *Bell v. Woodward Governor Co.*, 2005 WL 23340 (N.D. Ill. Jan. 4, 2005) (certifying multi-facility discrimination class where plaintiff proved centralized control).

made “by hundreds of different individuals under different circumstances across the country,” they would necessitate 700-plus “unmanageable” and “inefficient” trials, each with “different witnesses,” to determine liability and damages. App. 22-23. When a class trial gives “rise to hundreds or thousands of individual proceedings requiring individually tailored remedies,” as here, certification is error. *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008).

Plaintiffs now proffer two issues that they say could be adjudicated with “class-wide proof”: whether “two uniform, company-wide policies or practices were substantially responsible for the statistically significant lower wages” of African American FAs, and whether this purported wage discrepancy arose because it is difficult for African American FAs to cross racial and cultural boundaries to reach the white clients who hold most of the nation’s wealth. Pet. 1. This effort to manufacture common questions flatly contradicts Judge Gettleman’s findings.

The district court found that the race-neutral account distribution and teaming policies plaintiffs now focus on do not have uniform effects because their implementation turns on the subjective decisions of thousands of geographically dispersed managers and FAs.² The court also found that FAs are not paid wages in the traditional sense, but are all compensated under the same objective compensation grid that pays FAs based on a formula tied to their production. App. 10. Thus, the district court found, it is “individual allegedly discriminatory decisions along the way, such as a white FA’s decision not to team with an African American FA that leads to the asserted disparity in compensation,” not this “mathematical formula.” App. 11. The district

² Plaintiffs’ complaint alleges 26 types of race discrimination in localized decisions—ranging from assignment of offices and staff support, to assessment and selection for management positions, to training and mentoring, to the minutiae of contract terms—resurrecting “across-the-board” class actions the Supreme Court long ago rejected. *Falcon*, 457 U.S. at 157-58; 2d Am. Compl., D. 72 ¶7. Such omnibus claims of discrimination in “compensation, terms, conditions and privileges of employment” cannot be certified as a class action where each employee’s claim turns on “substantially different facts,” as is true here. *Patterson v. GM Corp.*, 631 F.2d 476, 479-82 (7th Cir. 1980); App. 9.

court also made clear that whether or not “racial differences in access to wealth caused disparate outcomes” was irrelevant to its decision to deny class certification, which turned instead on the failure of plaintiffs’ statistical and anecdotal evidence to satisfy Rule 23. App. 24. In fact, “the conflicting and unconvincing anecdotal evidence” submitted by plaintiffs (App. 8) *proves* that highly diverse experiences destroy the cohesiveness of the putative class. Some of the plaintiffs “were hugely successful financially, while others never got through the FA training program” (App. 9); some attribute their success to mentoring they received from Caucasian FAs, others complain about social isolation; some had good experiences teaming with other FAs, others had bad experiences; some were successful with allocated accounts, some avoided them, and so on.

Plaintiffs’ petition thus bears little relation to the decision the district court actually reached in this case. Certainly, it satisfies none of the Rule 23(f) standards for interlocutory review. Plaintiffs identify no unsettled and important legal issue. And they do not claim that denial of class certification is the death knell to this litigation by well-compensated brokers seeking substantial damages as well as attorneys’ fees. Stripped of misrepresentations about Judge Gettleman’s reasoning, the petition complains about the court’s routine application of settled legal principles laid down by the Supreme Court and this Court to particularized facts. That fact-bound challenge to the district court’s exercise of its broad discretion does not justify Rule 23(f) review.

Three times plaintiffs’ counsel has sought Rule 23(f) review of decisions denying certification of similar employment discrimination classes, supported by some of the same experts making the same arguments made here. **Each time this Court has denied review.** *Puffer v. Allstate Ins. Co.*, No. 04-5764 (N.D. Ill. Oct. 8, 2009), *pet. for leave to appeal denied*, No. 09-8044 (7th Cir. Dec. 21, 2009); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450 (N.D. Ill. 2009), *pet. for leave to appeal denied*, No. 09-8005 (7th Cir. Mar. 25, 2009); *Remien v. EMC Corp.*, 2008

WL 4067324 (N.D. Ill. Aug. 28, 2008), *pet. for leave to appeal denied*, No. 08-8028 (7th Cir. Oct. 10, 2008). This petition deserves the same disposition.

STATEMENT OF FACTS

The FA Job. Merrill Lynch employs 15,000 FAs in 600 offices across the country, managed by 135 Complex Directors (“Directors”). Directors have discretion to manage complexes as stand-alone businesses, constrained to varying degrees by national policies. App. 2-3.

