IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH CAMPBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CIVIL ACTION NO. 1:99-cv-02979 (EGS)**
	)	
NATIONAL RAILROAD PASSENGER CORPORATION,	)	**CLASS ACTION**
	)	
Defendant.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' NEW ARGUMENTS RAISED IN PLAINTIFFS' REPLY IN SUPPORT OF CLASS CERTIFICATION AND PORTIONS OF THE DECLARATIONS OF TIMOTHY FLEMING AND ROBERT CHILDS

Pursuant to Local Civil Rules 23.1(a)(1) and 23.1(b) and Federal Rule of Civil Procedure ("Rule") 12(f), Defendant National Railroad Passenger Corporation (hereinafter "Amtrak") submits this consolidated Memorandum of Points and Authorities in support of its Motion to Strike certain new arguments Plaintiffs raised for the first time in their Memorandum in Reply to Defendant's Opposition to Motion for Class Certification (Dkt. 344).[1] Further, pursuant to Local Civil Rule 7(a) and Rules 602, 701, 702 and 802 of the Federal Rules of Evidence, Amtrak also submits this Memorandum of Points and Authorities in support of its Motion to Strike in part the declarations of Timothy Fleming and Robert Childs submitted by Plaintiffs in Support of their

[1] Pursuant to this Court's Minute Orders dated November 5 and 6, 2012, the Court entered January 4, 2013 as the deadline for Amtrak to submit its reply briefs (in support of Docket Numbers 319 and 329 to 332), and further requested that any common issues be consolidated in the responsive papers where practicable. Consistent with the Court's Minute Orders, Defendant will file its reply briefs by January 4, 2013. However, Defendant files the above-referenced consolidated Motion to Strike at this time to promptly bring to the Court's attention several untimely, immaterial, or otherwise improper arguments that were contained in or relied upon in several of Plaintiffs' filings dated October 23, 2012, as described above. Defendant has done so in the above consolidated memorandum, consistent with this Court's request to consolidate filings where practicable, and to ensure that the above-referenced issues are fully briefed within the parties' existing briefing schedule, which concludes on January 4, 2013. Should this Court deny the above-referenced motion in whole or in part, Amtrak respectfully requests the opportunity to supplement the record as appropriate.

Memorandum in Opposition to Defendant's Motion to Exclude the Report and Testimony of Plaintiffs' Statistical Experts, Edwin Bradley, Ph.D. and Liesl Fox, Ph.D. (Dkt. 342); Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment on Disparate Impact Claims (Dkt. 343); and Plaintiffs' Memorandum in Reply to Defendant's Opposition to Motion for Class Certification (Dkt. 344). For all of the reasons set forth below, Plaintiffs' newly raised arguments and portions of the attorney declarations are untimely, immaterial, or otherwise improper and should be stricken.

I. THE COURT SHOULD STRIKE PLAINTIFFS' CLASS CERTIFICATION ARGUMENTS RAISED FOR THE FIRST TIME IN PLAINTIFFS' REPLY BECAUSE THE NEW ARGUMENTS SHOULD AND COULD HAVE BEEN RAISED IN PLAINTIFFS' OPENING MEMORANDUM.

A. INTRODUCTION

Plaintiffs present four entirely new arguments in their Memorandum in Reply to Defendant's Opposition to Motion for Class Certification (Dkt. 344) that were never raised in Plaintiffs' Memorandum of Law in Support of Motion for Class Certification (Dkt. 303), as follows:

(1) Plaintiffs now request issue certification under Rule 23(c)(4);

(2) Plaintiffs for the first time present a proposed trial plan;

(3) Plaintiffs radically changed their theory of commonality under Rule 23(a); and

(4) Plaintiffs now allege that certain provisions of Amtrak's collective bargaining agreements caused alleged disparate impact against African-Americans.

Because these arguments were not asserted in Plaintiffs' opening brief, they are not a part of the record upon which Plaintiffs relied in seeking class certification and, as such, they are immaterial. Further, because Plaintiffs waited to assert these new arguments until their Reply, and Amtrak has not had a fair opportunity to respond to any of these new arguments, they are

untimely and should be stricken. In addition, the Court should strike Plaintiffs' improper reference to two previously settled actions involving Amtrak as a basis to certify a class in this matter, which is prohibited by the terms of those prior settlement agreements.

