No. 11-8027

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE McREYNOLDS et al., individually on behalf of themselves and all others similarly situated, Plaintiffs-Petitioners, v. MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, Defendant-Respondent.	)	Answer in Opposition to Petition for Rule 23(f) and 28 U.S.C. § 1292(b) Appeal from the United States District Court for the Northern District of Illinois No. 05-C-6583 Judge Robert W. Gettleman Magistrate Judge Gilbert

DEFENDANT-RESPONDENT MERRILL LYNCH'S ANSWER IN OPPOSITION TO PLAINTIFFS' PETITION FOR LEAVE TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f) AND 28 U.S.C. § 1292(b)

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Interlocutory review is "disfavored" (*Blair* v. *Equifax Check Servs.*, 181 F.3d 832, 835 (7th Cir. 1999)) and "must be used sparingly lest [it] increase the time and expense required for litigation." *Asher* v. *Baxter Int'l*, 505 F.3d 736, 741 (7th Cir. 2007). This case is the poster child for enforcing that policy. After presiding over this case for five years, Judge Gettleman denied certification of a nationwide class of some 700 African American financial advisors ("FAs") employed by Merrill Lynch in hundreds of offices around the country over the course of a decade. Following more briefing and argument, Judge Gettleman denied plaintiffs' motion for reconsideration. This Court denied plaintiffs' Rule 23(f) petition, and the Supreme Court denied certiorari.

Plaintiffs returned to district court and filed an "amended" motion for class certification, rehashing the same arguments they made before. Plaintiffs justified this repetitive request by citing the intervening decision in *Wal-Mart Stores* v. *Dukes*, 131 S. Ct. 2541 (2011). Incredibly, plaintiffs argued that *Wal-Mart*—which *rejected* class certification in a case that plaintiffs admitted presents "several identical legal issues" (Cert. Pet. 27)—somehow supports class certification here. Judge Gettleman thought otherwise and denied plaintiffs' amended motion, holding that *Wal-Mart* "confirmed" his prior rulings. A4. Plaintiffs now seek a second bite at interlocutory review, this time invoking both Rule 23(f) and 28 U.S.C. § 1292(b).

To "reduce the risk that attempted appeals will disrupt continuing proceedings" (Fed. R. Civ. P. 23, 1998 Comm. Note), Rule 23(f) requires petitioners to seek review within 14 days (formerly 10 days) of "an order granting or denying class-action certification." That deadline cannot be extended "by making another motion for class certification." *Asher*, 505 F.3d at 739. Plaintiffs' petition, filed seven months after Judge Gettleman denied reconsideration, thus comes far too late. Plaintiffs' argument that they filed in time because their new petition comes within 14 days of Judge Gettleman's rejection of their *second* motion seeking reconsideration cannot be right—

otherwise plaintiffs could seek reconsideration over and over again in district court, each time opening a new window for Rule 23(f) review. That would violate this Court's command that Rule 23(f) provides "only one window of potential disruption" (*Gary* v. *Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999)), and would "undermine[] 'efficient judicial administration.'" *Mohawk Indus.* v. *Carpenter*, 130 S. Ct. 599, 605 (2009).

Plaintiffs' request for interlocutory review under Section 1292(b) fares no better. It is an obvious attempt "to circumvent the [14]-day limitation in Rule 23(f)." *Richardson Elecs.* v. *Panache Broad.*, 202 F.3d 957, 959 (7th Cir. 2000). This Court has rejected similar attempts, holding that "we shall not[] authorize appeal under 28 U.S.C. § 1292(b) when appeal might lie under Rule 23(f)." *Id.* Because Judge Gettleman's orders "involve the merits of class certification," Rule 23(f) provides the exclusive mechanism for interlocutory review. *Id.*

Since plaintiffs filed this lawsuit over six years ago, Judge Gettleman denied class certification three times, this Court denied Rule 23(f) review, and the Supreme Court denied certiorari. Enough is enough. Plaintiffs' latest request for interlocutory review, based on a decision in *Wal-Mart* that flatly rejects their theories, serves only to waste judicial and party resources, contrary to the policy underlying Fed. R. Civ. P. 1. The petition should accordingly be dismissed.