Merrill Lynch FAs provide financial products and services to three million clients. D. 313-51 ¶3. To succeed, FAs must build a “book of business” by convincing investors to entrust the FA with their financial future. App. 3; see D. 312-14 ¶26. In doing so, FAs exercise considerable autonomy. *Id.* ¶¶25-28. As plaintiffs acknowledge, “[e]very [FA] has a different strategy.” D. 337-6 at 25 (McReynolds); see D. 312-14 ¶¶47-48. FAs build their business by gaining expertise in niche markets, engaging in community activities, developing preexisting relationships, and in many other ways. D. 313-2 pt. 2.

FA Compensation. Like its competitors, Merrill Lynch “pays FAs based on a percentage of the production credits (‘PCs’) and other revenue generated when one of the FA’s clients uses or purchases a Merrill Lynch financial product or security.” App. 10. “There is no discretion in calculating FA incentive compensation, which is based on a precise mathematical formula and grids.” *Id.* A host of factors independent of any alleged discrimination affect compensation. Looking only at white FAs, the average compensation for FAs in the first “quintile” (the top 20% in firm rankings) was \$442,000 compared to \$94,000 in the fifth quintile. D. 312-18 at 33.

Teaming. FAs themselves decide whether to “team” together to prospect for or serve clients and share commissions. D. 313-51 ¶¶86-87. Merrill Lynch encourages teaming and provides guidance on factors managers should consider in deciding whether to approve a team,

which managers implement in different ways. *Id.* ¶¶90-91; D. 313-2 pt. 6. There is no allegation that these factors are discriminatory or have an adverse impact.

Managers do not force FAs to team. Teaming requires FAs to alter their compensation structure and share clients (D. 313-51 ¶88), so forced teaming would cause FAs to “take their book of business to a competitor,” not because FAs do not want to team with African Americans, but because they do not want to team at all or want to control with whom they merge their business. D. 312-14 ¶33; see D. 313-2 pt. 5. As plaintiff Gibson testified, FAs want the final say on teammates based on “abilities,” “personalities,” and “compensation.” D. 314-9 at 206-07. Accordingly, teaming decisions are highly individualized. D. 313-2 pt. 3. Most FAs—including successful ones—are not on teams. D. 313-2 pt. 4; see D. 313-10 ¶16 (FAs work alone to “retain their relationships”). FAs who do team prefer to do so with high-producers (D. 313-51 ¶89), as plaintiff McReynolds confirmed. D. 337-6 at 195.

Plaintiffs had varied teaming experiences. Jennifer Madrid pooled with a successful white FA. D. 337-4 at 48-53. Leroy Brown declined a teaming opportunity. D. 314-4 at 226-27. Glenn Capel had trouble teaming because FAs in his office prefer working alone. D. 314-6 at 284-86; see D. 312-18 at 44 (pooling rates vary by office). Understanding why an FA did not team requires individual inquiry (D. 313-51 ¶98), which plaintiff Gibson conceded. D. 314-9 at 216.

Account Distributions. Accounts of departing FAs are distributed within individual offices, so FAs compete for these accounts only against others in the same office. D. 313-51 ¶¶104, 106. Merrill Lynch determines eligibility to receive accounts by ranking FAs according to published objective criteria that changed periodically during the putative class period, but which included new clients or investments attracted; industry certifications achieved; client retention; and, upon departure of a team member, team duration. *Id.* ¶¶104-05, 114, 119-27 & Ex. C.

FAs control their own rankings under the policy. For instance, some plaintiffs moved up the rankings by obtaining industry certifications (D. 337-4 at 148-49 (Madrid)), while others rejected managers' recommendations that they do so. D. 314-12 at 92 (Johnson).

Local managers have discretion to depart from the policy—*e.g.*, to honor a client request; tap a language skill, registration, or specialization; build on an existing relationship; or reflect FA availability. D. 313-51 ¶116; see D. 314-3 at 117-18. Plaintiffs acknowledged that they benefited from the discretion built into the policy. D. 314-5 at 172-74 (Browne); D. 337-4 at 399-400 (Madrid); see D. 312-18 at 39-41. Plaintiffs have themselves transferred accounts outside the policy to white FAs (D. 337-4 at 57-62, 291-93 (Madrid)), and to other plaintiffs. D. 314-2 at 113-14 (Bender-Jackson). And FAs have options within the policy: some do not participate in distributions because clients acquired through that process are difficult to retain; others reject accounts that do not fit the FA's business model or are considered likely to leave with the departing FA. D. 313-2 pt. 11. Given these variables, individual inquiry is necessary to reconstruct an account distribution, determine whether it complied with the policy, and identify any discrimination, as plaintiffs concede. D. 337-6 at 115-16 (McReynolds); D. 314-2 at 241 (Bender-Jackson).