B. ARGUMENT

1. Standard For Motion To Strike New Arguments Raised In Reply

The function of reply briefs is to "reply to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration." *MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010) (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002)). Courts in the D.C. Circuit generally refuse to entertain arguments raised for the first time in a reply brief. *See, e.g.*, *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 196 (D.C. Cir. 1992) (noting D.C. Circuit generally refuses to entertain arguments first raised in appellant's reply brief); *Day v. Dist. of Columbia*, CA No. 10-2250 (ESH), 2012 WL 456491, at *14 n.51 (D.D.C. Feb. 14, 2012) ("[T]he D.C. Circuit has consistently held . . . [that] the Court should not address arguments raised for the first time in a party's reply.") (quoting *Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008)); *Hicks v. Gotbaum*, 828 F. Supp. 2d 152, 164 n.11 (D.D.C. 2011) (recognizing well-settled prudential doctrine that courts generally will not entertain new arguments first raised in reply briefs).

The reasoning underlying this general rule is both "pragmatic" and "plain" because "[t]o consider an argument discussed for the first time in reply would be manifestly unfair to the [non-moving party] who, under [the] rules, has no opportunity for a written response." *Herbert*, 974 F.2d at 196. Courts have relied on this rule when granting motions to strike new arguments raised in replies. *See, e.g.*, *Jones*, 565 F. Supp. 2d at 81 (granting motion to strike arguments challenging disparate impact claim raised for first time in reply in support of motion to dismiss);

Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd., 246 F.R.D. 293, 311 n.18 (D.D.C. 2007) (granting motion to strike arguments raised for first time in reply and underlying rebuttal expert declaration that exceeded analysis and arguments offered in initial expert disclosure). Other courts agree with this sound approach. *See, e.g.*, *Lindner v. Ford Motor Co.*, Case No. 2:10-cv-00051-LDG (VCF), 2012 WL 3598269, at *1-2 (D. Nev. Aug. 17, 2012) (striking new arguments raised on reply and related rebuttal expert disclosure in which scope of analysis and arguments exceeded initial disclosure); *Brown v. NFL Players Ass'n*, 281 F.R.D. 437, 444 n.1 (C.D. Cal. 2012) (explaining that arguments raised for first time in reply are waived); *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 550 n.10 (D.N.J. 2001) (stating it is improper for party to present new argument in reply brief and explaining that court may choose not to consider new argument).

2. Plaintiffs' Request For Issue Certification Under Rule 23(c)(4) Raised For The First Time In Reply Should Be Stricken.

Recognizing that their predominant claims for compensatory and other individualized damages cannot be certified under Rule 23(b)(2) or (3), Plaintiffs now request "issue certification" of a liability determination under Rule 23(c)(4). Dkt. 344 at 22. This untimely request should be rejected for two reasons. First, this request was never included in Plaintiffs' Fourth Amended Complaint (Dkt. 145), in violation of LR 23.1(a)(1). That rule requires that a complaint, under a separate heading styled "Class Action Allegations," specify a "reference to the portion or portions of Rule 23 . . . under which the suit is claimed properly to be maintainable as a class action." Second, Plaintiffs failed to include any request for issue certification under Rule 23(c)(4) in their Memorandum of Law in Support of Plaintiffs' Motion for Class Certification. *See* Dkt. 303. Rather, it was raised for the first time in Plaintiffs' Memorandum in Reply to Defendant's Opposition to Motion for Class Certification. *See* Dkt. 344 at 22. This is

impermissible, and the Court should strike Plaintiffs' untimely and prejudicial request for issue certification. *See Richards v. Delta Airlines, Inc.*, 453 F.3d 525, 532 (D.C. Cir. 2006) (refusing to consider plaintiffs' request for certification under a provision of Rule 23 raised for the first time in reply).