Beyond this, Judge Gettleman's rulings are plainly correct. Judge Gettleman found that Merrill Lynch's "decentralized procedures" provide considerable discretion to hundreds of local managers in implementing policies that govern the distribution of accounts from departing FAs and allow FAs to "team" to pursue and service clients. A30. The impact of those policies also depends on decisions by 15,000 FAs about, for example, whether and with whom to team, whether to accept an account distribution, and whether to take action to improve the FA's rank under the firm's account distribution policy. As a result, Judge Gettleman found, plaintiffs had

"totally different experiences." A30. More than 700 "unmanageable" and "inefficient" jury trials would be required to determine individual liability and any remedies. A19.

Wal-Mart confirms Judge Gettleman's rulings. Like plaintiffs in *Wal-Mart*, plaintiffs here challenge policies that give "discretion [to] local supervisors" across the country. 131 S. Ct. at 2554. Because local managers exercise discretion differently, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* Plaintiffs in this case and in *Wal-Mart* tried to bind their individualized claims together by relying on the same theory offered by the same sociologist, Dr. Bielby, which the Supreme Court rejected as "worlds away" from the requisite "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'" *Id.* Plaintiffs in both this case and *Wal-Mart* also asserted aggregate statistical disparities, which the Supreme Court held do not "establish the uniform * * * disparity upon which the plaintiffs' theory of commonality depends." *Id.* at 2555. Accordingly, like plaintiffs in *Wal-Mart*, plaintiffs here have not produced "convincing proof of a company-wide discriminatory * * * policy" such that "all" class members' claims would "depend on the answers to common questions." *Id.* at 2554, 2556.

Finally, Judge Gettleman did not hold that *Wal-Mart* sounds the "death knell" of employment discrimination class actions, as plaintiffs claim. Pet. 11, 19. The district court cited that description of *Wal-Mart* by an academic commentator not to endorse his view, but rather to demonstrate the absurdity of plaintiffs' argument that *Wal-Mart* requires reconsideration of two pre-*Wal-Mart* opinions denying class certification. A1. In fact, the district court understood that it is "possible in an appropriate case to certify a company-wide class involving multiple branch offices across the country," but stated that "this is not the appropriate case." A38. That fact-bound determination does not warrant interlocutory review.

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. A23-24.

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 futures. A24; see D 312-14 ¶26. FAs exercise considerable autonomy. *Id.* ¶¶25-28. As plaintiffs acknowledge, "[e]very [FA] has a different strategy." D 337-6 at 25; see D 312-14 ¶¶47-48. FAs build their books 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." A31. "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" 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. Plaintiffs do not challenge any of these race-neutral guidelines, *e.g.*, that team members must have complementary skills. D 362-3 at 1-5.

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." 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 had a positive experience 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 plaintiffs concede. 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 that 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 business 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), while others rejected managers' recommendations that they do so. D 314-12 at 92.

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; D 337-4 at 399-400; 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), and to other plaintiffs. D 314-2 at 113-14. 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 variations, 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; D 314-2 at 241.

Denial of class certification and reconsideration. Agreeing with "numerous decisions" finding commonality lacking in similar cases, Judge Gettleman held that plaintiffs did not provide "'significant proof'" that discrimination "manifested itself in the 'same general fashion' as to all putative class members." A29-30. Rule 23(b)(2) certification was improper because the compensatory and punitive damages sought are not "incidental" to injunctive relief. A36-37. 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 a class trial would be "unmanageable." A37-39. On February 14, 2011, the court denied plaintiffs' motion for reconsideration. A15-21.

Denial of interlocutory review. Plaintiffs filed a Rule 23(f) petition on February 28, 2011. This Court denied review. No. 11-8008 (7th Cir. Apr. 12, 2011) (Posner, Wood, & Hamilton, JJ). And the Supreme Court denied plaintiffs' petition for certiorari. No. 10-1534 (U.S. Oct. 3, 2011).

Denial of second request for reconsideration. After this Court denied Rule 23(f) review and the Supreme Court decided *Wal-Mart*, plaintiffs filed an "amended" motion for class certifi-

cation, arguing that *Wal-Mart* "supports" certification here. A1-2. Judge Gettleman held that *Wal-Mart* "confirmed" his prior rulings and denied the motion. A4.