The District Court's decision. Judge Gettleman held that plaintiffs failed to satisfy Rule 23(a), (b)(2), or (b)(3). Agreeing with “numerous decisions” finding commonality lacking in similar circumstances, the court held that plaintiffs did not provide “the ‘significant proof’ required by *Falcon*” that alleged discrimination “manifested itself in the ‘same general fashion’ as to all putative class members.” App. 8-9. It also found typicality lacking, citing substantial “variations” in the claims and defenses that “necessitate individual inquiries.” App. 14-15. Rule 23(b)(2) certification was improper because the compensatory and punitive damages plaintiffs seek are not “incidental” to injunctive and declaratory relief. App. 15-16. And plaintiffs did not

satisfy Rule 23(b)(3) because “several separate layers of individual issues”—including “variation in personnel practices among the various branch offices, and how various office managers and complex managers handle individualized personnel decisions”—mean “common issues do not predominate,” and because a class trial would be “unmanageable,” requiring hundreds of individual proceedings to determine individual liability and remedies. App. 16-18.

Judge Gettleman denied plaintiffs’ motion for reconsideration. The court rejected plaintiffs’ assertion that it had held that a disparate impact claim requires proof that a neutral policy was neutrally applied. Plaintiffs “misread the court’s opinion,” which rested instead on the highly individualized application of every challenged employment policy. App. 20-22. The court also rejected plaintiffs’ assertion that it had rejected plaintiffs’ statistics. In fact, “the court accepted all of plaintiffs’ statistical evidence,” but held that it did not satisfy Rule 23. App. 23-24.

REASONS FOR DENYING THE PETITION

None of the factors that justify Rule 23(f) review are satisfied. Judge Gettleman’s decision is not “the death knell of the litigation.” *Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999). A prevailing plaintiff in an individual suit may recover backpay, up to \$300,000 in compensatory and punitive damages, and attorneys’ fees. 42 U.S.C. § 2000e-5(g), (k), § 1981a(b)(3). Plaintiffs have conducted extensive discovery and procured expert reports. Just as plaintiffs prosecuted *Puffer* and *Remien* after denial of class certification and Rule 23(f) review, plaintiffs here say that they will rely on “evidence developed during class discovery to prosecute their disparate impact and disparate treatment claims” individually. Pet. 17-18.

Plaintiffs also must show that Judge Gettleman’s decision is “questionable,” “taking into account” the “deferential standard” of review. *Blair*, 181 F.3d at 835. This Court has likened attempts to “hurdle this high standard of review to ‘rich men who wish to enter the Kingdom; their

prospects compare with those of camels who wish to pass through the eye of a needle.” *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). Plaintiffs do not come close to threading that needle.

Review would not facilitate “development of the law.” *Blair*, 181 F.3d at 835. This case “present[s] familiar and almost routine issues.” Fed. R. Civ. P. 23(f), 1998 Comm. Note. Judge Gettleman’s decision is not “novel” (*West v. Prudential Sec.*, 282 F.3d 935, 937 (7th Cir. 2002)), and relevant precedents are not “sparse” or “divided.” *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910 (7th Cir. 2003). The Rule 23(f) evaluation is like “the discretion exercised by the Supreme Court in acting on a petition for certiorari.” *Blair*, 181 F.3d at 833. Certiorari is not granted to correct “erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. But that is the sort of error plaintiffs assert here. Judge Gettleman applied settled law to the facts presented in a massive record, reaching the same result as “numerous” other courts. App. 9. Plaintiffs’ quarrel is with Judge Gettleman’s view of the factual record and the discretionary decision he reached as a result. Interlocutory review of his factual determinations and exercise of discretion is particularly unnecessary given plaintiffs’ declared intent to pursue individual claims, making it unlikely that the decision will “escape effective disposition at the end of the case.” *Blair*, 181 F.3d at 835.

A. Judge Gettleman properly found commonality and typicality lacking where local managers employed circumscribed discretion in making individualized decisions.