Amtrak has been substantially prejudiced by Plaintiffs' untimely request, as it has had no reasonable opportunity to respond. Further, Amtrak could have presented substantial opposition arguments as the following summary establishes. First, Rule 23(c)(4) is no substitute for compliance with Rule 23(b). *See Richards*, 453 F.3d at 532 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) . . . .")). Here, Plaintiffs failed to meet the standards for certification under Rule 23(b), as explained fully in Amtrak's Memorandum in Opposition to Plaintiffs' Motion for Class Certification (*see* Dkt. 320 at 36-45), and they cannot now overcome their failure by adding an untimely request for issue certification under Rule 23(c)(4).

Second, Plaintiffs do not demonstrate that certification of liability under Rule 23(c)(4) would meaningfully advance the overall litigation of the claims of the putative class members. Plaintiffs' new argument is that "[e]ven if Amtrak were correct that individualized issues were to predominate with respect to Plaintiffs' monetary relief claims . . . the Court could utilize the mechanism under Rule 23(c)(4) to adjudicate those issues capable of classwide resolution separately." Dkt. 344 at 22. However, Plaintiffs fundamentally misunderstand the implications of their own theory of the interaction between Rule 23(b)(3) and Rule(c)(4). Under Plaintiffs' request, Rule 23(c)(4) is an alternative to certification of damages claims under Rule 23(b)(3)

and contemplates this Court's denial of Plaintiffs' request for a Rule 23(b)(3) monetary relief class. The denial of the Rule 23(b)(3) class, in turn, would require class members to immediately file over 10,000 individual actions in federal courts across the country to preserve their claims for damages. *See Crown Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." (emphasis added)).[2] Class members have every incentive to file these separate actions because monetary damages are plainly the primary form of relief they seek; indeed, over 43% of the class members here are former employees who lack standing to seek injunctive relief. Dkt. 320 at 44. At that point, the proposed class has devolved into thousands of individual actions and any further class proceedings would not materially advance the litigation of those individual claims. In any event, the Court should strike the flawed theory because it was improperly raised for the first time in Plaintiffs' Reply.

3. Plaintiffs' New Trial Plan, Proposed For The First Time In Their Reply, Should Be Stricken.

In their opening Memorandum in Support of Class Certification, Plaintiffs provided no specific trial plan. *See* Dkt. 303 at 42-43. In their Reply, however, Plaintiffs now for the first time propose a trial plan. *See* Dkt. 344 at 17. Plaintiffs' new trial plan should have been proposed in their opening brief, as it was central to their request for certification under Rule 23(b). *See* Advisory Committee Notes to 2003 Amendments to Rule 23(c)(1) (noting that many "courts require a party requesting class certification to present a 'trial plan'"); *see also* Manual for Complex Litigation, at § 21.142 ("The judge must decide whether the proposed Rule 23(b)(3)

[2] Every circuit has concluded that *American Pipe* tolling ceases upon denial of class certification. *See Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 519 (5th Cir. 2008); *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006); *Yang v. Odom*, 392 F.3d 97, 102 (3d Cir. 2004); *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355-56 (Fed. Cir. 2000); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir. 1998) (*en banc*); *Andrews v. Orr*, 851 F.2d 146, 149-50 (6th Cir. 1988); *Fernandez v. Chardon*, 681 F.2d 42, 48 (1st Cir. 1982).

class will be manageable. For the most part, courts determine manageability by reviewing affidavits, declarations, [and] trial plans . . . that counsel present."). This was especially important given that Plaintiffs here seek class certification of monetary damages claims for a putative class of over 11,500 employees. This is entirely different from cases newly proffered by Plaintiffs such as *Ellis v. Costco Wholesale Corp.*, Nos. C-04-3341 EMC, 543, 664, 2012 WL 4371817, at *48 (N.D. Cal. Sept. 25, 2012), in which the court found that a much smaller number of 700 individualized *Teamsters* hearings was manageable where the issues in the case related to promotions into only two positions and there was significant proof of common decision makers. *See infra.* at pp. 13-15 (contrasting the circumstances of the cases newly cited by Plaintiffs and those of this case).

