IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Quinton Brown, Jason Guy, Ramon Roane, Alvin Simmons, Sheldon Singletary, Gerald White, and Jacob Ravenell, Individually and on behalf of the class they seek to represent,	)	**Civil Action No.: 2:04-22005-CWH**
Plaintiffs,	)	
vs.	)	**ORDER**
Nucor Corporation and Nucor Steel Berkeley,	)	
Defendants.	)	

This matter is before the Court on the defendants' motion for reconsideration of class certification ("motion for reconsideration") (ECF No. 346). For the reasons set forth in this order, the motion is denied.

I. BACKGROUND

The Court assumes familiarity with the facts and procedural history of this case, which are set forth in detail in the Court's order of February 17, 2011 (ECF No. 339). The following procedural history is relevant to the motion at hand. The original case was filed in the Western District of Arkansas on December 8, 2003, as a nationwide class action alleging employment discrimination against Nucor Corporation and several of its subsidiaries. The action was severed into four separate cases on August 24, 2004, and each case was transferred to the judicial district in which the unlawful employment practices allegedly occurred. The named plaintiffs in this particular

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case are seven African-Americans who are or were employed at the Nucor Steel plant in Huger, South Carolina. The plaintiffs allege that Nucor Steel Berkeley and Nucor Corporation ("the defendants") discriminated on the basis of race in their promotions. The plaintiffs advance causes of action for disparate treatment, disparate impact, and a hostile work environment.

On May 7, 2007, the plaintiffs moved to certify the following class:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments (hereafter "production departments") or, in the alternative, for such separate classes or subclasses of such persons as may be appropriate under the Federal Rules of Civil Procedure.

Mot. for Class Certification 1, ECF No. 184. On August 7, 2007, this Court denied the plaintiffs' motion for class certification, holding that the plaintiffs had failed to satisfy the requirements of Rule 23(a). Order Den. Mot. to Certify Class, Aug. 7, 2007, ECF No. 224. Two years later, on August 7, 2009, a 2-1 panel of the Fourth Circuit Court of Appeals reversed. In its initial order, the Fourth Circuit concluded that the plaintiffs had satisfied the requirements of Rule 23(a) and Rule 23(b)(3) and remanded the case to this Court "with instructions to certify the appellants' class action." Brown v. Nucor Corp., No. 08-1247, at 19 (4th Cir. Aug. 7, 2009), amended by Brown v. Nucor Corp., 576 F.3d 149 (4th Cir. 2009). On October 8, 2009, the panel modified its opinion by deleting its lone reference to Rule 23(b)(3). The portion of the majority's opinion instructing this Court to certify the class remained unchanged. Brown, 576 F.3d at 160.

On October 22, 2009, the defendants filed their motion for consideration of FRCP 23(b) and motion to deny class certification (ECF No. 308), urging this Court to analyze the putative class under Rule 23(b) and to deny class certification. On November 11, 2009, the plaintiffs responded

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in opposition (ECF No. 309), and the defendants filed a reply (ECF No. 310) on November 20, 2009. Although the Fourth Circuit remanded the case "with instructions to certify the appellants' class action," Brown, 576 F.3d at 160, the defendants insisted that the Fourth Circuit's opinion governed only the 23(a) analysis, and that this Court could deny class certification if it found that the plaintiffs had not satisfied Rule 23(b). In response, the plaintiffs argued that by instructing this Court to "certify the appellants' class action," the Fourth Circuit's opinion required this Court to certify a class under either Rule 23(b)(2) or a hybrid of 23(b)(2) and 23(b)(3) because those were the provisions pursuant to which the plaintiffs originally sought certification.