REASONS FOR DENYING THE PETITION

I. Neither Rule 23(f) Nor Section 1292(b) Permits A Second Bite At Interlocutory Review.

Plaintiffs filed this Rule 23(f) petition more than seven months after Judge Gettleman denied reconsideration, long after Rule 23(f)'s 14-day deadline elapsed. Plaintiffs' "amended" motion did not restart that deadline. A "motion to reconsider filed more than [14] days after the order is too late to preserve the possibility of appeal under Rule 23(f)." *Gary*, 188 F.3d at 893; see *Fleischman* v. *Albany Med. Ctr.*, 639 F.3d 28, 331-32 (2d Cir. 2011) (circuits "unanimously" hold that "'[a]n order that leaves class-action status unchanged from what was determined by a prior order is not'" reviewable under Rule 23(f)). It does not matter "what caption the litigant places on the motion" because "[o]therwise * * * a litigant could defeat the function of the [14]-day line drawn in Rule 23(f)." *Gary*, 188 F.3d at 893; accord *Asher*, 505 F.3d at 739.

Despite acknowledging below cases holding that they get only "one shot" at Rule 23(f) review (A13), plaintiffs now say they should get a second shot because, unlike petitioners in *Gary* and *Asher*, they timely sought review of the initial order denying class certification. Pet. 10. But the fact that plaintiffs had a Rule 23(f) petition denied while the petitions in *Gary* and *Asher* were dismissed as untimely confirms that plaintiffs' renewed effort should be rejected. The Supreme Court has warned that "'appellate courts [should] not repeatedly intervene to second-guess prejudgment rulings'" (*Mohawk Indus.*, 130 S. Ct. at 605), and this Court has emphasized that Rule 23(f) provides "only one window of potential disruption." *Gary*, 188 F.3d at 893.

Plaintiffs also argue that a second Rule 23(f) petition is proper because their amended motion is "based on" *Wal-Mart*, which was decided after their first petition. Pet. 10. But in *Asher*, the district court denied three class certification motions because successively-proposed lead plain-

tiffs were inadequate. 505 F.3d at 739. Although the motions "were different enough that the district court could not have invoked the law of the case to reject any of them," this Court nevertheless dismissed plaintiffs' Rule 23(f) petition for review of the third order because Rule 23(f)'s deadline "cannot be extended by making another motion for class certification." *Id.*

In addition, because Rule 23(f) review "would have to be limited to [any] new elements" in plaintiffs' amended motion to avoid an "end run around the [14]-day limit," this Court would have to determine whether any such "new elements" "require a different result regardless of how the district court weighed the factors presented originally." *Carpenter* v. *Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006). Putting a court through such "mental gymnastics," just to give plaintiffs "a second bite at the interlocutory-appellate-review apple," is inappropriate. *Id.* While "parties may suggest changes as the factual record and legal theories develop," "there can be no Rule 23(f) appeal from the denial of such a suggestion." *Id.*

Even if new developments could justify a second Rule 23(f) petition in some cases, this is not one of them. Plaintiffs' amended motion is a virtual carbon copy of their request for a disparate impact class in their motion for reconsideration. Compare D 471 with D 415 at 1-8. The only "new" development in plaintiffs' amended motion is *Wal-Mart*. But because *Wal-Mart* does not make new law that *supports* plaintiffs' theories, it cannot support a second bite at Rule 23(f).

Nor does Section 1292(b) permit review. Plaintiffs err in suggesting that *Asher sub silentio* overruled *Richardson Electronics*. Pet. 15. *Asher* stated that plaintiffs' failure to file a timely Rule 23(f) petition from the initial order denying class certification "ended the opportunity for interlocutory review under Rule 23(f), leaving § 1292(b) and an appeal from a final decision" as plaintiffs' remaining options. 505 F.3d at 740. But *Asher* suggested only that plaintiffs could have invoked Section 1292(b) to appeal the district court's "antecedent" determinations that the

lead plaintiffs were inadequate under the PSLRA, not to appeal the class certification orders. *Id.* "Rule 23(f) does not allow interlocutory appeals from orders designating (or not designating) lead plaintiffs," but Section 1292(b) "could in principle allow an interlocutory appeal from such an order." *Id.* at 738. It remains the rule, as *Richardson Electronics* established, that there is no "appeal under 28 U.S.C. § 1292(b) when appeal might lie under Rule 23(f)." 202 F.3d at 959.

II. Plaintiffs Have Not Offered Any Justification For Interlocutory Review.

Rule 23(f) review is unwarranted. Plaintiffs conceded in seeking certiorari that this Court will "likely" deny Rule 23(f) review, for good reason. Supp. Br. 7. Judge Gettleman's decision is not "the death knell of the litigation." *Blair*, 181 F.3d at 834. 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. Plaintiffs say they will use this evidence "to prosecute their disparate impact and disparate treatment claims" individually. Pet. I at 17-18.

