
**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,)	Appeal from the United States
)	District Court for the Northern
Plaintiffs-Appellants,)	District of Illinois
)	
v.)	No. 05-C-6583
)	
MERRILL LYNCH, PIERCE, FENNER)	Judge Robert W. Gettleman
& SMITH, INCORPORATED,)	Magistrate Judge Gilbert
)	
Defendant-Appellee.)	

BRIEF FOR DEFENDANT-APPELLEE MERRILL LYNCH

Jeffrey S. Klein	Timothy S. Bishop
Nicholas J. Pappas	Stephen M. Shapiro
Allan Dinkoff	Lori E. Lightfoot
WEIL, GOTSHAL & MANGES LLP	Stephen J. Kane
767 Fifth Avenue	MAYER BROWN LLP
New York, New York 10153	71 South Wacker Drive
(212) 310-8000	Chicago, Illinois 60606
	(312) 782-0600

Attorneys for Appellee Merrill Lynch, Pierce, Fenner & Smith, Incorporated

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JURISDICTIONAL STATEMENT

Plaintiffs' jurisdictional statement is not complete and correct. The district court had jurisdiction under 28 U.S.C. §1331 because plaintiffs allege violations of 42 U.S.C. §§1981 and 2000e *et seq.* On August 9, 2010, Judge Gettleman denied plaintiffs' motion for certification of a nationwide class of 700 current and former African-American financial advisors ("FAs") employed by Merrill Lynch in hundreds of offices over the course of a decade. Judge Gettleman denied plaintiffs' motion for reconsideration on February 14, 2011, this Court denied plaintiffs' petition for review under Fed. R. Civ. P. 23(f), and the Supreme Court denied certiorari.

Plaintiffs filed an "amended" motion for class certification based on the intervening decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011)—even though *Wal-Mart rejected* class certification in a case plaintiffs admit presents "several identical legal issues." *McReynolds v. Merrill Lynch*, 2011 WL 2472739, at *28 (June 17, 2011). Judge Gettleman denied plaintiffs' motion on September 19, 2011. On September 29, 2011, plaintiffs sought interlocutory review of the September 2011 order under Rule 23(f) and the August 2010 and February 2011 orders under 28 U.S.C. §1292(b). A motions panel granted plaintiffs' petition on November 16, 2011.

We explain below that plaintiffs' petition was untimely under Rule 23(f)'s 14-day time limit and that they may not use Section 1292(b) to circumvent that limit. Regardless of whether Rule 23(f)'s time limit is "jurisdictional," it "must be enforced." *Asher v. Baxter Int'l*, 505 F.3d 736, 741 (7th Cir. 2007). Plaintiffs' request for Sec-

tion 1292(b) review also was untimely and, regardless, this Court lacks jurisdiction because Judge Gettleman did not certify his orders for review.

QUESTIONS PRESENTED

1. Whether this Court may review the district court's class certification orders under Rule 23(f) or Section 1292(b) where plaintiffs' second petition for interlocutory review was not filed within 14 days of the court's February 2011 order denying class certification and the court's September 2011 order denying plaintiffs' "amended" motion for class certification left its prior rulings intact.

2. Whether Judge Gettleman abused his discretion by denying certification of a sprawling class of African-American FAs employed in hundreds of offices across the country where he found, based on an exhaustive record, that plaintiffs' claims involve discretionary decisionmaking by thousands of local managers and FAs in implementing Merrill Lynch's race-neutral policies, not national policies that apply uniformly to all.

STATEMENT OF THE CASE

Plaintiffs filed their complaint in November 2005. D1. As amended, it alleged race discrimination in 26 types of localized decisions—ranging from assignment of offices and staff, to selection for management, to training and mentoring. D72 ¶7.

In November 2008, plaintiffs moved for class certification. D257. After considering voluminous briefing and record materials, Judge Gettleman denied plaintiffs' motion in a comprehensive opinion dated August 9, 2010. A12-29. Plaintiffs moved

for reconsideration. D414. After two more rounds of briefing and argument, Judge Gettleman denied reconsideration in February 2011. A5-11.

On February 28, 2011, plaintiffs sought leave to appeal under Rule 23(f). No. 11-8008, D1. This Court (Posner, Wood, Hamilton, JJ.) denied review on April 20, 2011. *Id.*, D13. Plaintiffs petitioned for certiorari, which the Supreme Court denied on October 3, 2011. 132 S. Ct. 119 (2011).

On July 18, 2011, plaintiffs filed an “amended” motion for class certification, making the same arguments but citing *Wal-Mart*. D471. Following more briefing, Judge Gettleman denied plaintiffs’ motion in September 2011. A1-4. A motions panel granted plaintiffs’ second petition for leave to appeal. No. 11-8027, D10.

STATEMENT OF FACTS

Key facts described in plaintiffs’ brief are contradicted by the record and Judge Gettleman’s findings. Plaintiffs pretend that compensation of Merrill Lynch FAs is driven by their ability to “team” with other FAs and by distribution of accounts of departing colleagues; that Merrill Lynch’s teaming and account distribution policies apply in some cookie-cutter manner; and that these policies disparately impact African-American FAs. But after reviewing the massive record, Judge Gettleman found that this is not a case where a “centralized group makes decisions.” A19. Merrill Lynch employs “decentralized procedures” that allow thousands of “independent” “decision-makers across the country to consider subjective factors” in making “discretionary decisions.” A20. Its race-neutral teaming and account distribution policies do not dictate outcomes, but “depend in their implementation on discretionary

decisions” by thousands of local managers and FAs. A3. Thus, Judge Gettleman found, this case is not about “neutral policies” that have a disparate impact (A19), but alleged “intentional discrimination” by thousands of largely-autonomous decisionmakers scattered across the country. A17.

The facts found by Judge Gettleman and supported by the evidence are thus far different from those described by plaintiffs and show that the district court acted well within its discretion in denying class certification, as *Wal-Mart* confirms. Class certification would not advance resolution of plaintiffs’ claims because detecting discrimination in teaming or account distributions would require 700 trials focused on localized discretionary decisions. That would be far less efficient than the individual actions these well-compensated plaintiffs promise to bring regardless of any class trial. D488 at 28-31. A “systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice”; “we must take care that each individual plaintiff’s—and defendant’s—cause not be lost in the shadow of a towering mass litigation.” *Malcolm v. Nat’l Gypsum*, 995 F.2d 346, 350 (2d Cir. 1993).

I. Merrill Lynch’s Decentralized Procedures Provide Discretion To Local Managers And FAs To Implement Race-Neutral Policies.

Merrill Lynch policies support diversity. Plaintiffs characterize Merrill Lynch as a “centralized” firm with policies that affect each FA in the same way and with a common purpose—race discrimination. Br. 11. But Merrill Lynch prohibits race discrimination (D313-51 ¶13), and makes substantial affirmative action efforts. Its CEO throughout the class period was Stan O’Neal, an African-American grandson of a slave. D315-3 at 4.

Merrill Lynch partners with African-American organizations in recruiting diverse FAs. D313-51 ¶11. It provides diversity recruiting training to local managers. *Id.* ¶¶10-12; see D313-2 pts. 20, 29-30. It operates programs to help diverse FAs succeed, providing opportunities and resources beyond those offered to the general FA population. D313-51 ¶30. Those programs provide “coaches” to assist FAs with business development, offer training to enhance FAs’ skills, assign successful FAs as mentors, and arrange networking opportunities. *Id.* ¶¶71-80. And it tied local manager compensation to the hiring, retention, and success of diverse FAs. *Id.* ¶14. After studying Merrill Lynch’s policies and practices, Olivet Jones, an expert in corporate diversity, concluded that the firm has developed “a culture that respects and values employees regardless of any demographic characteristics.” D312-12 at 1.

Merrill Lynch management is decentralized. Merrill Lynch employs 15,000 FAs in over 600 branch offices. A13. FAs are supervised by 135 Complex Directors, each of whom manages multiple offices within a complex. *Ibid.* Judge Gettleman found that each Complex Director has discretion to “manag[e] his or her complex as a stand-alone business.” A13-14; accord D313-2 pt.1. The experiences of individual FAs therefore do not depend on policies devised at corporate headquarters, but on the implementation of those policies in local offices nationwide. A3.

FAs operate their own businesses using different strategies. Judge Gettleman found that each FA “operates his or her own business within a business.” A14. FAs must build a “book of business” by convincing investors to entrust the FA with their financial futures. *Ibid.*; see D312-15 ¶26. FAs exercise considerable autonomy

over business-generation activities, including client-development strategy, hours invested, and cooperative efforts with other FAs. *Id.* ¶¶25-28. As plaintiffs acknowledge, “[e]very [FA] has a different strategy.” D337-6 at 25; see D312-15 ¶¶47-48. FAs build their books by gaining expertise in niche markets, engaging in community activities, developing preexisting relationships, and in countless other ways. D313-2 pt.2.

For example, plaintiff Leslie Browne landed a large client because he assisted that client before joining Merrill Lynch. D314-5 at 125. Browne’s varied accounts include an African-American client he knew before becoming an FA, a corporate client he met at an event paid for by Merrill Lynch, and a governmental client he learned about on the internet. *Id.* at 145-168. By comparison, plaintiff Glenn Capel’s largest clients are family accounts of a white FA who retired from Merrill Lynch after forming a relationship with Capel. D314-6 at 63-64. Plaintiff LaRue Gibson acknowledged that “the way I built my business is very different” from most, because he does not focus on a small number of large clients. D314-9 at 333-334, 341; see D338, App. III to Merrill Lynch’s Opposition to Class Certification (containing deposition excerpts).

II. Merrill Lynch’s Teaming And Account Distribution Policies Are Implemented Through Localized Discretionary Decisions.

Like its competitors, Merrill Lynch “pays its FAs based on production,” using a formula based on “production credits” and “revenue generated when one of the FA’s clients uses or purchases a Merrill Lynch financial product or security.” A21. “There is no discretion in calculating FA incentive compensation, which is based on a pre-

cise mathematical formula.” *Ibid.* A host of factors, unrelated to alleged discrimination, affect compensation under this formula. Looking only at white FAs, the average compensation in the first “quintile” (the top 20% in firm rankings) was \$442,000 compared to \$94,000 in the fifth quintile. D312-18 at 33.