There is a “wide gap” between an individual discrimination claim and a class claim in which the two “share common questions” and “the individual’s claim will be typical of the class claims.” *Falcon*, 457 U.S. at 157. To “bridge that gap,” plaintiffs must prove the alleged discrimination “manifested itself * * * in the same general fashion” as to all putative class members. *Id.* at 158, 159 n.15. A plaintiff may represent a multi-facility class where centralized practices go-

vern facilities in the same way; but a decentralized system that gives local managers structured discretion destroys commonality and typicality. See *supra* at 1 n.1; *Cooper*, 390 F.3d at 716-17.³

Judge Gettleman’s ruling straightforwardly applies this settled law to the record. The court understood that Merrill Lynch’s “decentralized procedures,” allowing thousands of managers and FAs to make “discretionary decisions” confined to varying degrees by national policies, mean that no two plaintiff’s stories are alike. App. 9. Some plaintiffs benefited from managers’ discretion in implementing the account distribution policy; some say they were discriminated against. Some declined invitations to team; some could not find teammates; some were on teams that helped them. Class member declarations “underscore the lack of commonality,” the court observed, showing that plaintiffs “allegedly experienced vastly different forms of discrimination.” App. 14; see *Spano v. Boeing Co.*, 2011 WL 183974, at *12 (7th Cir. Jan. 21, 2011) (“necessary identity of interest among all class members” is missing if “conduct harmed some participants and helped others”); *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984) (“isolated or sporadic” instances do not show discrimination was “standard operating procedure”).

For example, plaintiff LaRue Gibson is a successful FA in Manhattan. He credits a white team for invaluable mentoring; was on a successful team that failed for reasons he claims are discriminatory; is now on a team he likes; and has refused invitations to join management. D. 314-8 at 8, 143-50, 263-64. Plaintiff Rocky Howard is an unsuccessful FA in Fort Worth. He testified to personal problems that impeded his performance, had no significant community ties, and devoted substantial time to tango dancing. D. 337-2 at 49-52, 79-83. His experiences bear no

³ Except for *Bartelson v. Dean Witter*, 86 F.R.D. 657, 667 (E.D. Pa. 1980)—an outdated (b)(2) case seeking only equitable relief where defendant conceded that “local variations” in its policies were “insignificant”—the commonality cases cited by plaintiffs all involved stipulated settlement classes. Pet. 15. Such cases lack the adversarial presentation critical to a rigorous analysis of Rule 23 requirements (*Thorogood v. Sears, Roebuck*, 624 F.3d 842, 848-49 (7th Cir. 2010)), and require no consideration of the “thorny” manageability issues involved here. *Carnegie v. Household Int’l*, 376 F.3d 656, 660-61 (7th Cir. 2004).

semblance to Gibson's. Thus, the requisite cohesion is missing because liability "depend[s] upon any number of factors peculiar" to individual claimants. *Patterson*, 631 F.2d at 481; see *Payton v. Cnty. of Carroll*, 473 F.3d 845, 853-54 (7th Cir. 2007) (no typicality where each defendant "independently determined how much to charge, why, and under what circumstances").

Plaintiffs claim that the district court treated the work of their statistician Dr. Madden with "disdain" (Pet. 12, 14-15), but in fact it "accepted" Madden's statistics. App. 23. Judge Gettleman held, however, that these statistics could not obscure the highly individualized nature of plaintiffs' claims. App. 10-11. That holding follows settled law in this Circuit denying certification of pattern or practice and disparate impact claims when statistics fail to "bind together the individualized nature of [the] claims." *Bennett*, 2000 WL 781868, at *5; accord *Allen v. CTA*, 2000 WL 1207408, at *10 (N.D. Ill. July 31, 2000); *Abram*, 200 F.R.D. at 431; *Betts*, 1999 WL 436579, at *7. Aggregate statistics asserting that African American FAs are less successful than whites cannot create commonality when liability turns on individual decisions made by thousands of managers and FAs. See *Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 319-20 (7th Cir. 2003) (statistics must look at "part of the company where the plaintiff worked" and include only those "similarly situated with respect to performance, qualifications, and conduct" who "shared a common supervisor"); *Cooper*, 390 F.3d at 717; *Stastny*, 628 F.2d at 278-79.