Nor is Judge Gettleman's decision "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 also would not facilitate "development of the law." *Blair*, 181 F.3d at 835. Judge Gettleman's decision is not "novel" (*West* v. *Prudential Sec.*, 282 F.3d 935, 937 (7th Cir. 2002)), and relevant precedents are not "divided." *Mejdrech* v. *Met-Coil Sys.*, 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. That is the sort of error plaintiffs assert here. Judge Gettleman applied settled law to a massive evidentiary record, reaching the same result as "numerous" other courts. A30.

Section 1292(b) review is unwarranted. After promising to "make a formal motion" for Section 1292(b) certification (A13), plaintiffs now claim that Judge Gettleman's statement that he "would support" certification suffices. A4. But Judge Gettleman's conditional statement neither "tracks the language of § 1292(b)" nor makes it "evident *on the face* of [the] order that certification was intended and that the district court actually believed the statutory requirements were fulfilled." *Hewitt* v. *Joyce Beverages*, 721 F.2d 625, 626-27 (7th Cir. 1983). The order does not "identify" a controlling legal "issue" (*Buckley* v. *Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1990), vacated on other grounds, 502 U.S. 801 (1991)), or "explain[] *why*" the case "satisfies the statutory criteria." *In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

Even if the order below complied with Section 1292(b), plaintiffs have not satisfied their "'burden'" to show that "'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978). Plaintiffs identify no "controlling question of law," *i.e.*, a "'pure' question of law rather than merely * * * an issue that might be free from a factual contest." *Ahrenholz* v. *Bd. of Trs.*, 219 F.3d 674, 677 (7th Cir. 2000). In *Richardson Electronics*, this Court found the district court's predominance determination "too fact-specific to be suitable for a 1292(b) appeal." 202 F.3d at 958. Similarly, Judge Gettleman's discretionary rulings depend on his analysis of a massive evidentiary record. There is no "abstract legal issue" that this Court "could decide quickly without having to study the record." *Ahrenholz*, 219 F.3d at 676-77.

Plaintiffs also have not demonstrated "substantial ground for difference of opinion." This Court denied interlocutory review *before Wal-Mart*, which as Judge Gettleman recognized strongly "confirmed" his rulings. A4. Cases cited by plaintiffs, most of which were also cited in their first request for interlocutory review, are distinguishable for reasons described below.

Interlocutory review also would not "materially advance the ultimate termination" of this case. "The longer" litigation over class certification "takes in the district court, the less appropriate is interlocutory review that will prolong the litigation even further." *Asher*, 505 F.3d at 739. This case has been pending for six years. The district court has promised to "hold off doing anything else until" this petition is resolved. A11. While plaintiffs note that they must prosecute their claims individually through final judgment in courts across the country to obtain appellate review of class certification (Pet. 16), that is true of all cases where nationwide class certification is denied. Because Judge Gettleman's rulings are plainly correct, nothing would be accomplished by interlocutory review but more delay and the needless consumption of resources.

Finally, a motion for Section 1292(b) certification "must be filed in the district court within a *reasonable time* after the order sought to be appealed." *Ahrenholz*, 219 F.3d at 675. Plaintiffs first sought certification seven months after Judge Gettleman denied reconsideration. Because "the time limits in section 1292(b) may not be circumvented by the facile device of asking for reconsideration" (*Weir* v. *Propst*, 915 F.2d 283, 286 (7th Cir. 1990)), plaintiffs' "inexcusably dilatory request" bars review of the district court's orders. *Richardson Elecs.*, 202 F.3d at 958 (two-month delay "was sufficient grounds" to deny Section 1292(b) review).

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." *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 157 (1982). 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. And plaintiffs' claims must "depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Wal-Mart*, 131 S. Ct. at 2551. "'What matters to class certification * * * is not the raising of common "questions"—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* Applying this law both before and after *Wal-Mart*, courts consistently have held that a decentralized system that gives local managers structured discretion destroys commonality and typicality.[1]

Judge Gettleman's rulings straightforwardly apply this settled law to the record. 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. A30. Some 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.