Plaintiffs nonetheless claim that Merrill Lynch discriminates against African-American FAs under policies they say affect an FA’s production and therefore indirectly affect inputs into the race-neutral compensation formula. Plaintiffs initially sought certification of an across-the-board class (D257 ¶3), but now confine their arguments to two policies: teaming and account distributions. Plaintiffs ignore, however, Judge Gettleman’s finding, based on the exhaustive record, that these policies “depend in their implementation on discretionary decisions that affect each of the class members” differently. A3. That factual finding is entitled to deference, reviewable only for clear error, and is well-supported by the record.

Teaming. FAs themselves decide whether to join forces with one or more fellow FAs to prospect for or serve clients and share commissions. Merrill Lynch calls these relationships “pools.” If one-third of an FA’s production credits come from pooled accounts, Merrill Lynch considers the FA to be on a “team.” D313-51 ¶86.¹

Merrill Lynch’s only national teaming policies are to encourage the practice, provide uncontroversial guidance about what FAs should consider in deciding whether

¹ Merrill Lynch executive William Sieg describes the teaming and account distribution policies at D313-51 ¶¶86-132 and D313-52 Exhibit C (documenting frequent changes to account distribution policy), which also appear at D338, App. II to Merrill Lynch’s Opposition to Class Certification, Binder 4. The account distribution policies themselves are at D353, Exhibits 197-201, and teaming guidelines are at D353, Exhibits 174, 177-179, 188 and D362-3.

and how to team, and require that local managers approve teams. *Id.* ¶¶89-91. Merrill Lynch periodically disseminates teaming guidelines, which the firm encourages (but does not require) FAs and managers to follow. *Id.* ¶¶90-91. These recommend, for example, that team members have complementary skills and compatible investment philosophies, and offer suggestions about preparing team business plans and agreements governing compensation. D362-3 at 1-2, 8-20.

Plaintiffs never have articulated how these race-neutral guidelines are discriminatory or disparately impact African-American FAs. Nor have plaintiffs tied these guidelines to asserted racial disparities in teaming. Instead, they complain only about teaming decisions in local offices and the benefits they claim flow from teaming.

The record establishes that FA success is not contingent upon teaming. Plaintiffs' expert Dr. Bielby conceded that FAs need not team to succeed. D314-3 at 94. Most FAs—including successful ones—are *not* on teams. D313-2 pt.4. Some FAs prefer working alone; others do not want to share the business they developed. D313-10 ¶16; see D313-51 ¶88. Plaintiff Leroy Brown declined a teaming opportunity, and plaintiff Mark Johnson did not ask anyone to team, because both prefer working alone. D314-4 at 226-227; D314-12 at 221.

The prevalence of teaming varies by office, plaintiffs' expert concedes. D314-15 at 295. Merrill Lynch's expert economist Dr. Saad found without contradiction that "[t]here are 45 offices in which less than half of the brokers are in pools and 20 offices at which all FAs are in pools." D312-18 at 44. Plaintiff Capel could not find a

teammate because FAs in his office are “comfortable” as “sole proprietor[s].” D314-6 at 284-286.

FAs who team do so for different reasons: to take advantage of complementary business models, because one FA excels at portfolio management and the other at client development, or because team members are blood relatives. D313-2 pt.3. FAs who team prefer to do so with high-producers. D313-51 ¶89. Plaintiff George McReynolds explained that he wants a teammate who is “knocking the ball out of the park.” D337-6 at 195; accord D313-2 pt.7. Dr. Saad proved, without contradiction, that higher-producing FAs are more likely to join pools and to do so with other high-producers. D312-18 at 44-46. Unsuccessful white FAs are just as unlikely to pool as unsuccessful African Americans. *Id.* at 47. As Dr. Bielby conceded: “there are lots of factors” that “influence whether someone gets on a team” besides any alleged “hurdle” of race. D314-3 at 82. In fact, Bielby could not even opine that successful African-American FAs would have more difficulty joining teams than successful white FAs—the critical issue under plaintiffs’ theories. *Id.* at 135-36.

Plaintiffs had varied teaming experiences. A successful white FA invited Jennifer Madrid to pool with him, resulting in a substantial increase in Madrid’s book of business. D337-4 at 48-53, 70-71. McReynolds had a positive teaming experience with a white FA in what he called a “partnership of equals.” D337-6 at 161-163. McReynolds’ later-established team with different FAs failed for reasons he attributes to discrimination. *Id.* at 80-87.

Managers do not compel FAs to team. Teaming requires FAs to take substantial risks by altering their compensation structure and sharing clients (D313-51 ¶88), so forced teaming would cause some FAs to take their business to competitors. D312-15 ¶33. This is true not because FAs want to avoid teaming with African Americans, but because they do not want to team at all or want to decide with whom they merge their business. D313-2 pt.5. For example, plaintiff Gibson testified that while he would “entertain the introduction” if asked to team with a low-producing FA, he must have the final say based on “their abilities,” “personalities,” and whether “you can make it worth my while from a compensation perspective.” D314-9 at 206-207.

Managers have discretion in the degree to which they promote teaming. D313-2 pt.6. Some “facilitate” team formation (D313-14 ¶16); others refuse to “play ‘matchmaker.’” D313-16 ¶29. Managers also vary in their approach to approving teams. One scrutinizes team formation to ensure that the FAs “have a solid business plan and work well together,” declining to approve teams if they “will not benefit all of the prospective teammates.” D336-4 ¶10. Another has “never denied anyone the opportunity to team.” D313-47 ¶12.

Thus, nothing in Merrill Lynch’s national teaming policy drives any particular result. Individual inquiry is necessary to determine why an FA chose to team or not team, why a team succeeded or failed, and why a manager approved or rejected a team. A fact-finder would need to hear testimony from local managers, the FAs involved, other FAs in the office (FA availability is a critical factor in teaming decisions), and clients (who influence allocation of accounts after team dissolution).

D313-51 ¶98. Plaintiffs concede that “a factual inquiry into each situation” is essential. D314-9 at 216; see D313-2 pt.3.

Account Distributions. When an FA leaves Merrill Lynch, the firm must act quickly to try to retain the departing FA’s business. D313-51 ¶101. Merrill Lynch allocates the right to pursue a departing FA’s accounts under a national policy that ranks FAs using published objective criteria. *Id.* ¶102. Accounts are distributed within individual offices, so FAs compete for distributions only against others in the same office. *Id.* ¶¶104, 106. Although the policy has changed frequently (*id.* ¶109 & Ex. C), the criteria used to rank FAs have included revenue generated; industry certifications achieved; client retention; and, upon departure of a team member, team duration; and at times local managers have been able to select which criteria to use. *Id.* ¶105 & Ex. C. In addition, to provide more FAs with a chance to earn distributions, Merrill Lynch has used a “best-ball” criterion—one plaintiffs fail to mention—that allows FAs with low production to accumulate points for any recent uptick in their books of business, while FAs with established books are ranked based on their total production. *Id.* ¶114. As discussed below (at 36-37), plaintiffs’ experts never studied the operation of these criteria, including which (if any) have a disparate impact.

FAs control their own rankings under the policy. Some plaintiffs moved up the rankings by obtaining industry certifications at Merrill Lynch’s expense (D337-4 at 148-149), while others rejected managers’ recommendations that they do so. D314-12 at 92. Many putative class members rank highly under the policy. D313-34 ¶10.

In addition to controlling their own position in the rankings, FAs have discretion whether to seek or accept an account. Account distributions typically are not a significant “factor in whether or not an FA is successful.” D313-19 ¶11. Some FAs do not participate in *any* distributions because accounts developed by other FAs are far more difficult to retain than self-generated accounts. D313-2 pt.11. Others reject particular accounts because they do not fit the FA’s business model, are considered likely to leave with the departing broker, or the FA does not wish to compete with the departing FA (*e.g.*, a friend or relative). *Ibid.*

Leading to further variation, local managers have discretion as to the method of distributing accounts using the rankings, and whether to use the rankings *at all* for a particular account. Plaintiffs concede that “branch managers retained discretion” (D380 at 28) to use the “assignment method” (managers assign accounts in order of FA rank) or “draft method” (FAs select accounts in order of rank) until 2006, when Merrill Lynch required the draft method. D313-51 ¶¶120, 127-128.

Dr. Bielby acknowledged that Merrill Lynch “allows managers considerable discretion to depart from the ranking system in distributing accounts.” D312-5 ¶38. For example, local managers may depart from the rankings to honor a client request; tap a language skill, registration, or specialization; build on an existing relationship; or reflect FA availability (D313-51 ¶116)—exceptions Bielby deemed “reasonable.” D314-3 at 117-118. Sometimes—again outside the rankings—a departing FA would transfer accounts to another FA. D313-51 ¶124. Plaintiffs benefited from this discretion. Leslie Browne received accounts when the departing FA’s clients re-

quested him (D314-5 at 172-174), and Madrid received a lucrative client from an account transfer from another FA. D337-5 at 399-400; see D312-18 at 39-41. Plaintiffs have transferred accounts outside the rankings to white FAs (D337-4 at 57-62, D337-5 at 291-293), and to other plaintiffs. D314-2 at 113-114.

Plaintiff Capel's testimony illustrates the uniqueness of each account distribution. Capel inherited one of his top accounts from a white FA (D314-6 at 77-78); his two most recent clients came from distributions (*id.* at 90-91); he lost an account acquired through a distribution when the client complained about his work (*id.* at 269-270); lost out to remaining members of departing FAs' teams under the policy (*id.* at 328-329); but received accounts when an FA he pooled with departed (*id.* at 343-344).

Local manager and FA discretion means that determining whether an account distribution complied with the policy requires inquiry into "individual circumstances," plaintiffs concede. D337-6 at 115-116; see D313-2 pt.9. Reconstructing a distribution requires determining which FAs participated; whether the local manager used the assignment or draft method; whether and the extent to which discrimination affected plaintiff's rank; which accounts were most desirable to which FAs; whether the departing FA was on a team and if so whether the team was formed to evade the account distribution policy; whether the ranking system was followed and if not whether the manager had a legitimate reason for departing from it; and whether any flaw in the distribution was the result of discrimination. That inquiry—which depends on extensive documentation and testimony from local

managers, each FA in the office, and (in some cases) the departed FAs and their clients—must be repeated for each distribution.