Inadequacies in Madden's analysis have led courts to reject her statistics in other cases (see *Cooper*, 390 F.3d at 717-18; *Puffer*, 255 F.R.D. at 465), and here they suffer from additional flaws. In studying compensation, Madden used experience and education as proxies for production, but those factors did not distinguish among successful and unsuccessful FAs regardless of race. D. 312-18 at 20-21. Madden's finding that African American FAs receive inferior account distributions does not control for eligibility rankings; the disparities disappear when rank is con-

sidered. *Id.* at 36. And her conclusion that African Americans team less frequently failed to account for uncontradicted evidence that FA success, not race, controls the rate of team formation. *Id.* at 44-47. Plaintiffs' expert, Dr. Bielby, proves the point: he testified that many of the criteria used to rank FAs for account distributions are not discriminatory and he could not say whether racism or a relative lack of success explains why African American FAs on average team less frequently than whites. D. 309-5 at 87-89; D. 314-3 at 90-93, 135.

B. Judge Gettleman's denial of Rule 23(b) certification follows *Andrews* in rejecting a class that would require 700+ follow-on trials to determine liability and remedies.

The district court properly denied Rule 23(b)(2) certification. A Rule 23(b)(2) class is permissible "only when monetary relief is incidental to the equitable remedy" sought. *Jefferson v. Ingersoll Int'l*, 195 F.3d 894, 898 (7th Cir. 1999). Damages are "incidental" only if their computation "is mechanical, 'without the need for individual calculation.'" *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005). Incidental damages do not depend on "'subjective differences'" in class members' "'circumstances'" or "'require additional hearings to resolve the disparate merits of each individual's case.'" *Lemon v. Int'l Union*, 216 F.3d 577, 581 (7th Cir. 2000).

Plaintiffs' proposed Rule 23(b)(2) class fails these tests. This case centers around countless decisions made by hundreds of local managers who used structured discretion to implement changing policies. Far from Merrill Lynch's alleged conduct "apply[ing] generally to the class," as Rule 23(b)(2) requires, "each individual claim" here is "uniqu[e]" and would necessitate plaintiff-specific remedies, as Judge Gettleman found. App. 13. Any damage awards would not be amenable to mechanical calculation, but would "require judicial inquiry into the particularized merits of each individual plaintiff's claim." *Lemon*, 216 F.3d at 580. Any backpay awards also would require "additional hearings" to resolve "each individual's case." *Id.* at 581.

Furthermore, “the additional proof required by an individual class member for relief” is not “part of the damage phase,” but is “an element of the liability portion of the case.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O’Connor, J., concurring). For example, Merrill Lynch has the right to show that individual class members would not have received the benefits they seek even absent discrimination to defeat liability under § 1981 (see *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009)), and backpay under Title VII. 42 U.S.C. § 2000e-5(g)(2)(B). “Determining back pay awards” or other monetary relief would require 700-plus individual hearings, “a ludicrous task.” *Bishop v. Gainer*, 272 F.3d 1009, 1018-19 (7th Cir. 2001); see *Randall*, 2010 WL 987484, at *15. Because plaintiffs’ claims “require a remedy that differentiates materially among class members,” Judge Gettleman properly held that a Rule 23(b)(2) class may not be certified. *Lemon*, 216 F.3d at 580; see *Remien*, 2008 WL 4067324, at *5.

The district court properly denied Rule 23(b)(3) certification. Rule 23(b)(3)’s predominance requirement focuses on “the proof necessary” to establish “the substantive elements” of a claim. *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). Predominance is lacking when “proof of the essential elements of the cause of action requires individual treatment.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); accord *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (class adjudication improper when “differences in the factual background of each claim will affect the outcome of the legal issue”); *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009). The need for extensive individualized inquiry here makes it “hard to see how common issues predominate” (*Andrews*, 545 F.3d at 577):

- The central inquiry in disparate treatment cases is whether the employer “intentionally discriminated.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). Here, Judge Gettleman recognized, “different witnesses and proofs” would be needed for “each” class member to

determine “the motivation of each supervisor” who made a challenged decision. App. 16; accord *Puffer*, 255 F.R.D. at 471-72; see *Lemon*, 216 F.3d at 581.

- An “essential” element of disparate treatment and impact claims is that the challenged practice “caused” harm to each class member. *Allison*, 151 F.3d at 424; see *Lemon*, 216 F.3d at 581; *Farrell v. Butler Univ.*, 421 F.3d 609, 617 (7th Cir. 2005). “Such an inquiry would involve different witnesses and proofs for various putative class members to determine,” e.g., “the quality and quantity of production of each employee.” *Puffer*, 255 F.R.D. at 471; accord *Radmanovich v. Combined Ins. Co.*, 216 F.R.D. 424, 436-37 (N.D. Ill. 2003); see *Amchem*, 521 U.S. at 624; *Siegel v. Shell Oil*, 612 F.3d 932, 936 (7th Cir. 2010); *West*, 282 F.3d at 938.