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 tes-

[1] See, *e.g.*, *Puffer* v. *Allstate Ins. Co.*, 255 F.R.D. 450, 460-61 (N.D. Ill. 2009); *Ellis* v. *Elgin Riverboat*, 217 F.R.D. 415, 424 (N.D. Ill. 2003); *Adams* v. *R.R. Donnelley*, 2001 WL 336830, at *10-*12 (N.D. Ill. Apr. 6, 2001); *Bennett* v. *Roberts*, 2000 WL 781868, at *4 (N.D. Ill. June 15, 2000); *Betts* v. *Sundstrand Corp.*, 1999 WL 436579, at *6-*7 (N.D. Ill. June 21, 1999); *Gorence* v. *Eagle Food*, 1994 WL 445149, at *9 (N.D. Ill. Aug. 16, 1994); accord *Bennett* v. *Nucor Corp.*, 2011 WL 4389194, at *7-*10 (8th Cir. Sept. 22, 2011); *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); *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); *Abram* v. *UPS*, 200 F.R.D. 424, 428 (E.D. Wis. 2001).

tified 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. Thus, liability "depend[s] upon any number of factors peculiar" to individual claimants. *Patterson* v. *GM Corp.*, 631 F.2d 476, 481 (7th Cir. 1980); see *Payton* v. *Cnty. of Carroll*, 473 F.3d 845, 853-54 (7th Cir. 2007).

Wal-Mart confirms Judge Gettleman's rulings. As here, plaintiffs in *Wal-Mart* sought certification of a nationwide class alleging that local managers discriminated in exercising discretion over employment decisions. In rejecting class certification, the Court noted that "*allowing discretion* by local supervisors" is "just the opposite of a uniform employment practice that would provide the commonality needed for a class action." 131 S. Ct. at 2554. The Court found it "quite unbelievable that all managers would exercise their discretion in a common way." *Id.* at 2555. While some managers may be guilty of discrimination and others may "reward various attributes that produce disparate impact," "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Id.* at 2554.

Wal-Mart also confirms Judge Gettleman's conclusion that even taken at face value (but see D 312-2 at 43-46), plaintiffs' aggregate statistics asserting that African American FAs are less successful than whites cannot obscure the highly individualized nature of plaintiffs' claims. A31-32; accord *Bennett*, 2000 WL 781868, at *5 (denying certification of pattern or practice and disparate impact claims because statistics failed to "bind together the individualized nature of [the] claims"); *Abram*, 200 F.R.D. at 431; 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"). Statistics alleging disparities at the "'national level'" do "'not establish the existence of disparities'" locally. *Wal-Mart*, 131 S. Ct. at 2555. "Even if"

there were uniform disparities locally, "that would still not demonstrate * * * commonality" because "almost all" managers "will claim to have been applying some [race]-neutral, performance-based criteria—whose nature and effects will differ from" office to office. *Id.*

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

The district court properly denied Rule 23(b)(2) certification. This case centers around countless decisions made by hundreds of local managers who used structured discretion to implement changing policies. Merrill Lynch's conduct thus does not "apply generally to the class," as Rule 23(b)(2) requires, but rather "each individual claim" is unique, as Judge Gettleman found. A34. Any injunctive or declaratory relief necessarily must "differentiate materially among class members." *Lemon* v. *Int'l Union*, 216 F.3d 577, 580 (7th Cir. 2000).

Furthermore, *Wal-Mart* confirmed that backpay claims are not "incidental" to injunctive or declaratory relief because employers are "entitled to individualized determinations of each employee's eligibility for backpay." 131 S. Ct. at 2560-61. Here, plaintiffs seek backpay as well as compensatory and punitive damages, making Rule 23(b) certification improper. See *Randall* v. *Rolls-Royce*, 637 F.3d 818, 826 (7th Cir. 2011).

The district court properly denied Rule 23(b)(3) certification. Predominance is lacking when "'proof of the essential elements of the cause of action requires individual treatment.'" *In re Hydrogen Peroxide*, 552 F.3d 305, 311 (3d Cir. 2008); see *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979). The need for extensive individualized inquiry here makes it "hard to see how common issues predominate." *Andrews* v. *Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008).

- The central inquiry in disparate treatment cases "is 'the reason for a particular employment decision.'" *Wal-Mart*, 131 S. Ct. at 2552. 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. A37; accord *Puffer*, 255 F.R.D. at 471-72.

- 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). That "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 *Wal-Mart*, 131 S. Ct. at 2552.