On February 17, 2011, this Court issued an order certifying a class under Rule 23(b)(3). The Court agreed with the plaintiffs that, in light of the Fourth Circuit's opinion, the Court was required to certify a class. Order Den. Defs.' Mot. to Den. Class Certification 11, Feb. 17, 2011, ECF No. 339 ("Order Granting Class Certification"). However, the Court also found that by removing its lone reference to Rule 23(b), the Fourth Circuit had given the Court discretion to conduct a Rule 23(b) analysis for the purpose of determining the type of class to certify. See id. at 13-15.[1] Accordingly, this Court carefully considered the plaintiffs' class under the various provisions of Rule 23(b). The Court found that the monetary relief sought by the plaintiffs predominated over the injunctive relief requested, and therefore, certification was not proper under Rule 23(b)(2). Id. at 23.

[1] Before conducting its analysis, this Court noted that "the question of which provision the plaintiffs' class satisfies essentially requires the same analysis as the question of whether the plaintiffs have satisfied any of the requirements at all." Order Granting Class Certification 15, Feb. 17, 2011, ECF No. 339. Thus, while the Fourth Circuit's opinion compelled a particular outcome (class certification in some form), the analysis required to reach that outcome was otherwise identical to the analysis the Court would have performed had the Fourth Circuit remanded the case with instructions to consider whether the appellants' class satisfies Rule 23(b).

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Furthermore, the Court declined to certify the class using a "(b)(2)/(b)(3) hybrid" because this approach is not well established within the Fourth Circuit. Id. at 24-25. At the same time, the Court acknowledged that certifying a separate subclass for plaintiffs seeking monetary relief might prove a workable solution. Id. at 25 n.11. Although the plaintiffs initially sought hybrid certification as an alternative to certification under Rule 23(b)(2), they never proposed any specific subclasses, and failed to address the defendants' arguments against the hybrid approach in their response. See id. 24-25.

Finally, the Court considered the putative class under Rule 23(b)(3), noting that although it retained discretion as to which type of class to certify, its evaluation of the facts was significantly constrained by the Fourth Circuit's ruling above. Id. at 27 ("[T]he Court of Appeals significantly altered the lens through which this Court must evaluate the facts relevant to an analysis under Rule 23(b)(3)."). Consequently, in considering whether the putative class satisfied Rule 23(b)(3), this Court could not revert to factual findings or assumptions that the Fourth Circuit had explicitly rejected in reversing this Court's analysis of Rule 23(a). After examining the putative class in light of the Fourth Circuit's opinion and applying the relevant factors under Rule 23(b)(3), this Court found that the putative class satisfied both the predominance and superiority requirements of Rule 23(b)(3) and certified the following class:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance, and shipping department.

Id. at 30.

On March 7, 2011, the defendants filed a motion for reconsideration (ECF No. 346) and a motion to stay the case (ECF No. 347) until the Supreme Court issues its opinion in Wal-Mart

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Stores, Inc. v. Dukes. On March 24, 2011, the plaintiffs filed a response in opposition (ECF No. 351), and the defendants filed a reply (ECF No. 354) on April 4, 2011. Additionally, the plaintiffs submitted a proposed class notice (ECF No. 348) on March 9, 2011. The defendants filed objections to the proposed notice (ECF No. 350) on March 11, 2011, and the plaintiffs filed a reply (ECF No. 353) on March 24, 2011. On April 6, 2011, the Court held a hearing to consider the parties' motions. The parties suggested that they be given additional time to confer regarding the proposed notice as many of the issues appear susceptible to resolution by mutual consent. The Court agreed and instructed the parties to confer and submit a new proposed notice. The Court indicated that it was reluctant to issue a stay given the age of the case and requested that the plaintiffs submit a letter proposing steps that might be taken to advance the case over the next several months while delaying dispositive motions until after the Supreme Court issues its opinion in Dukes. Finally, the Court heard arguments in support of and opposition to the motion for reconsideration, to which the Court now turns.