- Merrill Lynch is “entitled” to prove that each decision was lawfully made. *E. Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977); see *Amchem*, 521 U.S. at 620 (class adjudication may not “abridge * * * any substantive right”). That defense “must be analyzed on an individual basis” (*Reeb v. Ohio Dep’t of Rehab.*, 435 F.3d 639, 651 (6th Cir. 2006)), as must a mixed-motive defense. *Rutstein v. Avis Rent-A-Car*, 211 F.3d 1228, 1236 (11th Cir. 2000).

- Firm policies changed significantly during the class period. E.g., D. 313-52 Ex. C (account distributions). That necessitates individual inquiry because plaintiffs “will have suffered harm from different policies.” *Smith v. Texaco, Inc.*, 263 F.3d 394, 416 n.35 (5th Cir. 2001), *vacated by settlement*, 281 F.3d 477 (5th Cir. 2002); accord *Abram*, 200 F.R.D. at 431-32.

- Plaintiffs’ demand for compensatory and punitive damages undermines predominance. See *Thorogood v. Sears, Roebuck*, 547 F.3d 742, 748 (7th Cir. 2008). Resolving those claims requires “individualized analysis.” *Lemon*, 216 F.3d at 581; see *Allison*, 151 F.3d at 419.

The need for “individual proceedings” also means that a class action is not “the superior means to adjudicate the claims.” *Andrews*, 545 F.3d at 577. Nor is class certification needed “to

afford putative class members an opportunity to litigate.” *Puffer*, 255 F.R.D. at 473; see *Amchem*, 521 U.S. at 616-17; *Andrews*, 545 F.3d at 577-78; *Pastor v. State Farm Ins. Co.*, 487 F.3d 1042, 1047 (7th Cir. 2007). Prevailing plaintiffs may recover attorneys’ fees and compensatory and punitive damages (42 U.S.C. § 2000e-5(g), (k); *id.* § 1981a(b))—enough incentive to encourage “[c]ountless” individual employment discrimination suits. *Puffer*, 255 F.R.D. at 473. Well-paid Merrill Lynch FAs with claims that could be substantial could certainly pursue individual claims, and have declared their intent to do so. See *Allison*, 151 F.3d at 420; Pet. 17-18.

Judge Gettleman’s decision is consistent with Teamsters. Plaintiffs assert that by denying class certification based in part on the need for jury trials to resolve individual liability and remedies, Judge Gettleman rejected the procedure for trying pattern or practice claims set forth in *Teamsters v. United States*, 431 U.S. 324 (1977). Pet. 12-14. But a *Teamsters* class trial requires a common issue, which plaintiffs have not identified. And there is no *Teamsters* exception to Rule 23 that allows plaintiffs to hide individual liability and remedies issues from scrutiny. See *Rodriguez*, 431 U.S. at 403 n.9 (reversing class certification when, even assuming discrimination was established, “the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event”); *Patterson*, 631 F.2d at 481; *supra* at 1 n.1.

Teamsters did not address Rule 23, but was a non-jury government suit seeking solely injunctive relief where a class trial efficiently narrowed claims of overt discrimination that resulted in the number of African Americans hired nearing “the inexorable zero.” 431 U.S. at 342 n.23, 338 & n.19. Here, by contrast, (1) Merrill Lynch’s race-neutral policies provide no similar tell-tale indicia of intentional discrimination; (2) plaintiffs seek backpay and compensatory and punitive damages; (3) Merrill Lynch has a right to a jury trial; and (4) plaintiffs must establish pre-

dominance, manageability, and superiority. A *Teamsters* class trial would thus do little to limit the scope of 700+ follow-on jury trials needed to detect any discrimination and award remedies.⁴

Judge Gettleman correctly denied partial certification. Plaintiffs urge that “partial certification” is appropriate for any common issue. Pet. 12, 16-18. But they may not “gerrymander predominance” by “sever[ing] issues” until “the remaining common issue predominates.” *Hamilton v. O’Connor Chevrolet*, 2006 WL 1697171, at *6 (N.D. Ill. June 12, 2006); accord *Alison*, 151 F.3d at 422. And partial certification is improper where, as here, *most* issues require individual resolution, and a class trial “offer[s] little in the way of efficiency.” *Puffer*, 255 F.R.D. at 472; see *Clark v. Experian Info. Solutions*, 256 F. App’x 818, 822 (7th Cir. 2007).