III. Judge Gettleman Applied Settled Law To A Massive Record In Denying Class Certification.

Discovery in this case lasted almost three years. A13. The parties submitted 9 reports from experts in labor economics, sociology, social networks, diversity, and organizational psychology; deposition testimony from 25 witnesses; and affidavits from 50 Merrill Lynch managers and executives, 19 named plaintiffs, and 47 putative class members.

Judge Gettleman’s denial of class certification. In August 2010, Judge Gettleman denied class certification. He first found that plaintiffs failed to establish commonality under Rule 23(a)(2). Putative class members “were supervised and reviewed by hundreds of different people” and “had totally different experiences.” A20. “Each individual plaintiff’s experience was the result of countless decisions made by themselves, other FAs in their branch offices, their branch managers and so on up the chain of command.” *Ibid.* Judge Gettleman agreed with “numerous decisions” denying certification of classes that “implicat[e] numerous, independent decision-makers resulting in the need for numerous individual inquiries.” *Ibid.*

Judge Gettleman observed that “plaintiffs offer little to establish the ‘significant proof’ required by [*General Telephone Co. v. Falcon*, 457 U.S. 147 (1982)] to establish that the asserted discriminatory culture manifested itself in the ‘same general fashion’ as to all putative class members.” A19. Plaintiffs’ “raw statistics,” asserting racial disparities, could not overcome the highly-individualized nature of plaintiffs’

claims. A21. Plaintiffs' declarations "underscore[d] the lack of commonality," showing that plaintiffs "worked in different offices, had different supervisors, and allegedly experienced vastly different forms of discrimination." A25.

Judge Gettleman also found that plaintiffs failed to establish typicality under Rule 23(a)(3). Claimant declarations revealed "variations" that "would necessitate individual inquiries to determine whether the individuals suffered racial discrimination." A25. Merrill Lynch's defenses—*e.g.*, presenting "a legitimate non-discriminatory reason" for an action—also required individual inquiries. A26.

Finally, Judge Gettleman found that plaintiffs cannot satisfy Rule 23(b). Rule 23(b)(2) certification was inappropriate because plaintiffs' demand for compensatory and punitive damages meant their "financial interests are too high to be considered incidental to the requested equitable relief." A27. Rule 23(b)(3) certification was improper due to "several separate layers of individual issues," "including the variation in personnel practices among the various branch offices, and how various office managers and complex managers handle individualized personnel decisions." A29. Thus, "each individual putative class member's claim" would "have to be tried to a jury," necessitating countless proceedings with "different witnesses and proofs." A27. Under these circumstances, "common issues do not predominate" and a class trial "would be unmanageable." A29.

Judge Gettleman's denial of reconsideration. Plaintiffs sought reconsideration, arguing that Judge Gettleman improperly denied certification of a disparate impact class by reasoning that "discretionary or subjective decision-making" cannot

support a disparate impact claim. D422 at 4. In a February 2011 order denying reconsideration, Judge Gettleman acknowledged that “a disparate impact claim can be based on subjective or discretionary employment practices.” A8. “But the mere fact that a plaintiff can state a disparate impact claim based on subjective employment practices does not mean that class treatment is always appropriate, particularly when those subjective decisions are made by hundreds of different individuals under different circumstances across the country” so that policies did not manifest themselves “in the same general fashion as to all putative class members.” *Ibid.*

Judge Gettleman rejected plaintiffs’ assertion that he had “ignored” their statistics. A9. Statistics could neither bind together plaintiffs’ claims nor avert the need for “1000 follow-on jury trials to determine whether each individual class member suffered discrimination as a result of [Merrill Lynch’s] policies and, if so, the amount of damages.” *Ibid.*

This Court’s denial of Rule 23(f) review. In their first Rule 23(f) petition, plaintiffs presented the same arguments they present here, asserting that Judge Gettleman erred by declining to certify a disparate impact or pattern-or-practice class and by denying partial certification. No. 11-8008, D1 (“Pet. I”). This Court denied review.

The Supreme Court’s denial of certiorari. Plaintiffs’ petition for certiorari rehashed the arguments they made in their Rule 23(f) petition and raise again here. 2011 WL 2472739. Plaintiffs acknowledged that this Court would “likely” reject a second Rule 23(f) petition, and that “when a class-certification order is an arguable

candidate for a Rule 23(f) appeal, the appellants may not use section 1292(b) to circumvent the [14]-day limitation in Rule 23(f).” 2011 WL 4400331, at *7 (quoting *Richardson Elecs. v. Panache Broad.*, 202 F.3d 957, 959 (7th Cir. 2000)). “Under current Seventh Circuit law,” plaintiffs predicted, “action by [the Supreme] Court is likely the only opportunity for interlocutory review of the full denial of class certification.” *Id.* at *7-*8. The Supreme Court denied certiorari.

Judge Gettleman’s denial of plaintiffs’ second motion for reconsideration. After this Court denied Rule 23(f) review and the Supreme Court decided *Wal-Mart*, plaintiffs filed an “amended” motion that sought “only certification of the disparate impact claims.” D471 at 1 n.1. Plaintiffs justified this repetitive request by arguing that *Wal-Mart* “supports” certification. *Id.* at 2. Plaintiffs’ amended motion was a carbon copy of their prior request for a disparate impact class. Advocating the same trial plan, plaintiffs cited the same statistics in seeking the same bench trial to determine whether the same account distribution and teaming policies discriminated. Compare D471 with D415 at 1-8.

At a hearing, Judge Gettleman explained that although he generally “lean[s]” toward class certification, it “just doesn’t work” here. A32. He stated, however, that he “would support” a Rule 23(f) petition. A36. Plaintiffs responded by asking Judge Gettleman to certify his decision under Section 1292(b) because there is case law “on 23(f) that we get one shot at it, that’s it.” A38. Plaintiffs stated “[w]e can make a formal motion at the next status on 1292” (*ibid.*), but never did.

In his opinion, Judge Gettleman held that *Wal-Mart*—“which was a disparate treatment and disparate impact case”—“confirmed” his prior rulings. A4. Plaintiffs “fail[ed] to account for the requirement that the identified policy must have caused the disparate impact.” A3. Merrill Lynch’s policies “depend in their implementation on discretionary decisions that affect each of the class members.” *Ibid.* Thus, “the decision on whether to join a team or to be invited to join a team would depend on a myriad other decisions by supervisors and the FAs themselves.” A3-4. “For example, a manager might choose to suggest a particular FA to a team and the FA may decline for personal or professional reasons.” A4. While some FAs “might balk” at teaming with an African American “for discriminatory reasons,” “[e]ach such decision would have to be examined to determine whether the particular FA was the victim of discrimination.” *Ibid.*

The motions panel’s grant of review. Plaintiffs sought review of Judge Gettleman’s September 2011 order under Rule 23(f) and the August 2010 and February 2011 orders under Section 1292(b). No. 11-8027, D3-2 (“Pet. II”) at 9, 15. A motions panel granted the petition without opinion.

SUMMARY OF ARGUMENT

To “reduce the risk that attempted appeals will disrupt continuing proceedings” (Rule 23, 1998 Comm. Note), Rule 23(f) requires petitioners to seek review within 14 days of “an order granting or denying class-action certification.” Plaintiffs argue that their second Rule 23(f) petition—filed seven months after Judge Gettleman denied reconsideration in February 2011—was timely filed within 14 days of Judge

Gettleman's September 2011 order denying their "amended" motion for class certification. But courts "unanimously" hold that "[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class-action certification'" under Rule 23(f). *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31-32 (2d Cir. 2011) (collecting cases). Otherwise the 14-day limit "would not be worth anything": litigants could indefinitely extend it "by making another motion for class certification." *Asher*, 505 F.3d at 739. Because Judge Gettleman's September 2011 order left his prior rulings intact, it is not subject to Rule 23(f) review.

Plaintiffs' request for review of the August 2010 and February 2011 orders under Section 1292(b) would "circumvent the [14]-day limitation in Rule 23(f)." *Richardson Elecs.*, 202 F.3d at 959. This Court has rejected similar attempts, holding that "we shall no[t] authorize appeal" under Section 1292(b) "when appeal might lie under Rule 23(f)." *Ibid.* Because Judge Gettleman's orders "involve the merits of class certification," Rule 23(f) provides the exclusive mechanism for interlocutory review. *Ibid.* The appeal should accordingly be dismissed.

Even if the appeal were timely, Judge Gettleman acted well within his discretion in denying certification. Based on an exhaustive record, Judge Gettleman found that under Merrill Lynch's "decentralized procedures" (A20), the firm's race-neutral teaming and account distribution policies "depend in their implementation on discretionary decisions that affect each of the class members" differently. A3. Hundreds of local managers exercised discretion in implementing changing national pol-

icies over the course of a decade. And 15,000 FAs in offices across the country exercised discretion in deciding whether and with whom to team, whether to seek or accept an account distribution, and whether to improve their rank under the policy. Plaintiffs had “totally different experiences,” each “the result of countless decisions made by themselves, other FAs in their branch offices [and] their branch managers.” A20. Thus, Judge Gettleman found, Merrill Lynch’s national policies do not apply uniformly (A19), and plaintiffs fail to tie those policies to asserted compensation disparities. A3. Instead, this case “revolves around” highly-individualized “allegations of intentional discrimination” by local decisionmakers exercising discretion built into firm policies. A7.

Wal-Mart confirms these rulings. Plaintiffs here, as in *Wal-Mart*, challenge policies that give “discretion [to] local supervisors” scattered nationwide. 131 S. Ct. at 2554. “[D]emonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.” *Ibid.* Plaintiffs here and in *Wal-Mart* tried to bind their individualized claims together with the same theory offered by the same sociologist, Dr. Bielby, which the Supreme Court rejected as “worlds away” from “significant proof that Wal-Mart ‘operated under a general policy of discrimination.’” *Ibid.* Plaintiffs here and in *Wal-Mart* also asserted aggregate statistical disparities, which the Court held fail to establish the “uniform” disparity necessary for class adjudication. *Id.* at 2555. Accordingly, like plaintiffs in *Wal-Mart*, plaintiffs here have not produced “convincing proof of a company-wide dis-

criminary” policy such that “all” class members’ claims “depend on the answers to common questions.” *Id.* at 2554, 2556.