Amtrak has been denied a fair opportunity to present arguments as to the numerous defects in Plaintiffs' untimely proposed trial plan. Again, the prejudice to Amtrak is demonstrated by the barest summary of several of the substantial arguments that Amtrak could have raised in opposition: First, Plaintiffs' proposed plan contemplates over 10,000 *Teamsters* hearings, which on its face is plainly unmanageable.

Second, as Plaintiffs concede, *Teamsters* hearings would involve individualized issues as to liability, defenses, back pay, and compensatory and punitive damages. As such, common issues certainly would not predominate during these proceedings. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) (stating predominance standard is "demanding" under Rule 23(b)(3)); *Garcia v. Veneman*, 211 F.R.D. 15, 24 (D.D.C. 2002) (denying class certification where proposed action "would quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances").

Third, "whether Amtrak's conduct meets the standard for an award of punitive damages," (Dkt. 344 at 17 (emphasis added)), is not a proper inquiry at any stage of the proceedings, much less during stage-one proceedings as proposed by Plaintiffs. Instead, the standard for an award of punitive damages is whether the particular actor that engaged in intentional discrimination did so with malice or reckless indifference to the aggrieved individual's statutory rights. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535-36 (1999) ("The inquiry does not end with a showing of the requisite 'malice or . . . reckless indifference' on the part of certain individuals" (emphasis added, citation omitted)).[3] Plaintiffs here, however, concede that they challenge literally thousands of decisions by local managers—and whether any particular manager intentionally discriminated with malice or reckless indifference is an individual-specific determination that could only be decided during the over 10,000 *Teamsters* hearings.[4]

For all of the foregoing reasons, Plaintiffs' newly proposed trial plan should be stricken because it is untimely and designed to prejudice Amtrak's ability to substantively oppose an inextricably complex set of legal issues that would have to be resolved in thousands of hearings on a variety of legal issues related to particular positions, alleged practices, and the intent of thousands of managers.

[3] This much should be obvious from the fact that corporate entities such as Amtrak literally do not have states of mind; rather, corporate entities may be liable for the states of mind of their human agents. Accordingly, a plaintiff "must impute liability for punitive damages" from the individual actors to the employer under principles of agency law. *Kolstad*, 527 U.S. at 539-40, 546 (remanding for determination of whether alleged discriminator was serving in a "managerial capacity"). Similarly, "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Id.* at 545 (citations omitted) (internal quotation marks omitted).

[4] We are unaware of any court of appeals that has approved the bifurcation of punitive damages under Title VII, although bifurcation of liability and damages is common. *See Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 418 (5th Cir. 1998) ("Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage.").

4. Plaintiffs' New Theory Of Commonality Should Be Stricken.

Plaintiffs present an entirely new theory of commonality in their Reply in a superficial attempt to meet the standard promulgated by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, the Supreme Court explained that "proof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination. That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision." 131 S. Ct. at 2552 (citations omitted) (internal quotation marks omitted). "Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored." *Id.* (emphasis in original).[5] In the context of local decision making, as the Supreme Court explained in *Dukes*, commonality is unlikely to exist because "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

[5] Plaintiffs argue that they need not demonstrate that there is in fact a contention common to each class member regarding the reason he or she was disfavored. Instead, Plaintiffs argue, it is enough for them to show that classwide proceedings have the theoretical capacity to produce a common answer to the question of the reason for having been disfavored. Dkt. 344 at 5, 15. Plaintiffs' argument is contrary to *Dukes*. There, the Supreme Court explained:

> Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982). This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.

Dukes, 131 S. Ct. at 2551 (emphasis added). The Court went on to explain that the "common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Plaintiffs focus entirely on the capability requirement, but ignore the common contention requirement. They lack any contention of a common mechanism of discrimination that harmed all class members alike.

employees' Title VII claims will in fact depend on the answers to common questions." *Id.* at 2554-55. In such a case, commonality exists only if Plaintiffs can "identify a common mode of exercising discretion that pervades the entire company." *Id.*

In Plaintiffs' Memorandum of Law in Support of Motion for Class Certification, Plaintiffs plainly asserted that the Supreme Court's decision in *Dukes* applied only to cases where the employer had no uniform employment practices but left employment decisions to the unfettered discretion of local managers. Dkt. 303 at 15. Attempting to distinguish the circumstances in *Dukes* from the circumstances in this case, Plaintiffs specifically alleged in their opening brief that "Campbell is precisely the opposite, where all of AMTRAK's employment policies are entirely uniform nationwide, but are poorly implemented. **Discretion plays no part in it at all.**" *Id.* (emphasis added).