Plaintiffs belatedly proffered a trial plan at the motion to reconsider stage—but even if this Court considered it,⁵ the plan did not explain how class adjudication would be manageable. Plaintiffs wanted the district court to “defer” deciding how to resolve individual liability and remedies (Pet. 11), but that is not an option. 2003 Amendments to Rule 23 eliminated “conditional” certification. So courts must “make a definitive determination that the requirements of Rule 23 have been met before certifying a class.” *Hohider v. UPS*, 574 F.3d 169, 202 (3d Cir. 2009).

Plaintiffs suggest Judge Gettleman could have awarded “formulaic” damages (Pet. 11), but doing so would not avoid the need for follow-on trials to determine individual liability. See *Firefighters Local v. Stotts*, 467 U.S. 561, 581 (1984) (courts may not “give [relief] to non-victims”). Beyond this, it is well understood that compensatory and punitive damages claims re-

⁴ Plaintiffs’ reliance in their *Teamsters* argument on *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001), ignores the facts that the case was decided under a now-discarded Rule 23 standard (*In re IPO*, 471 F.3d 24 (2d Cir. 2006)), and flatly contradicts law of this Circuit holding that individual liability issues preclude class certification (*Andrews*, 545 F.3d at 577; *Patterson*, 631 F.2d at 481); that seeking non-incidental damages precludes a (b)(2) class (*Lemon*, 216 F.3d at 580-81); and that members of (b)(2) classes have no opt-out rights. *Allstate*, 400 F.3d at 508.

⁵ *Green v. Whiteco Indus.*, 17 F.3d 199, 201 n.4 (7th Cir. 1994) (“raising [an] argument for the first time in the motion for reconsideration is not adequate to preserve the issue for appeal”).

quire “inquiry into [each] plaintiff’s circumstances” (*Lemon*, 216 F.3d at 581), as do claims seeking backpay. See *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997).

Finally, plaintiffs’ proposal that a “phase one” jury resolve the pattern or practice claim and “phase two” juries resolve individual liability and damages for each plaintiff violates the Seventh Amendment. See *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1303 (7th Cir. 1995). In determining “whether any particular plaintiff suffered discrimination” and resolving any mixed-motive defense, phase two juries would necessarily “unconstitutionally reexamine” the pattern-and-practice finding of the initial jury. *Puffer*, 255 F.R.D. at 472; see *Allison*, 151 F.3d at 424-25.

Cases cited by plaintiffs do not support partial certification here. Pet. 16-18. *Allstate*—which reversed class certification—was an ERISA case where a class trial could efficiently resolve a single question applicable to all class members, there was no right to a jury trial, and damages could “be read off from the plan.” 400 F.3d at 507-08. *Carnegie* was a negative-value RICO suit where liability turned on a single question applicable to all class members and judicial estoppel barred defendants from contesting the Rule 23 requirements save manageability. 376 F.3d at 660-61. *Allen v. Int’l Truck*, 358 F.3d 469 (7th Cir. 2004), involved blatant discrimination at a single facility. None of these cases supports partial certification where claimants are spread across 100-plus offices, each with different decisionmakers, a class trial would do little to ease the burden of follow-on juries, and plaintiffs have ample incentive to sue individually.

C. Judge Gettleman correctly denied certification of plaintiffs’ disparate impact claim.

Plaintiffs contend that the district court “eliminate[d] the possibility of certification” of any disparate impact class challenging intentional discrimination (Pet. 18), but it did no such thing. Judge Gettleman simply recognized that plaintiffs would have a “more compelling case” for class certification if they were challenging “a neutral policy neutrally applied.” App. 22; accord App. 8. But at the end of the day, plaintiffs here have not made a “significant” showing

that “all” class members “suffered an adverse effect” from the challenged policies. *Garcia*, 444 F.3d at 633 n.10; see *Falcon*, 457 U.S. at 159 n.15.

Plaintiffs have not even “identif[ied] the specific employment practic[e]” that caused any racial disparity in teaming. *Farrell*, 421 F.3d at 616. Plaintiffs challenge neither Merrill Lynch’s decision to encourage teams nor its race-neutral guidelines governing team formation. Plaintiffs’ real complaint, as the district court properly found, is with the individual decisions of thousands of FAs about whether and with whom to team as well as of hundreds of managers in approving or rejecting teams. Plaintiffs’ complaints about account distributions also do not concern the policy’s race-neutral criteria, but fact-specific decisions by different managers employing varying standards to distribute tens of thousands of accounts as well as a host of individual decisions by FAs (for example, whether to take steps to increase their ranking or accept a particular account). Thus, Judge Gettleman did not create a *per se* bar against disparate impact classes alleging intentional discrimination. He held only that such a class cannot be certified *in this case*.