II. DISCUSSION

Motions to alter or amend an order under Rule 59(e) are disfavored, Stoudemire v. Branch Banking & Trust Bankcard Corp., No. 3:09-2485, 2010 WL 4340460 (D.S.C. Oct. 25, 2010), and should only be granted on three limited grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). A party's "mere disagreement" with a court's decision "does not support a Rule 59(e) motion." Id. at 1082. "Hindsight being perfect, any lawyer can construct a new argument to support a position previously rejected by the court, especially once the court has spelled out its reasoning in an order."

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Potter v. Potter, 199 F.R.D. 550, 553 (D. Md. 2001). Rule 59(e) was not designed to give parties "a second bite at the apple," Shields v. Shetler, 120 F.R.D. 123, 126 (D. Colo. 1988), and it "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 486 n.5 (2008) (quotation marks and citations omitted).

A. Request to Reconsider Certification Under Rule 23(b)(3)

The defendants advance two primary arguments in support of their motion to reconsider. First, the defendants claim that the parties have not had an adequate opportunity to present arguments regarding certification under Rule 23(b)(3). Second, the defendants argue that the plaintiffs have not satisfied the predominance and superiority requirements of Rule 23(b)(3), and thus the Court's decision to certify a class under Rule 23(b)(3) was a clear error of law.

1. The parties have not had an opportunity to address Rule 23(b)(3)

The defendants contend that because the plaintiffs never sought certification under Rule 23(b)(3), the defendants "never had the opportunity or the motive to fully brief the issue, much less request a hearing solely on 23(b)(3) factors." Mot. for Recons. 5, ECF No. 346. Thus, the defendants claim that the Court erred by certifying a class "sua sponte" without requiring the plaintiffs to satisfy the requirements of 23(b)(3) or affording the defendants an opportunity to contest the certification. Id.

A "court has an independent obligation to decide whether an action brought on a class basis is to be so maintained even if neither of the parties moves for a ruling under subdivision (c)(1)." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1785 (3d ed. 2005). Therefore, even if the Court did certify a (b)(3) class sua sponte, there is no

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clear error. Moreover, the defendants' contention that they lacked both an opportunity and a motive to address Rule 23(b)(3) is misleading. In fact, the defendants have repeatedly challenged the propriety of (b)(3) certification as a part of their opposition to the plaintiffs' request to certify a hybrid class. From the outset, the defendants maintained that the Court could only certify a hybrid class if the plaintiffs satisfied the requirements of both 23(b)(2) and 23(b)(3). See Resp. to Pls.' Mot. for Class Certification 57, ECF No. 197 (citing Lott v. Westinghouse, 200 F.R.D. 539, 563 (D.S.C. 2000)). Indeed, the defendants have repeatedly argued that the plaintiffs failed to satisfy the predominance and superiority requirements of Rule 23(b)(3), and they advance the same argument again in their motion for reconsideration. Compare Resp. to Pls.' Mot. for Class Certification 57-59, ECF No. 197, and Defs.' Mot. to Den. Certification 8-11, ECF No. 308, with Defs.' Mot. for Recons. 5-11, ECF No. 346.

Although the Fourth Circuit amended its initial opinion to remove its brief mention of Rule 23(b)(3), as a practical matter, the omitted language indicated that (b)(3) certification was a possibility. The Fourth Circuit said, "our assessment inevitably leads us to conclude that the requirements of Federal Rule of Civil Procedure 23(b)(3) have also been satisfied for these claims." Brown, No. 08-1247, at 19 (emphasis added) (footnote and citation omitted), amended by Brown, 576 F.3d at 160. On remand, the plaintiffs argued that by deleting this language and instructing the Court to certify a class, "the Court of Appeals recognized that this case easily satisfies both subsection b-2 and b-3 in the manner set forth in [the] plaintiffs' Motion For Class Certification." Pls.' Opp'n to Mot. to Deny Class Certification 4 n.2, ECF No. 309. In summary, the issue of (b)(3) certification was raised by both the plaintiffs and the Fourth Circuit, and, notwithstanding their objection, the defendants have previously addressed the issue on several occasions.