- Merrill Lynch is "entitled" to show that each decision was lawfully made (*id.* at 2560), and that claimants would not have received the benefits they seek even absent discrimination. See *Gross* v. *FBL Fin.*, 129 S. Ct. 2343, 2349 (2009) (§ 1981); *Wal-Mart*, 131 S. Ct. at 2561 (Title VII backpay). Those defenses require "individualized determinations." *Id.* at 2560.

- 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 *Andrews*, 545 F.3d at 577-78. Plaintiffs—well-compensated professionals—may recover attorneys'

fees and compensatory and punitive damages (42 U.S.C. § 2000e-5(g), (k); *id.* § 1981a(b)), providing enough incentive to encourage individual suits. *Puffer*, 255 F.R.D. at 473 (citing *Andrews*, 545 F.3d at 577-78; *Nagel* v. *ADM Investor Servs.*, 217 F.3d 436, 443 (7th Cir. 2000)).

The district court properly denied partial certification. Plaintiffs argue that "partial certification" under Rule 23(c)(4) is proper to resolve "liability and injunctive and declaratory relief," leaving individual liability and remedies for later proceedings. Pet. 14-15. But plaintiffs 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 *Allison*, 151 F.3d at 422; see *Randall*, 637 F.3d at 826 (citing Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 741-43 (2003)).

Plaintiffs' argument, which simply assumes a common issue, is also irreconcilable with *Wal-Mart* and Circuit precedent rejecting class certification if it "only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies." *Andrews*, 545 F.3d at 577. A class trial on the pattern or practice or disparate impact claim would not establish liability for a single class member, leaving causation and other individual issues for follow-on proceedings. Even if the district court could devise an injunction applicable to the class as a whole, it would not provide "final" relief under Rule 23(b)(2) because it "'would merely lay an evidentiary foundation for subsequent determinations of liability,'" "backpay," and damages in some 700 "separate hearings." *Randall*, 637 F.3d at 826. Thus, partial certification is improper because 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 have not explained how their backpay claims could be tried as part of a disparate impact-only class. See Fed. R. Civ. P. 23, 2003 Comm. Note ("A critical need is to determine

how the case will be tried"); *Andrews*, 545 F.3d at 577. Plaintiffs suggested below that special masters could resolve backpay. D 471 at 12. But Merrill Lynch is entitled to jury trials on the legal remedy of backpay (*Great-W.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002); *Albemarle Paper* v. *Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring)), and Article III does not permit a special master to resolve individual liability. *Stauble* v. *Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992). Beyond this, plaintiffs have promised to pursue damages individually regardless of the outcome of a class trial on disparate impact (D 488 at 28-31), using "evidence developed during class discovery" (Pet. I at 17-18), so such a trial would not make the litigation more efficient.

Plaintiffs also have not explained how their damages claims could be resolved as part of a pattern or practice class. Plaintiffs proposed below that a "phase one" jury resolve the pattern or practice claim and hundreds of "phase two" juries resolve individual liability and damages. That proposal is inefficient (*Andrews*, 545 F.3d at 577), and would violate 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. 14-15. *In re Allstate Ins. Co.*, 400 F.3d 505, 507-08 (7th Cir. 2005)—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." *Kartman* v. *State Farm*, 634 F.3d 883 (7th Cir. 2011)—which also reversed class certification—distinguished *Allen* v. *Int'l Truck*, 358 F.3d 469 (7th Cir. 2004), on the ground that an injunction there would provide the "final" relief required by Rule 23(b)(2). In *Allen*, however, a single in-

junction could remedy pervasive discrimination permitted by "top supervisors" at one plant. 358 F.3d at 470. And in *Mejdrech*, a class trial could efficiently resolve whether a factory leaked chemicals that contaminated local groundwater, issues that were "identical across all claimants." 319 F.3d at 911. None of these cases supports partial certification where claimants are spread across more than 100 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's denial of a disparate impact class is confirmed by *Wal-Mart*.

Plaintiffs argue that racial disparities in teaming and account distributions require certification of a disparate impact class. Pet. 11-14. But "the mere claim" that plaintiffs "suffered * * * a disparate impact Title VII injury[] gives no cause to believe that all their claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551. And "[m]erely showing" an "overall [race]-based disparity does not suffice." *Id.* at 2556. Rather, plaintiffs must offer "'significant proof'" that firm policies caused a "disparate impact" that affected "all" class members. *Id.* at 2554.