Plaintiffs identify no legal error in Judge Gettleman’s analysis, complaining only about his application of *Falcon* and *Wal-Mart* to the facts. Plaintiffs say there are common questions “whether the policies at issue had an unlawful disparate impact or created a pattern or practice of race discrimination.” Br. 25. But those questions—at the core of *any* discrimination suit—are precisely the sort of abstract questions *Wal-Mart* rejected. Asking whether defendant engaged in “an unlawful employment practice,” the Court held, “is not sufficient.” 131 S. Ct. at 2551.

Plaintiffs insist they do not challenge the discretionary “actions of lower-level managers” and FAs in “implementing” Merrill Lynch’s teaming and account distribution policies, but rather those policies’ “design and operation.” Br. 24. But plaintiffs told the district court that the account distribution policy delegates “undue discretion and subjectivity.” D380 at 28. And plaintiffs describe Merrill Lynch’s teaming “policy” as “allowing [team] formation” (Br. 6)—*i.e.*, delegating discretion to thousands of FAs to decide whether and with whom to team. See *Wal-Mart*, 131 S. Ct. at 2554 (“policy’ of *allowing discretion* by local supervisors” is “the opposite of a uniform employment practice” that provides “commonality”).

Plaintiffs cannot challenge “an abstract policy.” *Falcon*, 457 U.S. at 159 n.15; see *Lewis v. City of Chi.*, 643 F.3d 201, 205 (7th Cir. 2011) (“In disparate-impact litigation” focus is not the policy “standing alone” but its “*application*”). And these neutral policies do not “dictate” outcomes. Br. 20. As Judge Gettleman found, they “de-

pend in their implementation on discretionary decisions.” A3. Judge Gettleman’s factual finding is unassailable and entitled to deference.

Plaintiffs’ experiences are too diverse to establish the class “cohesion” necessary under Rule 23(b). *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). As Judge Gettleman observed, some plaintiffs “were hugely successful financially, while others never got through the FA training program.” A20. Dissimilarities among class members mean that no “single injunction” would “provide relief to” all. *Wal-Mart*, 131 S. Ct. at 2557. Dissimilarities also mean that individual issues “would completely overwhelm any common issue.” A28-29. More than 700 “unmanageable” and “inefficient” jury trials, “involv[ing] different witnesses” and proofs, would be required to determine liability and remedies. A9. When “class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually-tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims.” *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008); accord *Randall v. Rolls-Royce*, 637 F.3d 818, 826 (7th Cir. 2011) (an “injunction is not a final remedy if it would merely lay an evidentiary foundation for subsequent determinations of liability”).

The absence of any common issue as defined in *Wal-Mart* makes plaintiffs’ request for issue certification under Rule 23(c)(4) untenable. And a class trial here would not make the litigation more efficient. Plaintiffs’ experiences turn on localized decisions, not national policies uniformly applicable to all. Because the proposed class lacks cohesion, a class trial would not establish liability for a single

class member, but would be a prelude to hundreds of full-blown jury trials challenging countless discretionary decisions by thousands of local managers and FAs. That procedure is particularly unnecessary because Title VII provides ample incentive to sue individually. Issue certification would promote *inefficiency*, doing nothing to obviate additional complex proceedings.

Plaintiffs' doomsday predictions that Judge Gettleman's rulings "spell the end for employment discrimination class actions" are absurd. Br. 22. Judge Gettleman did not hold that disparate impact claims require proof of discriminatory "motive." Br. 27. He concluded that because any discrimination here would result from local, highly-individualized implementation of policies rather than the policies themselves, plaintiffs must provide "some glue holding the alleged reasons" for the local decisions together. *Wal-Mart*, 131 S. Ct. at 2552. Nor did Judge Gettleman hold that follow-on proceedings to resolve individual issues "inevitably bar class treatment." Br. 30. He understood that it is "possible in an appropriate case to certify a company-wide class involving multiple branch offices." A28. But "this is not the appropriate case" (*ibid.*) because plaintiffs identify no central question uniformly applicable to all class members that a class trial could efficiently resolve.

ARGUMENT

I. The Appeal Should Be Dismissed Because Plaintiffs' Petition Was Untimely.

A motions panel's unexplained decision "whether an appeal should be heard" under Section 1292(b) is "revisable by the merits panel." *Johnson v. Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991). Likewise, a motions panel's ruling on the timeliness

of a Rule 23(f) petition “does not block full consideration by the merits panel.” *Asher*, 505 F.3d at 739. This Court should dismiss the appeal.

A. Rule 23(f) does not permit a second bite at interlocutory review.

Plaintiffs’ request for Rule 23(f) review of Judge Gettleman’s September 2011 order is untimely under the Rule’s 14-day time limit. Plaintiffs’ motion for reconsideration of Judge Gettleman’s August 2010 order “defer[red] the time for appeal” (*Blair v. Equifax Check Servs.*, 181 F.3d 832, 837 (7th Cir. 1999)) until Judge Gettleman denied reconsideration in February 2011. Plaintiffs’ second Rule 23(f) petition, *filed seven months after Judge Gettleman denied reconsideration*, comes far too late. See *Asher*, 505 F.3d at 739.

Plaintiffs erroneously claim they get a second bite at interlocutory review because they timely sought Rule 23(f) review of the February 2011 order and then sought Rule 23(f) review within 14 days of the September 2011 order. Pet. II 10. But Judge Gettleman’s September 2011 order “[le]ft class-action status unchanged” (*Fleischman*, 639 F.3d at 332), holding that nothing in *Wal-Mart* “changes the conclusion that this court had reached on two prior occasions.” A2. Therefore, the September 2011 order is not “an order granting or denying class-action certification” subject to Rule 23(f) review. Only the February 2011 order was reviewable under Rule 23(f)—and this Court denied review.

“Rule 23(f) is an exception” to the final judgment rule “used sparingly lest [it] increase the time and expense required for litigation.” *Asher*, 505 F.3d at 741. But under plaintiffs’ approach, Rule 23(f)’s time limit “would not be worth anything.” *Id.*

at 739. Plaintiffs could file repetitive motions for reconsideration that open new windows for interlocutory review. That would violate the command that Rule 23(f) provides “only one window of potential disruption” (*Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999)), and must not “undermin[e] ‘efficient judicial administration.’” *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009).

Plaintiffs assert that their “amended” motion was not for reconsideration, but was a “new motion” based on *Wal-Mart*. Pet. II 3. But a motion’s “caption” is irrelevant; otherwise, “a litigant could defeat the function of the [14]-day line drawn in Rule 23(f)” by “styling a motion to reconsider” as something else. *Gary*, 188 F.3d at 893. And if *Wal-Mart*—which flatly rejects plaintiffs’ theories—supports a successive petition, then *every* losing petitioner could hypothesize some intervening development to justify another petition.

Recognizing that problem, *Asher* rejected the argument that changed circumstances justify an end-run around Rule 23(f)’s time limit. There, the district court denied three class-certification motions because successively-proposed lead plaintiffs were inadequate. The motions “were different enough that the district court could not have invoked the law of the case to reject any of them.” 505 F.3d at 739. Nevertheless, this Court dismissed plaintiffs’ petition for review of the third order because Rule 23(f)’s deadline “cannot be extended by making another motion for class certification.” *Ibid.*

Allowing successive petitions limited to “new elements” in a motion for reconsideration would require appellate courts to determine whether there are any such

elements (there are none here except plaintiffs' inexplicable reliance on *Wal-Mart*) and whether they "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 these "mental gymnastics," just to give plaintiffs "a second bite at the interlocutory-appellate-review apple," is inappropriate. *Ibid.* While "parties may suggest such changes as the factual record and legal theories develop," "there can be no Rule 23(f) appeal from the denial of such a suggestion." *Ibid.*

B. Plaintiffs may not use Section 1292(b) to circumvent Rule 23(f)'s time limit.

Plaintiffs' petition for Section 1292(b) review of Judge Gettleman's August 2010 and February 2011 orders is procedurally improper. *Richardson Electronics* "ma[d]e clear" that this Court will not authorize a Section 1292(b) appeal "when appeal might lie under Rule 23(f)." 202 F.3d at 959. When a Rule 23(f) appeal does not lie because it is time-barred, Section 1292(b) cannot be used to evade the Rule's mandatory time limit.

Plaintiffs suggest (Pet. II 15) that *Richardson Electronics* was overruled when *Asher* stated that failure to file a timely Rule 23(f) petition "ended the opportunity for interlocutory review under Rule 23(f), leaving §1292(b)" as an option. 505 F.3d at 740. But *Asher* suggested only that petitioners could invoke 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.* at 738 ("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”). *Richardson Electronics*’ holding that Section 1292(b) cannot be used to evade Rule 23(f)’s time limit remains good law.

Furthermore, a Section 1292(b) motion must be filed “within a *reasonable time* after the order sought to be appealed.” *Ahrenholz v. Bd. of Trs.*, 219 F.3d 674, 675 (7th Cir. 2000). Plaintiffs sought review seven months after Judge Gettleman’s February 2011 order. 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. *Richardson Elecs.*, 202 F.3d at 958 (two-month delay provided “sufficient grounds” to deny Section 1292(b) review).

In addition, plaintiffs’ petition does not satisfy Section 1292(b) because Judge Gettleman said nothing about certifying his August 2010 and February 2011 orders. His September 2011 order stated only that he “would support a motion for an interlocutory appeal” of “*this* decision.” A4 (emphasis added). That conditional statement is not enough to permit review of even the September 2011 order, because it 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, 626-627 (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 “explai[n] *why*” it “satisfies the statutory criteria.” *In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

Nor could it: Judge Gettleman’s rulings present no “abstract legal issue” that this Court “could decide quickly and cleanly without having to study the record.” *Ahrenholz*, 219 F.3d at 676-677; see *Richardson Elecs.*, 202 F.3d at 958 (predominance determination was “too fact-specific to be suitable for a 1292(b) appeal”). 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,” so this appeal should be dismissed. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).²

II. Judge Gettleman Did Not Abuse His Broad Discretion By Denying Class Certification.

Class actions are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart*, 131 S. Ct. at 2550. To justify class adjudication plaintiffs must prove compliance with Rule 23. *Id.* at 2551. And courts must engage in a “rigorous analysis” of plaintiffs’ evidence because “actual, not presumed, conformance” with Rule 23 is “indispensable.” *Ibid.*; see *Thorogood v. Sears, Roebuck*, 547 F.3d 742, 746 (7th Cir. 2008) (requiring “caution in class certification”).