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2. Certification under Rule 23(b)(3) was in error

In its order granting certification, this Court analyzed the plaintiffs' class under Rule 23(b), as the defendants maintained was necessary. The Court agreed with the defendants that the presence of the plaintiffs' punitive damages claims caused monetary relief to predominate over injunctive or declaratory relief, rendering certification under Rule 23(b)(2) inappropriate. This left the Court to decide between certifying a (b)(2)/(b)(3) hybrid class or a standard (b)(3) class.[2] As a practical matter, the primary difference between a (b)(2)/(b)(3) hybrid and a standard (b)(3) class is that under a (b)(2)/(b)(3) hybrid, only class members seeking monetary damages receive notice and the opportunity to opt out, whereas under a standard (b)(3) class, all class members are afforded notice and the opportunity to opt out. As the Court discussed in its order, the hybrid approach is not well established within this circuit, and the plaintiffs appeared to have abandoned their arguments for this approach. Having reviewed the Fourth Circuit's opinion and having carefully analyzed the proposed class under Rule 23(b)(3), the Court determined that the best course of action was to certify the class under Rule 23(b)(3). The defendants have not demonstrated that this decision was a clear error of law,[3] and therefore, the Court denies their motion to reconsider.

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[2] The defendants contend that this Court should not have certified any class at all; however, to maintain this position they must completely ignore the Fourth Circuit's directive: "we remand the case to the district court with instructions to certify the appellants' class action . . . ." Brown, 576 F.3d at 160. Although the defendants may find it odd that the Fourth Circuit would dictate the general outcome to be reached (class certification) while leaving this Court to fill in the details, that appears to be precisely what the Fourth Circuit did. While the defendants may insist that the Fourth Circuit made an error, they did not prevail on the Fourth Circuit or the Supreme Court to correct it. See Nucor Corp. v. Brown, 130 S.Ct. 1720 (Mar. 1, 2010) (denying certiorari).

[3] The defendants correctly point out that many courts have declined to certify Title VII discrimination classes under Rule 23(b)(3). See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402, 420 (5th Cir. 1998); Hunter v. Am. Gen. Life & Acc. Ins. Co., Nos. CA 301-5000-22, CA 301-4506-22, CA 302-1483-22, 2004 WL 5231631, at *10, *12-15 (D.S.C. Dec. 2, 2004); Talley

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B. The Scope of the Class Must be Narrowed

The defendants argue that if the Court is unwilling to reconsider its certification decision, it should at least narrow the scope of the class. The defendants assert that the "class as currently certified has never been examined under Rule 23" and "is far more broad than the class analyzed by both this Court and the Fourth Circuit under Rule 23's requirements." Defs.' Mot. for Recons. 2, ECF No. 346. Contrary to this claim, the class certified by the Court is essentially identical to the class originally proposed by the plaintiffs in May of 2007, which included:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments (hereafter "production departments") or, in the alternative, for such separate classes or subclasses of such persons as may be appropriate under the Federal Rules of Civil Procedure.

Motion for Class Certification 1, ECF No. 184. In February of 2011, the Court certified the following class:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance, and shipping departments.

Order Granting Certification 30, ECF No. 339. As is obvious, the class ultimately certified by the Court was drawn directly from the class proposed by the plaintiffs.

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v. ARINC, Inc., 222 F.R.D. 260, 270-71 (D. Md. 2004); Carson v. Giant Food, Inc., 187 F. Supp. 2d 462, 471-72 (D. Md. 2002), aff'd sub nom. Skipper v. Giant Food, Inc., 68 F. App'x 393, 398 (4th Cir. 2003) (per curiam unpublished opinion); Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638, 643-44 (E.D. Pa. 2001); Adams v. Henderson, 197 F.R.D. 162, 171-72 (D. Md. 2000). However, the fact that courts in several circuits have authorized the use of the (b)(2)/(b)(3) hybrid in employment discrimination cases suggests that the use of Rule 23(b)(3) is not inherently incompatible with such actions. See, e.g., Jefferson v. Ingersoll Intern., Inc., 195 F.3d 894, 898-99 (7th Cir. 1999); Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997).