Now, in their Reply, Plaintiffs have done an "about-face" and have fundamentally changed their theory of commonality altogether. Contradicting their prior unequivocal assertion that discretion played no role, Plaintiffs now assert that "[t]he present case . . . involves local discretion closely tethered to a national, universal corporate policy." Dkt. 344 at 10 (emphasis added). Specifically, Plaintiffs now argue that *Dukes* does not foreclose class certification here because local managers' discretion at Amtrak is exercised within newly identified and allegedly uniform selection and discipline procedures mandated by Amtrak's collective bargaining agreements ("CBAs") that allegedly constrained the local managers to exercise discretion in a common way. *Id.* at 6-7, 10-13. In particular, with respect to their new theory of commonality (and their new theory of disparate impact, as discussed *infra* at pp. 15-16), Plaintiffs now identify the CBAs' requirements of the "best qualified" individual for promotions and "just cause" for

discipline as the purported "common" procedures that constrain discretion such that it was exercised in a "common" way. *Id.* at 10.

Plaintiffs' new arguments are based on factual assertions that flatly contradict assertions they have previously made in this case. In particular, Plaintiffs previously contended that "deviations or variations" in the "commonly applicable procedures . . . permitt[ed] the influx of racially discriminatory bias." Dkt. 303 at 21. Similarly, Plaintiffs asserted that "[d]epositions of scores of AMTRAK managers reflected that the standard selection process was followed throughout the country across all crafts; however, they also revealed **numerous variations which allowed for the infusion of subjective qualities**." *Id.* at 7 (emphasis added). Plaintiffs cannot now claim, in their Reply, to have satisfied *Dukes* on the grounds that local managers' discretion is constrained by uniform procedures after having attacked, in their opening brief, deviations from uniform procedures and the use of subjective decision making as the very mechanism of alleged discrimination. *Compare* Pls.' Mem. in Reply to Defs.' Opp' to Mot. for Class Certification, Dkt. 344 at 6-11, *with* Plaintiffs' Motion for Class Certification, Dkt. 303 at 7-9.

Leaving aside these blatant contradictions, Plaintiffs' raising the new theory of commonality for the first time in their Reply was plainly improper. Plaintiffs had over a decade to develop the record, followed by months to prepare their class certification brief. Amtrak is prejudiced by this untimely argument because there are substantial responses that could have been developed fully had Amtrak had an opportunity. Two examples demonstrate the severe prejudice to Amtrak.

First, Plaintiffs' new theory of commonality is fundamentally flawed in that the common mode of exercising discretion must still be discriminatory. This much is clear from the examples of various modes of exercising discretion listed in *Dukes*:

> [L]eft 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 at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity.

131 S. Ct. at 2554-55; *see also Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) ("Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist. . . . The appellants failed to identify any centralized, uniform policy or practice of discrimination . . . ." (emphasis added)). To be sure, any theory of commonality in a pattern or practice case must also be a theory of discrimination. *See Dukes*, 131 S. Ct. 2552 ("[P]roof of commonality necessarily overlaps with respondents' merits contention that Wal-Mart engages in a pattern or practice of discrimination. That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is the reason for a particular employment decision.") (internal quotations and citation omitted).

Here, Plaintiffs' new assertion that local managers' discretion was exercised in a common mode because of the alleged uniform selection and discipline procedures in the CBAs has nothing to do with their theory of discrimination.[6] Indeed, their discrimination theory continues to be that deviations from the uniform policies led to biased decision making:

[6] To the extent that Plaintiffs' argument is that local managers commonly exercised discretion in a discriminatory manner because of constraints on their decisionmaking through "binding" selection and discipline policies, this claim is wildly implausible. Collectively bargained provisions that provide for hiring the "best qualified" candidate or using a "just cause" standard in discipline and similar constraints prevent discriminatory decision making; they do not cause it.