Plaintiffs argue that *Watson v. Fort Worth Bank*, 487 U.S. 977 (1988), is dispositive, but it is irrelevant to the issues here. It recognized that a policy of subjective decisionmaking could give rise to a disparate impact claim in the right circumstances, but it was not a class action, and the Court said nothing about whether decisionmaking by thousands of managers and tens of thousands of FAs scattered in 600 offices around the country over a ten-year period would be sufficiently “cohesive” to support class action treatment. *Amchem*, 521 U.S. at 623.

D. Plaintiffs grossly misrepresent the record.

Plaintiffs’ argument that this case is suitable for class adjudication rests on a grossly distorted view of the facts—one Judge Gettleman rejected after a year’s consideration of the extensive record. Plaintiffs characterize Merrill Lynch as a centrally controlled organization that en-

forces uniform policies that affect each FA in the same way and with a common insidious purpose—race discrimination. This picture is impossible to reconcile with the fact that Merrill Lynch’s CEO throughout the putative class period was Stan O’Neal, an African American grandson of a slave. It ignores how Merrill Lynch operated—with its managers exercising autonomy in implementing national policies, and “[e]ach FA basically operat[ing] his or her own business within a business.” App. 2-3. The picture plaintiffs paint also ignores Merrill Lynch’s diversity efforts. Defendant’s expert Olivet Jones analyzed Merrill Lynch’s diversity programs and concluded that Merrill Lynch “demonstrated a consistent and persistent commitment to understanding diversity and to putting in place policies, programs and practices that would reasonably lend themselves to building a robust, diverse and highly talented workforce * * * and a culture that respects and values employees regardless of any demographic characteristics.” D. 312-12 at 1.⁶

Plaintiffs have never identified any Merrill Lynch policy that treats African Americans differently than Caucasians or that has a disparate impact on African Americans. Plaintiffs point to Merrill Lynch’s policy encouraging FAs to team and to the fact that African Americans and Caucasians team at different rates, but fail to connect the one to the other. See *Farrell*, 421 F.3d at 616 (“plaintiff must first isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities, and second demonstrate causation by offering statistical evidence of a kind and degree sufficient to show that the practice in question has caused” the disparate result). Defendant’s labor economist, Dr. Saad, demonstrated without rebuttal that the controlling factor in team formation is not race but the average size of the accounts in an FA’s book (D. 312-2 at 15-16), a conclusion Dr. Bielby could not contradict. See D.

⁶ Plaintiffs rely heavily (at 5, 7-8) on a single Merrill Lynch study, examining a period largely pre-dating the class period, which was designed to improve the firm’s diversity efforts. Statements cited by plaintiffs were designed to identify areas where diversity efforts might be useful, and the conclusions upon which plaintiffs rely were based on non-scientific anecdotal evidence.

312-2 at 39; D. 314-3 at 135. Judge Gettleman correctly determined that plaintiffs' complaint is over the decisions of thousands of FAs in deciding whether and with whom to team, for how long, and for what share of their book, and of hundreds of managers in deciding whether to encourage, discourage, approve, or disapprove a team.

Plaintiffs complain that African Americans get fewer and worse accounts distributed from departing FAs. But plaintiffs never identify *which* criteria drive differences in account distributions, and their expert testified that many of the criteria used are non-discriminatory. D. 309-5 at 87-89; D. 314-3 at 90-93. As Judge Gettleman recognized, the effect of the policy on any individual FA would require highly particularized inquiry—as demonstrated by the fact that many of the named plaintiffs acknowledged receiving substantial benefits from account distributions, including in situations where managers deviated from the objective criteria. See D. 314-6 at 77, 90-91, 343-44; D. 337-5 at 399-400; D. 314-2 at 113-14; D. 314-5 at 172-74.

In short, there is no evidence that either policy was discriminatory. Judge Gettleman correctly held that if discrimination occurred, it was in their implementation in diverse circumstances, by diverse personnel, in situations far too fragmented to be litigated in a class action.

CONCLUSION

The petition for Rule 23(f) appeal should be denied.

Dated: March 14, 2011

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on March 14, 2011, I caused two copies of the foregoing Rule 23(f) Response to be served by UPS overnight delivery, and a digital version to be served by e-mail, on the following:

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One of Respondent's Attorneys