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Because the class definition does not include a cut-off date, the number of individuals who fall within the definition is likely to have increased with time; however, excepting these changes, any flaw that exists in the current class definition also existed at the time the class was proposed by the plaintiffs, opposed by the defendants, rejected by this Court, reviewed by the Fourth Circuit, opposed by the defendants again, and only then adopted by this Court. The defendants have been afforded every imaginable opportunity to raise objections to the scope of the plaintiffs' class and have previously presented most, if not all of the arguments advanced in their motion for reconsideration.

Nevertheless, the defendants argue that the class defined by the Court is overly broad because it encompasses "departments in which no named Plaintiffs have worked, jobs which no named Plaintiff has sought, and time periods for which there is no evidence in the record of discrimination of any form." Defs.' Mot. for Recons. 2, ECF No. 346. The Court will address each of these arguments in turn.

1. Departments in which no named Plaintiffs have worked

The defendants object that the class includes "departments in which no named Plaintiffs have worked," and therefore they argue that the named plaintiffs are not adequate representatives of the class. Id. at 2, 19. The Fourth Circuit rejected this very argument.

> A person who has been injured by unlawful, discriminatory promotion practices in one department of a single facility may represent others who have been injured by the same discriminatory promotion practices in other departments of the same facility. In such a case, the representatives of the class all have the same interests in being free from job discrimination, and they have suffered injury in precisely the same way in the denial of promotion.

Brown, 576 F.3d at 158 (quoting Hill v. W. Elec. Co., 596 F.2d 99, 102 (4th Cir. 1979)). This Court's finding that Nucor lacked a plant-wide promotion procedure did not stop the Fourth Circuit

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from concluding, "the appellants are adequate representatives for the disparate impact and treatment claims of the putative class." Brown, 576 F.3d at 160. The Court declines to narrow the number of departments represented in the class definition.

2. Jobs which no named Plaintiff has sought

The defendants object that the class includes "jobs which no named Plaintiff has sought" and jobs that are not "similarly situated to those held by the named Plaintiffs." Defs.' Mot. for Recons. 2, 19, ECF No. 346. Again, it should be noted that the Fourth Circuit was aware of these facts, yet found that the named plaintiffs were "adequate representatives" for the claims "of the putative class." Brown, 576 F.3d at 160 (emphasis added). Furthermore, the proper scope of the class was thoroughly addressed by this Court on remand.

> From the outset of this case, it has been clear that the plaintiffs alleged a group injury. The relevant question was the level at which the injury was inflicted. The Fourth Circuit held that "a practice of disparate treatment in the exercise of unbridled discretion . . . rais[es] questions of law and fact common to all [subject] black employees." Brown, 576 F.3d at 153 (alteration in original) (quoting Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 333 (4th Cir. 1983)). Since the Fourth Circuit rejected this Court's characterization of the production departments as separate environments, the Court must proceed under the assumption that the production departments were permeable, if not unitary. This assumption is buttressed by the fact that Nucor's bidding is plant-wide, and this Court already has held that "potential applicants are eligible to prove that they would have applied for a promotion but for the discriminatory practice." Brown, 2007 WL 2284581, at *9. Therefore, all African-Americans who worked in the production departments qualify as "subject black employees."

Order Granting Class Certification 28, Feb. 17, 2011, ECF No. 339. In light of the Fourth Circuit's opinion, the fact that class members may have worked in different departments, held positions with varying responsibilities, and applied for jobs with distinct qualifications does not render their claims uncommon or defeat the predominance of common issues under Rule 23(b)(3). The various

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distinctions emphasized by the defendants may be relevant to a determination on the merits, and the defendants will be afforded the opportunity to raise such arguments. However, at this time, the Court declines to narrow the class by job description.