> The local managers' "common mode of exercising discretion" is to do what they want to do while still trying to keep, in some fashion, within the general ambit of AMTRAK's uniform selection policy's, [sic] and the CBAs', requirement of "best qualified." The result is illustrated by the decision making variances shown in Ex. 63 . . . termed "Selection Roulette."

Dkt. 344 at 11.

Second, Plaintiffs' convoluted new theory finds no support in the three new cases they cite: *Ellis v. Costco Wholesale Corp.*, Nos. C-04-3341 EMC, 543, 664, 2012 WL 4371817 (N.D. Cal. Sept. 25, 2012); *Chen-Oster v. Goldman Sachs & Co.*, --- F. Supp. 2d ----, 2012 WL 2912741 (S.D.N.Y. July 17, 2012); and *McReynolds v. Merrill Lynch*, 672 F.3d 482, 488 (7th Cir. 2012). The specific facts and legal theories of each of these cases present a stark contrast to those offered by Plaintiffs in this case:

- **Plaintiffs' proposed class in this case includes approximately 11,566 employees as well as an additional number of applicants for employment.** Dkt. 320 at 22. By contrast, each of the cited cases involved a class of fewer than 1,000 employees or former employees. *See Ellis*, 2012 WL 4371817, at *15 (class of approximately 700 employees); *Chen-Oster v. Goldman Sachs & Co.*, --- F. Supp. 2d ----, 2012 WL 3964742, at *13 (S.D.N.Y. Sept. 10, 2012) (estimating the class size to be in the hundreds); *McReynolds*, 672 F.3d at 488 (class of 700 African-American brokers).
- **Plaintiffs here seek to certify a class including employees in literally hundreds of different jobs at scores of different work locations across the United States.** By contrast, each of the new cases cited by Plaintiffs involved either a handful of specific jobs or one specific location. *Chen-Oster*, 2012 WL 2912741, at *4 ("Plaintiffs all worked at—and the allegations all center around—Goldman's New York office; Plaintiffs were all members of a circumscribed category of Goldman employees"); *Ellis*,

2012 WL 4371817, at *15 ("this case only involves applicants to GM and AGM positions"); *McReynolds v. Merrill Lynch*, No. 05-C-6583, 2012 WL 5278555, at *1 (N.D. Ill. July 13, 2012) (involving employees in two titles, Financial Advisor and Financial Advisor Trainees).

- **Plaintiffs have proposed an array of unfocused theories in this case. For example, Plaintiffs here "identify a specific employment practice that Amtrak implements companywide" and that allegedly establishes commonality: a "principle" to "fill vacancies with the <u>best qualified</u> candidates."** Dkt. 344 at 7 (emphasis added). By contrast, the courts in these other cases considered discrete and concrete theories of common discrimination including common employment practices alleged to be discriminatory <u>or</u> challenges to the decisions of a common decision maker. *Chen-Oster*, 2012 WL 2912741, at *2 (challenge to "360-degree review" process, the forced-quartile ranking of employees, and the "tap on the shoulder" system for selecting employees for promotion); *McReynolds*, 672 F.3d at 48 (disparate impact challenge to teaming policy that "permits brokers in the same office to form teams" and account distribution policy under which the company established "competing brokers' records of revenue generated for the company" as the criteria for deciding which broker will receive the accounts of a departed broker); *Ellis*, 2012 WL 4371817, at *19-22 ("CEO Sinegal personally instructs his staff as to the criteria they should employ in making promotion decisions for AGM and GM and states that said criteria is uniform.").[7]

[7] In *Ellis*, the district court provided an extensive discussion of how the evidentiary record demonstrated both decisionmaking by senior management and common promotion criteria culminating with the following: "Senior management's involvement in AGM and GM promotions makes sense given the importance of these positions and their placement in the upper echelons of Costco. Far from mere mid-level supervisors, AGMs and GMs oversee warehouses with an average of over 200 employees and over $120 million of merchandise sales per year." 2012 WL 4371817, at *22 (see extensive discussion at *18-22). *Ellis* is far afield from this case, which involves tens of thousands of line employees in hundreds of jobs covered by numerous different CBAs. Nor is it even remotely

Setting aside the deficiencies of Plaintiffs' convoluted new theory, the Court should strike their new theory of commonality because it was alleged for the first time in their Reply.