Plaintiffs are not entitled to *de novo* review. Br. 22. They challenge only Judge Gettleman’s application of settled law to particularized facts. Judge Gettleman’s

² If the Court considers the merits of this appeal, its review should be confined to the only “new” issue asserted by plaintiffs: the impact of *Wal-Mart*.

“factual findings”—*e.g.*, that challenged policies “depend in their implementation on discretionary decisions” (A3) under Merrill Lynch’s “decentralized procedures” (A20)—are reviewed only for “clear error.” *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). And because Rule 23 gives district courts “broad discretion,” Judge Gettleman’s application of law to facts is reviewed “only for an abuse of discretion.” *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). 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.’” *Ibid.* Plaintiffs fall far short of that standard.

A. *Wal-Mart* confirms Judge Gettleman’s rulings.

Wal-Mart—the Supreme Court’s latest word on class certification—confirms Judge Gettleman’s rulings. See, *e.g.*, *Bennett v. Nucor Corp.*, 656 F.3d 802, 814-816 (8th Cir. 2011) (rejecting certification of disparate impact and treatment classes under *Wal-Mart* because employer’s “decentralized management structure” delegated “discretion” to decisionmakers); *Bell v. Lockheed Martin*, 2011 WL 6256978, at *8 (D.N.J. Dec. 14, 2011) (rejecting certification of disparate impact class under *Wal-Mart* because claims “depend on the discretion of individual managers” in different facilities).

The *Wal-Mart* plaintiffs asserted disparate impact and treatment claims, alleging discrimination against women in pay and promotions. The Supreme Court held that the “wide gap” between an individual discrimination claim and “a class of persons who have suffered the same injury as that individual” may be bridged only

with “[s]ignificant proof that an employer operated under a general policy of discrimination.” 131 S. Ct. at 2553. Such proof “conceivably could justify a class” if “discrimination manifested itself” in “the same general fashion, such as through entirely subjective decisionmaking processes.” *Ibid.* But the Court found no evidence of such a policy. In fact, “Wal-Mart’s announced policy forbids” discrimination. *Ibid.*

Similarly, plaintiffs here identify no “general policy of discrimination.” To the contrary, Merrill Lynch forbids race discrimination and devotes substantial resources to affirmative action. Plaintiffs assert that this case is the “polar opposite” of *Wal-Mart* because they challenge teaming and account distribution policies that “apply uniformly” (Br. 31-32), but that simply is not true. Judge Gettleman found those policies *do not* apply uniformly, but rather “depend in their implementation on discretionary decisions.” A3. Merrill Lynch’s teaming policy delegates discretion to local managers to approve or disapprove teams and gives FAs discretion over whether, with whom, and how to team. *Supra*, pp. 7-11. Merrill Lynch’s account distribution policy gives local managers discretion in implementing and departing from the policy, while FAs have discretion in deciding whether to take steps to improve their ranking, whether to participate in distributions, and which accounts to select. *Supra*, pp. 11-14.

Like plaintiffs in *Wal-Mart*, plaintiffs’ complaint here is with Merrill Lynch’s “policy’ of *allowing discretion*” by local managers and FAs. 131 S. Ct. at 2554; see

A3-A4. That “is just the opposite of a uniform employment practice that would provide the commonality needed for a class action.” *Wal-Mart*, 131 S. Ct. at 2554.

The Supreme Court in *Wal-Mart* found it “unbelievable that all managers would exercise their discretion in a common way without some common direction.” *Id.* at 2555. Left “to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity.” *Id.* at 2554. “Others” might “reward various attributes that produce disparate impact.” *Ibid.* “And still other managers may be guilty of intentional discrimination.” *Ibid.* Therefore, “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims”—whether “under a disparate-impact” or pattern-and-practice theory—“will in fact depend on the answers to common questions.” *Ibid.* The same is true here: “there is nothing to unite all of the plaintiffs’ claims.” *Id.* at 2557 n.10.

The “three forms of proof” the Supreme Court held inadequate for class certification are the same kinds of evidence plaintiffs rely on here. *Id.* at 2549. First, plaintiffs in *Wal-Mart* relied on Dr. Bielby, who testified that “Wal-Mart has a ‘strong corporate culture,’ that makes it ‘vulnerable’ to ‘gender bias.’” *Id.* at 2553. Bielby could not, however, “calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” *Ibid.* Because

“Bielby admittedly has no answer to that question,” the Court held, “we can safely disregard what he has to say.” *Id.* at 2554.

Plaintiffs cite the same theory proffered by the same sociologist with the same defect. As in *Wal-Mart*, Bielby theorized that Merrill Lynch has a “culture” of discrimination that reduces the likelihood that African Americans team or receive account distributions. D312-5 ¶87. But Bielby admitted that he did not “study any individual decision,” that the “culture” would not cause every manager to use “discretion in a way that favors whites over African Americans,” and that individual factors may “counteract” bias. D314-3 at 101, 104-105, 136. Bielby could not even say whether racism or a relative lack of success explains why African-American FAs team less frequently than whites. *Id.* at 135-136. Because that is the “essential question,” this Court “can safely disregard what [Bielby] has to say.” *Wal-Mart*, 131 S. Ct. at 2554.

Second, just as plaintiffs in *Wal-Mart* offered evidence of “statistically significant disparities” in pay and promotions (*id.* at 2555), plaintiffs here cite aggregate statistical disparities in teaming and account distributions. But *Wal-Mart* held that an “overall sex-based disparity does not suffice.” *Id.* at 2556. Aggregate statistics did “not establish the existence of disparities at individual stores.” *Id.* at 2555. Even uniform disparities “would still not demonstrate” commonality because “[s]ome managers will claim that the availability of women, or qualified women, or interested women, in their stores’ area does not mirror the national or regional statistics,” and “almost all of them will claim to have been applying some sex-neutral,

performance-based criteria—whose nature and effects will differ from store to store.” *Ibid.*

Finally, here and in *Wal-Mart* plaintiffs offered anecdotal evidence. These anecdotes are “too weak” to “demonstrate that the entire company ‘operate[s] under a general policy of discrimination.” *Id.* at 2556. Indeed, Judge Gettleman found that the anecdotal evidence only “underscore[s]” declarants’ “vastly different” experiences. A25. Some “thrived while others did poorly. They have little in common but their [race] and this lawsuit.” *Wal-Mart*, 131 S. Ct. at 2557.

Plaintiffs’ assertion that *Wal-Mart* improves their position is absurd. *Wal-Mart* is controlling and requires affirmance.

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

Plaintiffs satisfy neither the commonality nor typicality requirements, which “tend to merge.” *Wal-Mart*, 131 S. Ct. at 2551 n.5. “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.* at 2551. What matters is not common *questions*, “but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Ibid.* A decentralized system that gives local decisionmakers discretion—a “presumptively reasonable way of doing business” that “raise[s] no inference of discriminatory conduct” (*id.* at 2254)—destroys commonality and typicality.³

³ See *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 460-461 (N.D. Ill. 2009); *Ellis v. Elgin Riverboat*, 217 F.R.D. 415, 424 (N.D. Ill. 2003); *Abram v. UPS*, 200 F.R.D. 424, 428 (E.D. Wis. 2001); *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.*,

Judge Gettleman’s rulings faithfully apply that law to this long record. He found that Merrill Lynch’s national policies do not apply uniformly (A19), and that plaintiffs fail to tie either policy to compensation disparities. A3. Instead, any discrimination results from “decentralized” decisions by thousands of managers and FAs who make “discretionary decisions” confined to varying degrees by national policies. This means that no two plaintiffs’ stories are alike. A20. 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. Due to “countless decisions” by local managers and FAs, plaintiffs “had totally different experiences.” *Ibid.*

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. D314-9 at 8, 143-150, 263-264. Plaintiff Rocky Howard is an unsuccessful FA in Texas. He testified to personal problems that impeded his performance, had no significant community ties, and devoted substantial time to tango dancing. D337-2 at 49-52, 79-83. Liability would thus “depend upon any

1999 WL 436579, at *6-*7 (N.D. Ill. June 21, 1999); *Bennett*, 656 F.3d at 814-816; *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Bacon v. Honda of Am.*, 370 F.3d 565, 570-574 (6th Cir. 2004); *Allison v. Citgo Petroleum*, 151 F.3d 402, 418 (5th Cir. 1998); *Stastny v. S. Bell Tel.*, 628 F.2d 267, 275-279 (4th Cir. 1980). Plaintiffs say these cases involved multiple jobs, but their focus, as in *Wal-Mart*, was on the decentralized structure that gave local managers discretion. And the FA position is highly diverse because each FA operates “a business within a business” in vastly different ways. *Supra*, pp. 5-6. While Merrill Lynch maintained “a framework of objective national policies” (D312-2 at 38), those general race-neutral policies were *implemented* through discretionary decisions.

number of factors peculiar” to individual claimants. *Patterson v. GM Corp.*, 631 F.2d 476, 481 (7th Cir. 1980).

Plaintiffs’ efforts to manufacture commonality out of aggregate statistics fail because they cannot paper over the manager and FA discretion through which the policies are implemented. As *Wal-Mart* makes clear, “overall” disparities do not establish commonality. 131 S. Ct. at 2556. Courts thus routinely deny certification of disparate impact and treatment classes on commonality grounds when similar statistics fail to “bind together the individualized nature of [the] claims.” *Bennett*, 2000 WL 781868, at *5; accord *Bennett*, 656 F.3d at 815-816; *Cooper*, 390 F.3d at 716-719; *Abram*, 200 F.R.D. at 431; *Betts*, 1999 WL 436579, at *7; see *Balderston v. Fairbanks Morse Engine*, 328 F.3d 309, 319-320 (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”).