3. Time periods for which there is no evidence in the record of discrimination

Finally, the defendants argue that the class "combine[s] potential plaintiffs from 1999 with those up to the present time" and claim that "significant changes undergone in the last eight years at NSB" render the class "uncommon." Defs.' Resp. to Pls.' Mot. for Class Certification 47, ECF No. 197. Since the Court discounted the promotions data from the period following December 2003, when the plaintiffs filed their action, the defendants claim that the class should be limited to African-American employees who worked at the Berkeley plant between December of 1999 and December of 2003.

The Court rejects the notion that the temporal scope of the class is strictly limited by the temporal scope of the plaintiffs' statistical evidence. Class definitions in other Title VII cases have extended up to the date of certification and indefinitely into the future. See Newsome v. Up-To-Date Laundry, Inc., 219 F.R.D. 356, 360, 369 (D. Md. 2004);[4] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 188 (N.D. Cal. 2004);[5] Adams v. Pinole Point Steel Co., No. C-92-1962, 1994 WL 515347, at *4, *9 (N.D. Cal. May 18, 1994); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 667 (D. Minn.

[4] In Newsome, the district court certified the following class: "All African Americans employed by defendant Up-To-Date Laundry, Inc. as hourly workers in Departments 100 through 500 at any time from August 1, 1998 to the present." 219 F.R.D. at 360.

[5] In Dukes, the district court certified the following class: "All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." 222 F.R.D. at 188.

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1991). Nevertheless, the Court finds that a cutoff date is needed to allow the parties and this Court to define the class with precision and to ensure that potential class members will be able to determine whether they fall within the parameters of the class. See Lee v. ABC Carpet & Home, No. Civ. 0984, 2008 WL 2073932, at *2 (S.D.N.Y. May 9, 2008) (concluding that the notice "should inform potential litigants of a cut-off date for inclusion in the class" and requiring the plaintiff to propose a cut-off date no later than 90 days after the mailing of the notice); Saur v. Snappy Apple Farms, Inc., 203 F.R.D. 281, 285-86 (W.D. Mich. 2001) (limiting the class to those who failed to receive overtime payments up until the filing of the action); In re Wal-Mart Stores, Inc. Wage & Hour Litig., No. cv 06-2069, 2008 WL 1990806, at *6-7 (N.D. Cal. May 5, 2008) (modifying the class and implementing the date of the notice as a cut-off date). The cut-off date for the class in this case shall be the date of this order.

The Court's review of the class certified in this case leads it to conclude that two additional modifications to the class definition are needed. First, for the sake of clarity, the Court finds that the class definition should indicate that it includes only those individuals who may have been discriminated against by the defendants. Second, the Court will grant the defendants' request that the definition be amended to make it clear that the class is limited to African-Americans who were employed by the defendants in one or more of the six enumerated departments at the Nucor Steel Berkeley plant and does not encompass individuals who may have worked at the plant as independent contractors or in some other capacity.

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III. CONCLUSION

For the reasons set forth in this order, the defendants' motion for reconsideration (ECF No. 346) is denied. The Court modifies the class definition, which now reads as follows:

> All African-Americans who are, as of the date of this order, or were employed by Nucor Corporation or Nucor Steel Berkeley at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time between December 2, 1999, and the date of this order, in the beam mill, hot mill, cold mill, melting, maintenance, and shipping departments, and who may have been discriminated against because of Nucor's challenged practices.

In addition, as the Court indicated at the status conference on April 6, 2011, the defendants' motion to stay (ECF No. 347) is denied. Should the Supreme Court's anticipated opinion in Wal-Mart Stores, Inc. v. Dukes require this Court to revisit the issue of class certification, the defendants may make a motion to decertify or modify the class at that time.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

April 25, 2011
Charleston, South Carolina

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