Plaintiffs have not even "'identif[ied] the specific employment practice'" that caused any racial disparity in teaming. *Id.* at 2555. Plaintiffs challenge neither Merrill Lynch's decision to encourage teams nor its race-neutral guidelines governing team formation. Plaintiffs' real complaint, Judge Gettleman found, is with "myriad" decisions by thousands of FAs about whether and with whom to team and by hundreds of managers in approving or rejecting teams. A4. Plaintiffs' expert Dr. Bielby could not even 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 135-136; see D 312-2 at 15-16 (controlling factor in team formation is not race but average size of FA's accounts). Because that is the "essential question" upon which plaintiffs base commonality, the Court "can safely disregard what [Bielby] has to say." *Wal-Mart*, 131 S. Ct. at 2554.

Plaintiffs' complaints about account distributions also do not concern the policy's race-neutral criteria, but a host of individual decisions by FAs, and countless decisions by managers employing varying standards to distribute tens of thousands of accounts, as plaintiffs' expert confirmed. D 318-3 at 26. Judge Gettleman found that "[e]ach such decision would have to be examined to determine whether the particular FA was the victim of discrimination." A4. As in *Wal-Mart*, while some managers may reward "attributes that produce disparate impact," "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." 131 S. Ct. at 2554.

Plaintiffs note that *Wal-Mart* involved a larger class. Pet. 11. But even though this case may not be "as big a stretch" as *Wal-Mart*, "it is big enough." *Randall*, 637 F.3d at 825. Plaintiffs also argue that, unlike *Wal-Mart*, they identify specific employment policies. Pet. 11. But Judge Gettleman found that, like *Wal-Mart*, those policies "depend in their implementation on discretionary decisions." A3. Finally, plaintiffs attack Judge Gettleman's reasoning. Pet. 12-14. But Judge Gettleman understood that a disparate impact claim does not require proof of discriminatory intent. A16-18. He held only that because plaintiffs challenge countless highly-individualized decisions made by thousands of managers and FAs in offices across the country, plaintiffs cannot prove that Merrill Lynch policies caused a disparate impact on a classwide basis.

D. Judge Gettleman's denial of a pattern or practice class is consistent with *Teamsters*.

Plaintiffs argue that by citing the need for hundreds of jury trials to resolve discriminatory intent and other issues relevant to 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), and *Franks* v. *Bowman Transp.*, 424 U.S. 747 (1976). Pet. 16-19. But a *Teamsters* class trial requires a common issue, which plaintiffs have not identified. And *Wal-Mart* rejected a proposal to

dispense with individual hearings by averaging awards given to a sample of class members, holding that a "class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. *Wal-Mart* makes clear that district courts *must* assess how individual liability and remedies would be resolved in deciding whether to certify a class. Accord *Randall*, 637 F.3d at 826; *Patterson*, 631 F.2d at 481.

Neither *Teamsters* nor *Franks* even addressed class certification. Because *Teamsters* was a government suit and *Franks* was certified under Rule 23(b)(2), plaintiffs did not have to establish manageability or predominance. And *Teamsters* and *Franks* were non-jury suits where plaintiffs did not seek compensatory or punitive damages. Thus, there is no *Teamsters* exception to Rule 23 that allows plaintiffs to hide individual liability and remedies issues from scrutiny.

Plaintiffs also assert that Judge Gettleman misconstrued *Teamsters* by questioning at argument whether "it would be unfair to accord Plaintiffs" a "presumption of discrimination." Pet. 17. However, *Wal-Mart* held that a presumption of discrimination cannot arise unless there is "a common answer to the crucial question *why was I disfavored*," which here there is not. 131 S. Ct. at 2552. A presumption of discrimination was justified in *Teamsters* because the number of minority truck drivers hired for better-paying jobs neared "'the inexorable zero'" and managers stated that race prevented class members from getting the job. 431 U.S. at 342 n.23, 338 & n.19. In contrast, here there are no tell-tale indicia of intentional discrimination. Stan O'Neal, an African American, was Merrill Lynch's CEO during most of the class period. Merrill Lynch prohibits discrimination and devotes substantial resources to affirmative action. D 312-12. The challenged policies are race-neutral. Managerial discretion was neutral or favored African Americans. D 312-19 at 38-41, 51-68. Detecting any discrimination requires individualized scrutiny.

CONCLUSION

The petition for leave to appeal should be dismissed or, alternatively, denied.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of October 2011, I served the foregoing Answer in Opposition to Plaintiffs' Petition for Leave to Appeal via the Court's ECF system upon counsel for Plaintiffs-Petitioners.

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