5. Plaintiffs' New Allegation That Amtrak's CBAs Caused Disparate Impact Should Be Stricken.

In their Reply, Plaintiffs argue for the first time that Amtrak's "[CBAs] provide the basic standards for selections: the 'best qualified' individual for promotions and the 'just cause' for discipline." Dkt. 344 at 10. Plaintiffs assert that "the 'best qualified standard' is not only Amtrak corporate policy, it is a binding legal obligation built into the collective bargaining agreements." *Id.* at 2; *see also id.* at 10 ("the 'best qualified standard' is . . . a truly binding national legal standard"). Again, for the first time, Plaintiffs assert that these are the very criteria that they challenge as producing a disparate impact against African-Americans. Dkt. 344 at 2 (asserting "'best qualified' standard" is Amtrak's "promotion selection policy"), 6-7 (identifying the "promotion selection policy" as the "employment policies that are challenged in this case"), 7 (arguing that the "best qualified candidate" criteria is the "specific employment practice" identified by Plaintiffs in this case).

Plaintiffs' new disparate impact claim **was never presented in any of the four amended complaints that they filed in this action**, nor was it raised in their opening brief in support of their Motion for Class Certification. Accordingly, this claim is untimely and should be stricken.

As with their other untimely arguments, Plaintiffs' new challenges to the CBA provisions deprive Amtrak of a fair response opportunity. A glimpse of the responses Amtrak could have developed with a fair opportunity demonstrates the prejudice of Plaintiffs' late disparate impact claim. First, "best qualified candidate" and "just cause" are far too generalized criteria to be

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plausible that the CEO or other senior managers at Amtrak were involved in some 55,000 selection decisions and 25,000 discipline decisions for line employees covered by CBAs. *See* Amtrak's Mem. in Opp'n to Pls.' Mot. for Class Certification, Dkt. 320 at 21 n.9 (explaining how this theory is incredulous on its face and based on the well-developed evidentiary record).

subject to a reasonable challenge under the disparate impact theory. 42 U.S.C. § 2000e-2(k)(1)(a)(i) (requiring challenge to a "particular employment practice"). Plaintiffs have offered no showing—and indeed, it would be hard to conceive of what such a showing could be—that these general criteria caused a disparate impact on African-American employees. *Id.* (plaintiffs bear the burden of demonstrating causation).[8]

Second, both "select the best qualified" and "terminate only for just cause" are obviously job related and consistent with business necessity as a matter of law. *Ricci v. DeStefano*, 557 U.S. 557, 562 (2009) ("Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates." (emphasis added)).[9] Indeed, one wonders what the alternative to these general criteria under the CBAs would be: purposefully not selecting the best qualified candidates or disciplining employees only when lacking just cause?

Third, Plaintiffs' disparate impact challenge to the CBA provisions is precluded by Section 703(h) of Title VII. 42 U.S.C. § 2000e-2(h) (foreclosing disparate impact challenges to bona fide seniority or merit systems). Plaintiffs do not allege in any of the Complaints or in their Motion for Class Certification that the CBA provisions were adopted for a discriminatory or improper purpose. *Teamsters v. United States*, 431 U.S. 324, 355-56 (1977) (identifying standard for bona fide systems). As such, there is no basis, and no evidentiary record, to support Plaintiffs' eleventh-hour attempt to identify a common employment practice for their disparate impact claims, and the untimely theory should be stricken.

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[8] Plaintiffs could only meet the causation standard by showing that African-American employees were not selected for positions because they were not the "best qualified" candidates, a showing that would plainly foreclose their disparate treatment claims. 42 U.S.C. § 2000e-5(g)(2).

[9] The unions' approval of these CBA provisions as lawful representatives of the interests of all employees strongly supports their validity. *Ricci*, 557 U.S. at 589 ("In fact, because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason.").