Teaming statistics. Plaintiffs pretend their statistics establish a “causal link” between Merrill Lynch’s teaming policies and asserted disparities. Br. 7. But plaintiffs identify no teaming policy that caused the alleged disparity other than the “policy” of giving discretion to FAs to decide whether and with whom to team. As Judge Gettleman held, the decision “whether to join a team or to be invited to join a team would depend on a myriad other decisions by supervisors and the FAs themselves.” A3-4. While some FAs might not team with an African American “for discriminatory reasons,” others “may decline for personal or professional reasons.” A4. As in *Wal-*

Mart, “demonstrating the invalidity of one [FA’s] use of discretion will do nothing to demonstrate the invalidity of another’s.” 131 S. Ct. at 2554.

Plaintiffs’ statistician, Dr. Madden, merely reported the existence of racial disparities in team participation, making no effort to tie them to any policy. And Madden’s conclusion that African Americans team less frequently failed to account for uncontradicted evidence that FA success, not race, controls the rate of team formation: FAs want successful teammates. D312-18 at 44-47; *supra*, p. 9; see *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616-617 (7th Cir. 2000) (statistics that fail to “take into account nondiscriminatory explanations d[o] not permit an inference’ of discrimination”). Madden’s failure to control for FA success is inexplicable given Dr. Bielby’s acknowledgment that “a lot of factors” influence teaming decisions (D314-3 at 82), and that “regardless of color, less successful FAs” are “much less likely to be on teams.” *Id.* at 85. Similar inadequacies in Madden’s work have led courts to reject her analyses. See *Cooper*, 390 F.3d at 717-718; *Puffer*, 255 F.R.D. at 465.

Account distribution statistics. Madden asserted that African-American FAs on average receive fewer distributions than whites, but did not study how Merrill Lynch’s policy operated or control for FA rankings under the policy. D312-2 at 26. Disparities disappear when FA rank is considered. D312-18 at 36; *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1045 (7th Cir. 1988) (“failure to control for differences in rank” rendered statistics “worthless”). Madden ignored elements of the policy—including the “best-ball” criterion that boosted the rank of poorer performers who achieved an increase in business—that Bielby admitted are not discriminatory.

D314-3 at 90-93. Madden justified this ostrich-like approach by asserting that the criteria are “potentially” tainted (D312-13 at 4-5)—but did nothing to show this was true or tie any tainted criteria to asserted disparities in account distributions.

Plaintiffs complain about the policy’s consideration of team membership in allocating accounts of departing team members. Br. 8. But without proof that teaming is discriminatory, that cannot be faulted. Plaintiffs also criticize FA-to-FA transfers of accounts outside the policy (*ibid.*), a practice that *benefited* plaintiffs like Jennifer Madrid. In any event, these were individualized decisions by thousands of FAs in hundreds of offices across the country.

Cultural boundaries. In search of a common issue, plaintiffs say Merrill Lynch’s African-American CEO, Stan O’Neal, blamed “racial bigotry” by “customers and society,” creating a “class-wide defense.” Br. 12, 28. O’Neal rejected that characterization of his testimony. D356-8 at 148. He made the different point—grounded in experience—that because whites hold most of the nation’s wealth, African-American FAs must “reach across racial and cultural community boundaries” to succeed. *Id.* at 130-131. Judge Gettleman understood that a fact-finder must examine each FA’s circumstances to determine if difficulties crossing cultural boundaries, differences in access to wealth, or any of a host of other factors explain outcomes. A10-11.⁴

⁴ Merrill Lynch’s willingness to jointly request an MDL does not “admit” commonality. Br. 29. 28 U.S.C. §1407 and Rule 23 serve “significantly different” purposes. Herr, *Multidistrict Litigation Manual* §5:11. And MDL courts routinely deny class certification. Herrmann & Bownas, *An Uncommon Focus on “Common Questions,”* 82 Tul. L. Rev. 2297, 2310 n.83 (2008) (collecting cases).

C. Adequacy is lacking because plaintiffs compete over scarce resources and attack policies that benefit many class members.

Plaintiffs cannot adequately represent class members who “compete” with one another for benefits. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980); see *Patterson*, 631 F.2d at 482 (no adequacy where “other members of the purported class may have been in competition with plaintiff for the promotion” he “was allegedly denied”); Fed. R. Civ. P. 23(a)(4). FAs compete over a finite number of account distributions and desirable teammates. Bielby concedes these “scarce resource[s]” have “a ‘zero-sum’ quality” because “what gets allocated to one person or team cannot also be allocated to another.” D312-4 at 17-18. Such conflicts would infect the litigation. See *Sec’y of Labor v. Fitzsimmons*, 805 F.2d 682, 698 (7th Cir. 1986) (no adequacy where “for every dollar” spent on one class member there is “one less dollar” for another); *E. Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 405 (1977).

The conflict is stark. Unsuccessful FAs may prefer a policy that distributes accounts regardless of production; successful FAs benefit from the current policy. Where some claimants “benefit from the very same conduct alleged to be wrongful,” “no circuit has approved” class certification. *Valley Drug v. Geneva Pharm.*, 350 F.3d 1181, 1190 (11th Cir. 2003); see *Spano v. Boeing Co.*, 633 F.3d 574, 587 (7th Cir. 2011) (no adequacy where “some members will actually be harmed by [requested] relief”); *Retired Chi. Police Ass’n v. City of Chi.*, 7 F.3d 584, 598 (7th Cir. 1993); *Bieneman v. City of Chi.*, 864 F.2d 463, 465 (7th Cir. 1988).

D. Judge Gettleman correctly denied Rule 23(b)(2) certification because the class is not cohesive.

Rule 23(b)(2) does not permit certification because plaintiffs' claims for compensatory and punitive damages and backpay are not "incidental" to the requested injunctive relief (*Wal-Mart*, 131 S. Ct. at 2557-2558), as plaintiffs concede. D471 at 10.

Even aside from plaintiffs' claims for monetary relief, no part of this case can be certified under Rule 23(b)(2). Judge Gettleman found, based on his review of the record, that plaintiffs did not establish that any common policy discriminated or caused disparities in FA compensation. A3. Instead, Judge Gettleman found, plaintiffs challenge countless decisions by thousands of local managers and FAs who exercised discretion in implementing changing policies. Merrill Lynch's conduct thus does not "apply generally to the class," as (b)(2) requires; "each individual claim" is unique. A24; see *Stastny*, 628 F.2d at 280 n.20 ("If facility concentrated discrimination" is involved, then employer has not acted "on grounds generally applicable" under (b)(2)).

"Rule 23(b)(2) applies only when a single injunction" would "provide relief to each member of the class"—not "when each individual class member would be entitled to a different injunction." *Wal-Mart*, 131 S. Ct. at 2557-2558. It requires that class members have "cohesive" interests so that "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union*, 216 F.3d 577, 580 (7th Cir. 2000). Here, "variance in circumstances" destroys cohesion and would make the effect of injunctive relief on individual class members "vary with their

particular circumstances.” *In re Allstate*, 400 F.3d 505, 508 (7th Cir. 2005). Unsurprisingly, plaintiffs failed “[a]t the class certification stage” to describe the injunctive relief they seek “in reasonably particular detail,” as Fed. R. Civ. P. 65(d)(1) requires. *Shook v. Bd. of Cnty. Comm’rs*, 543 F.3d 597, 605 (10th Cir. 2008); see *Kartman v. State Farm*, 634 F.3d 883, 893 (7th Cir. 2011) (“injunction may not be so vague to operate at a ‘stratospheric level of abstraction’”).

Any injunction that might satisfy Rule 65(d)—*e.g.*, instituting forced teaming or distributing accounts without regard for production—would chill lawful conduct and harm many class members. Successful FAs like plaintiff LaRue Gibson benefit from the account distribution policy’s consideration of production and want the final say regarding teammates. And it would not provide “final” relief required under Rule 23(b)(2). As in *Randall*, an injunction “would merely lay an evidentiary foundation for subsequent determinations of liability,” “backpay,” and damages in 700 “separate hearings.” 637 F.3d at 826. “The monetary tail would be wagging the injunction dog.” *Ibid.*; see *Andrews*, 545 F.3d at 577 (reversing (b)(2) certification because declaratory relief “would only *initiate*” individual actions).

E. Judge Gettleman’s denial of Rule 23(b)(3) certification applied settled law in rejecting a class that would require 700 follow-on trials to determine liability and remedies.

Plaintiffs did not establish predominance. Rule 23(b)(3)’s requirement that common questions “predominate” “is far more demanding” than commonality. *Amchem*, 521 U.S. at 624. Predominance focuses on “the proof necessary” to establish “the substantive elements” of plaintiffs’ claims. *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981). It 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 *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009). When “class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies,” common issues do not predominate. *Andrews*, 545 F.3d at 577.

Here, class certification would require 700 follow-on trials to resolve individual issues determinative of liability and remedies:

- An “essential” element of both disparate impact and treatment 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). Judge Gettleman held in rejecting a disparate impact class that plaintiffs “fail[ed] to account for the requirement that the identified policy must have caused” their alleged injuries. A3. Determining causation would turn on “different witnesses and proofs” showing why a particular claimant did not receive a particular account allocation or join a particular team. *Puffer*, 255 F.R.D. at 471; accord *Wal-Mart*, 131 S. Ct. at 2552; *Allison*, 151 F.3d at 424; *Radmanovich v. Combined Ins.*, 216 F.R.D. 424, 436-437 (N.D. Ill. 2003); see *Amchem*, 521 U.S. at 624; *Siegel v. Shell Oil*, 612 F.3d 932, 936 (7th Cir. 2010).

- To determine “the reason for a particular employment decision” (*Wal-Mart*, 131 S. Ct. at 2552), Judge Gettleman recognized, different proof would be needed for “each” class member to determine “the motivation of each supervisor” and FA making challenged decisions. A27; accord *Wal-Mart*, 131 S. Ct. at 2552; *Puffer*, 255

F.R.D. at 471-472; *Rutstein v. Avis Rent-A-Car*, 211 F.3d 1228, 1235 (11th Cir. 2000).

- Judge Gettleman correctly held that Merrill Lynch’s defenses also necessitate individual inquiries. A26. Merrill Lynch is “entitled” to show that each decision was lawfully made and that under the “mixed motive” defense claimants would not have received the benefits they seek even absent discrimination. *Gross v. FBL Fin.*, 129 S. Ct. 2343, 2349 (2009); *Wal-Mart*, 131 S. Ct. at 2560. *Wal-Mart* held that these defenses require “individualized determinations.” *Ibid.*; see *Rodriguez*, 431 U.S. at 404 n.9; *Reeb v. Ohio Dep’t of Rehab.*, 435 F.3d 639, 651 (6th Cir. 2006).

- Firm policies changed often during the class period. D313-51 ¶109 & Ex. C. That necessitates individual inquiry because plaintiffs “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); see *Abram*, 200 F.R.D. at 431-432.

- Plaintiffs’ demand for compensatory and punitive damages and backpay also requires “individualized analysis.” *Lemon*, 216 F.3d at 581; see *Allison*, 151 F.3d at 419; *Wal-Mart*, 131 S. Ct. at 2557; *Thorogood*, 547 F.3d at 748.⁵

⁵ *Lemon* forecloses plaintiffs’ argument (Br. 45) that punitive damages can be determined classwide before liability to any class member has been established. 216 F.3d at 581; see *Allison*, 151 F.3d at 417-418. Plaintiffs also err in suggesting (Br. 44) that compensatory damages could be determined in a (b)(3) class under *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004). In *Biondo*, claims by applicants for promotions in the Chicago Fire Department could be tried in groups because all challenged the same standardized test. Here, plaintiffs’ claims are individualized and, Judge Gettleman found, it would be “impossible” to “combine the cases into smaller groups” because “each” plaintiff “worked in separate branch offices.” A9. Plaintiffs concede as much. D488 at 34. And *Wal-Mart* did not hold that “backpay claims are appropriate for class treatment under Rule 23(b)(3)” (Br. 43)—just that (b)(3) supplies the only possible basis for certifying backpay claims. 131 S. Ct. at 2557-2558.

Amchem held that the class was insufficiently cohesive under Rule 23(b)(3) because claimants were exposed to different products at different times resulting in different (or no) injuries and varying defenses that “complicate[d] the causation inquiry.” 521 U.S. at 624. The class here is similarly uncohesive: claimants worked under different local managers and with different fellow FAs who exercised discretion differently in implementing different policies at different times in different offices. Some had good teaming experiences and received desirable accounts, some did not; some succeeded, some failed. As Judge Hamilton held in denying certification of an employment discrimination class on predominance grounds, “[s]eparate ‘mini-trials’—equivalent to full trials of individual claims”—would be necessary to determine whether Merrill Lynch policies caused harm to individual class members. *Rochlin v. Cincinnati Ins. Co.*, 2003 WL 21852341, at *12 (S.D. Ind. July 8, 2003).

Plaintiffs did not establish superiority. The need for “hundreds” of “individual proceedings requiring individually tailored remedies” means a class action would not “be the superior means to adjudicate the claims.” *Andrews*, 545 F.3d at 577. Courts repeatedly have denied certification of employment discrimination classes that “would not eliminate the need” for unmanageable individual proceedings. *Puffer*, 255 F.R.D. at 472; accord *Allison*, 151 F.3d at 419; *Remien v. EMC Corp.*, 2008 WL 4067324, at *5 (N.D. Ill. Aug. 28, 2008).

Plaintiffs argue that if left to sue individually, class members will use “the same evidence,” risking “duplicative trials and inconsistent rulings.” Br. 41-42. But as Judge Gettleman found, plaintiffs’ experiences result from localized decisions, not

national policies. A3-A4. Trials of class members' claims will revolve around highly-individualized testimony from local managers and FAs.

This is not a case where class certification is needed “to afford putative class members an opportunity to litigate.” *Puffer*, 255 F.R.D. at 473; see *Nagel v. ADM Investor Servs.*, 217 F.3d 436, 443 (7th Cir. 2000). Far more is at stake than the \$50,000 held to provide adequate incentive to litigate individually in *Andrews*. 545 F.3d at 577. A prevailing plaintiff in an individual suit may recover backpay, \$300,000 in compensatory and punitive damages, and attorneys' fees. 42 U.S.C. §2000e-5(g), (k), §1981a(b)(3). Merrill Lynch FAs are particularly unlikely to be deterred from suing individually because claims by “employees in these salary brackets could be substantial.” *Puffer*, 255 F.R.D. at 473; see *Reeb*, 435 F.3d at 651; *Allison*, 151 F.3d at 420. Plaintiffs have made clear that class members have “a large enough stake to be able to litigate on [their] own” (*Pastor v. State Farm*, 487 F.3d 1042, 1047 (7th Cir. 2007)), promising “to prosecute their disparate impact and disparate treatment claims” individually. Pet. I 17-18. Because “individual stakes are high and disparities among class members great,” certification is inappropriate. *Amchem*, 521 U.S. at 625.

Class adjudication would create “pressure for settlement” wholly “disproportionate to the actual merits of the suit.” *Thorogood v. Sears Roebuck*, 624 F.3d 842, 849 (7th Cir. 2010). A class trial would be “a roll of the dice” (*ibid.*), risking a substantial award to a large class and injunctive relief that might require Merrill

Lynch to dismantle policies essential to its \$13 billion-per-year private wealth business—the most successful in the U.S.

F. Issue certification would not make litigation of this uncohesive class more efficient.

Plaintiffs argue that Rule 23(c)(4) permits certification to resolve any common issue “even if the action as a whole could not meet the requirements of Rule 23,” and request a class trial to determine “the lawfulness of Merrill Lynch’s teaming and account distribution policies,” with individualized proceedings to follow. Br. 33-34. But Rule 23(c)(4) certification is improper because, as Judge Gettleman held in agreement with *Wal-Mart*, common issues are lacking. The “lawfulness” of Merrill Lynch’s policies is not a common issue, but turns on highly-individualized inquiries into the exercise of discretion by thousands of managers and FAs dispersed in different offices nationwide. *Supra*, pp. 33-37.

Even if this were a common issue, plaintiffs “cannot manufacture predominance through the nimble use of subdivision (c)(4).” *Castano v. Am. Tobacco*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). A “cause of action, as a whole,” must satisfy predominance; otherwise a court could “sever issues until the remaining common issue predominates,” resulting in “automatic certification in every case where there is a common issue.” *Ibid.*; accord *In re GM Corp. Prods. Liab. Litig.*, 241 F.R.D. 305, 314 (S.D. Ill. 2007); *Hyderi v. Washington Mut. Bank*, 235 F.R.D. 390, 398 (N.D. Ill. 2006); see *Randall*, 637 F.3d at 826 (citing Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 741-743 (2003)), which discusses with approval *Castano*’s interpretation of (c)(4)). As *Amchem* held, “parties seeking class certification must

show that the action is maintainable under Rule 23(b)(1), (2), or (3).” 521 U.S. at 614. Rule 23(c)(4) does not create a fourth option.

Plaintiffs’ proposal is irreconcilable with Circuit precedent rejecting certification when a class trial “only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies.” *Andrews*, 545 F.3d at 577. An issue-class trial would *not establish liability for even a single class member*, leaving causation and other individual issues for follow-on proceedings. And even if the district court could devise some generalized injunction applicable to the class as a whole, it “would merely lay an evidentiary foundation for subsequent determinations of liability,” “backpay,” and damages in 700 “separate hearings.” *Randall*, 637 F.3d at 826. Indeed, plaintiffs promise to pursue individual suits regardless of whether they prevail in a class trial. D488 at 28-31. Thus, issue certification would not make this litigation more efficient. See *Clark v. Experian Info. Solutions*, 256 F. App’x 818, 822 (7th Cir. 2007) (“need for individualized findings” meant that “little efficiency would be gained by certifying a class for only particular issues”); *Gates v. Rohm & Haas*, 655 F.3d 255, 272-274 (3d Cir. 2011) (relying on ALI’s Principles of Aggregate Litigation (2010), which applied here would bar issue certification); *McLaughlin v. Am. Tobacco*, 522 F.3d 215, 234 (2d Cir. 2008).

Sweeping use of Rule 23(c)(4) must be constrained by common-sense principles to ensure it does not eviscerate the Supreme Court’s teaching in *Amchem* and *Wal-Mart* that highly-disparate classes may not be certified. Where a class is as lacking in cohesion as this one—FAs worked in geographically-dispersed offices where hun-

dreds of managers exercised discretion to implement national policies that frequently changed, thousands of FAs made individual decisions affecting teaming and account allocation, and “[e]ach FA basically operates his or her own business within a business” (A14)—“differences within the class” make class adjudication of any sort inappropriate. *In re Bridgestone/Firestone*, 288 F.3d 1012, 1019 (7th Cir. 2002).

This is not a case like *Mejdrech v. Met-Coil Sys.*, 319 F.3d 910 (7th Cir. 2003), or *Pella Corp. v. Saltzman*, 606 F.3d 391, 393-394 (7th Cir. 2010), which raised “predominant issue[s]” that were “the same for all class members” and were not unduly “complex” (discharge of a pollutant into groundwater at one plant; design defect in one product and defendant’s alleged knowledge of defect), and the issues left to be resolved individually were relatively simple. Instead, this case falls squarely within the principle laid down in *Andrews* and *Randall* that fragmentary suits full of complex, highly-individualized issues that could only be resolved in individual trials are not suited to class treatment. There must be “a sufficient constellation of common issues” that “binds class members together” before issue certification is proper. *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006). Here there is not; “the essence of the dispute” is individual, not common. *Pella*, 606 F.3d at 393. And here, where plaintiffs are highly-compensated and can recover damages, punitive damages, and attorneys’ fees if they succeed—a case not remotely in “negative value” territory like *Pella* or *Carnegie v. Household Int’l*, 376 F.3d 656 (7th Cir. 2004)—there is no reason to strain for an issue to certify under (c)(4) to preserve the possibility of recovery.

Beyond this, a class trial to determine the “lawfulness” of Merrill Lynch’s policies followed by hundreds of jury trials to determine individual liability and remedies would threaten Merrill Lynch’s due process rights and violate the Seventh Amendment’s command that “juriable issues [be] determined by the first jury impaneled to hear them,” not “reexamined by another finder of fact.” *In re Rhone-Poulenc*, 51 F.3d 1293, 1303 (7th Cir. 1995). *Rhone-Poulenc* reversed issue certification in part because a classwide determination that defendants acted negligently would likely be reexamined by different juries in follow-on individual litigation examining comparative negligence and causation. Similarly, in determining “whether any particular plaintiff suffered discrimination” caused by Merrill Lynch’s policies and weighing any mixed-motive defense, follow-on juries would necessarily “unconstitutionally reexamine” the class jury’s findings. *Puffer*, 255 F.R.D. at 472; see *Allison*, 151 F.3d at 424-425. Partial certification could not “carve at the joint.” *Rhone-Poulenc*, 51 F.3d at 1302.

Limiting issue certification to plaintiffs’ claims for injunctive relief and backpay would not avoid jury trials. No classwide injunction could be entered here. *Supra*, pp. 39-40. If plaintiffs are “willing to forego class certification on damages” “to pursue injunctive relief that consisted of an admonition to follow general principles of settled law, it is far from clear that the named plaintiffs would adequately represent” the class. *Cooper*, 390 F.3d at 721. And because plaintiffs plan to pursue damages, those claims must be tried “first before a jury to preserve the Seventh Amendment right to a jury trial.” *Lemon*, 216 F.3d at 582.

Moreover, Title VII backpay is not an equitable remedy (see *Great-West Life v. Knudson*, 534 U.S. 204, 218 n.4 (2002)), but “virtually indistinguishable from an award for damages.” *Albemarle Paper v. Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring). Because plaintiffs have “an adequate remedy at law” (*Dairy Queen v. Wood*, 369 U.S. 469, 478 (1962)), juries—not judges—must resolve any class trial and follow-on backpay trials. See *Beacon Theatres v. Westover*, 359 U.S. 500, 509 (1959) (“equity has always acted only when legal remedies were inadequate”). Plaintiffs’ backpay claims also present “a fundamental issue of liability” that must be adjudicated by an Article III court (*Stauble v. Warrob, Inc.*, 977 F.2d 690, 695 (1st Cir. 1992)), not special masters. Br. 16.

Issue certification would be “neither ‘economical’ nor ‘efficient’” here, in contrast to cases plaintiffs cite. *Andrews*, 545 F.3d at 577.

- In *Allen v. Int’l Truck*, 358 F.3d 469 (7th Cir. 2004), plaintiffs worked in a single plant under the same supervisors, so a class trial could efficiently determine whether “plant-wide racial animosity” existed. A single injunction was proper because no class member benefited from, and an injunction could readily target, racial slurs and pictures of lynchings; here any injunction would fragment the class. *Id.* at 470-472.

- *Allstate* suggested an ERISA-benefits class trial might efficiently resolve whether Allstate had a blanket “policy of forcing its employee agents to quit” (400 F.3d at 508)—a “predominat[ing]” question that “equally applies to all class members,” unlike the discretionary local decisionmaking at issue here. *Flanagan v.*

Allstate Ins. Co., 228 F.R.D. 617, 623 (N.D. Ill. 2005). And in *Allstate* there was “no right to a jury trial” and damages could “be read off from the plan.” 400 F.3d at 507.

- In *Carnegie*, judicial estoppel barred defendants from contesting Rule 23 requirements save manageability because they previously urged class settlement. A class trial could economically resolve whether defendants violated RICO, the central question that applied equally to all class members; and claimants’ “modest stakes” made class litigation the only means of recovery. 376 F.3d at 659, 661.

Other cases relied on by plaintiffs are equally off-point. See *Mejdrech*, 319 F.3d at 911 (critical issue whether single factory leaked chemicals that contaminated local groundwater was “identical across all the claimants”); *Nassau Strip Search*, 461 F.3d at 221-222, 229-230 (“defendants conceded their liability” in challenge to “blanket policy,” leaving “de minimis” individual inquiry; claimants “lack an effective remedy” absent certification); *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 426, 429 (4th Cir. 2003) (not “particularly complex” “damage calculations” were left for follow-on proceedings and “few claims would be brought” absent certification).

G. Judge Gettleman correctly rejected a disparate impact class.

Plaintiffs argue that in citing “myriad” “reasons” why class members may not have received benefits (A4), Judge Gettleman incorrectly made “motive” part of their disparate impact claim. Br. 27. In fact, Judge Gettleman understood that a disparate impact claim does not require proof of discriminatory intent. A16-18. But Judge Gettleman also understood that when a “facially neutral employment practice” itself has “no impact” by race, plaintiffs are “really arguing” that the practice

“allows” decisionmakers to discriminate—a “disparate treatment” claim. *Griffin v. Bd. of Regents*, 795 F.2d 1281, 1287-1289 (7th Cir. 1986); accord *Senner v. Northcentral Technical*, 113 F.3d 750, 757 (7th Cir. 1997). Applying *Griffin* Judge Gettleman found, based on his exhaustive review of the record, that the complaint does not challenge “neutral policies” (A19 n.2) but rather “revolves around allegations of intentional discrimination.” A7.

Indeed, plaintiffs challenge neither Merrill Lynch’s decision to encourage teams nor its race-neutral guidelines governing team formation. Plaintiffs’ grievance is with decisions by thousands of FAs about whether and with whom to team and by hundreds of managers in approving or rejecting teams. A4. Plaintiffs’ complaints about account distributions also do not concern the policy itself, but a host of individualized decisions by FAs, and countless decisions by managers employing varying standards to distribute tens of thousands of accounts, as Bielby confirmed. D318-3 at 26.

Regardless of whether plaintiffs’ claims address disparate impact or treatment, they must prove causation. *Supra*, p. 41. Here, Judge Gettleman found, plaintiffs’ claims depend on countless “discretionary decisions.” A3. Those decisions cannot support a disparate impact class because, 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.” *Wal-Mart*, 131 S. Ct. at 2554.

Plaintiffs assert that by requiring proof that they suffered an adverse effect from the teaming and account distribution policies, Judge Gettleman erred because disparate impact causation focuses on the policies' "impact on a *group* as a whole, not on its individual members." Br. 27 (citing *Watson v. Fort Worth Bank*, 487 U.S. 977 (1988)). *Watson* says no such thing. And this Court has held that "a plaintiff must show that she was personally injured by the defendant's alleged discriminatory practice" to "bring a disparate impact claim." *Farrell*, 421 F.3d at 617. That is "all the more necessary" in class litigation, where plaintiffs must establish "a class of persons who have suffered the same injury." *Wal-Mart*, 131 S. Ct. at 2551, 2553; see *Garcia v. Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006) (Rule 23(a)(2) requires that class members "all suffered an adverse effect from the same facially neutral policy"). Plaintiffs cannot avoid proving individual causation simply by placing a disparate impact label on their claims.

H. Judge Gettleman correctly rejected a pattern-or-practice class.

Plaintiffs argue that Judge Gettleman's determination that individual liability and remedies issues prevent certification "inevitably bar[s] class treatment" of pattern-or-practice claims under *Teamsters v. United States*, 431 U.S. 324 (1977). Br. 30. But *Teamsters* requires a common issue that advances the litigation, not present here. And *Wal-Mart* rejected a proposal to dispense with individual hearings in an attempt to ease certification of pattern-or-practice claims, making clear that courts *must* assess how individual liability and remedies would be resolved in deciding whether to certify. 131 S. Ct. at 2561; accord *Randall*, 637 F.3d at 826; *Patterson*, 631 F.2d at 481; Rule 23, 2003 Comm. Note ("A critical need is to determine how the

case will be tried”). There is no *Teamsters* exception to Rule 23 that allows plaintiffs to hide individual liability and remedies issues from scrutiny.

Teamsters is also fundamentally different. It was a government suit not brought under Rule 23, so manageability and predominance were not required. A phase-one trial could efficiently answer whether the employer had a blanket policy of rejecting minority applicants. No such one-size-fits-all policy exists here. Phase-two proceedings in *Teamsters* were confined to the simple questions whether a claimant “wanted” the job and was “qualifi[ed]” (431 U.S. at 369), unlike the complex causation, injury, and defense inquiries necessary here. And as a non-jury suit where plaintiffs did not seek compensatory or punitive damages, *Teamsters* presented none of the fragmentary damages calculations or Seventh Amendment obstacles this case raises.

Plaintiffs also assert that Judge Gettleman misconstrued *Teamsters* by questioning at *oral argument* whether “it would be unfair” to accord plaintiffs a “presumption of discrimination.” Br. 30. Even if that were a proper basis for challenging three written opinions, *Wal-Mart* held that a presumption of discrimination cannot arise under *Teamsters* without “a common answer to the crucial question *why was I disfavored.*” 131 S. Ct. at 2552. No such common answer exists here.

Moreover, this case presents nothing like the clear-cut case for presuming intentional discrimination in *Teamsters*. Such a presumption was justified in *Teamsters* because the number of minority truck drivers hired for better-paying jobs neared “the inexorable zero” and managers stated bluntly that race prevented class mem-

bers from getting the job. 431 U.S. at 342 n.23, 338 & n.19. Here there are no tell-tale indicia of intentional discrimination. Merrill Lynch’s CEO was African American; the firm prohibits discrimination and devotes substantial resources to affirmative action; the firm’s policies are all race-neutral; and managerial discretion favored African Americans. D312-18 at 38-41, 51-68. Detecting any discrimination here would require scrutiny of individualized evidence.

Thus, Judge Gettleman’s rulings do not sound the death knell for pattern-or-practice class actions. In cases like *Allen*—where a phase-one trial could efficiently resolve a central question applicable to all class members and phase-two trials would be confined to determining the degree to which claimants in the same facility working for the same managers were harmed by the pattern or practice—certification of a *Teamsters* class may be appropriate. See *Wal-Mart*, 131 S. Ct. at 2551 (“discriminatory bias on the part of the same supervisor” may prove commonality). It also “may be possible in an appropriate case to certify a company-wide class,” Judge Gettleman observed. A28. But Judge Gettleman correctly found that “this is not the appropriate case.” *Ibid.*

CONCLUSION

The appeal should be dismissed or, alternatively, denial of class certification should be affirmed.

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Respectfully submitted,

/s/ Stephen M. Shapiro

Jeffrey S. Klein
Nicholas J. Pappas
Allan Dinkoff
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Timothy S. Bishop
Stephen M. Shapiro
Lori E. Lightfoot
Stephen J. Kane
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Attorneys for Appellee Merrill Lynch, Pierce, Fenner & Smith, Incorporated