6. Plaintiffs Improperly Cite Two Prior Class Action Settlement Agreements In Support Of Their Untimely Reply Arguments.

Plaintiffs argue in their Reply that, "[s]urely, from a pretrial perspective, this Court is far better equipped, given the history of this litigation and the entire AMTRAK Trilogy of cases, to guide the parties through pre-trial discovery and motions than would be a plethora of other courts, starting from scratch, hearing thousands of race discrimination claims by members of a rejected class group." Dkt. 344 at 16.

Plaintiffs' reference to prior cases involving Amtrak is improper because it violates the terms of the consent decrees in those cases, each of which has the same provision prohibiting reference to the decrees. *See Thornton v. Nat'l R.R. Passenger Corp.*, CA No. 98CV0890 (EGS) (D.D.C. June 21, 2000), Dkt. 60 (hereinafter "*Thornton* Consent Decree") at 12; *McLaurin v. Nat'l R.R. Passenger Corp.*, CA No. 1:98CV2019 (EGS) (D.D.C. Nov. 2, 1999), Dkt. 24 (hereinafter "*McLaurin* Consent Decree") at 10, *approved at* Dkt. 30. Both *Thornton* and *McLaurin* were mediated and eventually settled before the parties and the Court expended their resources on extensive fact discovery and without any contested class certification briefing. *See Thornton* Consent Decree at 2-3; *McLaurin* Consent Decree at 2. Obviously, the incentives toward voluntary resolution would be dramatically reduced if a defendant had to be concerned that a resolved case would be used to argue that some future case was amenable to class certification. Even if not barred by the consent decrees, this argument was not raised by Plaintiffs before their Reply and is untimely. Amtrak is prejudiced by this untimely argument because it had substantial response arguments, such as the fact that there was limited discovery and motion practice before voluntary resolution in each of those prior cases.

Further, Plaintiffs' argument makes abundantly clear that they contemplate "thousands of race discrimination claims" over which this Court must preside if the requested classes are

certified. It is one thing to ask hundreds of federal courts to manage individual claims, as they do every day under Title VII; it is quite another to burden a single court with adjudicating over 10,000 claims in a single case. Even if each claim took only one day of proceedings to resolve, the case would persist for more than 27 years.

II. THE COURT SHOULD STRIKE PORTIONS OF THE DECLARATIONS OF TIMOTHY FLEMING AND ROBERT CHILDS BECAUSE THEY CONTAIN STATEMENTS THAT FAIL TO MEET EVIDENTIARY STANDARDS.

A. INTRODUCTION

Plaintiffs' attorneys, Timothy Fleming and Robert Childs, submitted declarations in support of Plaintiffs' Memorandum in Opposition to Defendant's Motion to Exclude the Report and Testimony of Plaintiffs' Statistical Experts, Edwin Bradley, Ph.D. and Liesl Fox, Ph.D. *See* Dkt. 342-2 and 342-3. Plaintiffs also rely on these declarations in their Memorandum in Opposition to Defendant's Motion for Summary Judgment on Disparate Impact Claims (*see* Dkt. 343 at 14-18); their related Response to Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute (*see* Dkt. 343-1 ¶¶ 7, 15, 27); and their Memorandum in Reply to Defendant's Opposition to Motion for Class Certification (*see* Dkt. 344 at 8 n.4, 22). Both declarations state that (1) the parties entered into an agreement to create a joint database that the parties' respective experts would use as the sole basis for any statistical analysis because there was limited electronic applicant flow data; (2) the parties did not intend that Amtrak's job files would be used to supplement the experts' statistical analysis based on the joint database; and (3) the job files are incomplete and unreliable and cannot be used for the purposes of statistical analysis. Mr. Fleming and Mr. Childs, however, support these contentions through impermissible hearsay, speculation, and conclusory and self-serving statements. Rules 602, 701, 702, and 802 of the Federal Rules of Evidence prohibit such testimony.

B. ARGUMENT

1. A District Court Cannot Rely On Inadmissible Evidence To Find That The Requirements Of Rule 23 Have "In Fact" Been Satisfied.

As the Supreme Court made absolutely clear in *Dukes*, "[a] party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551 (emphasis in original). The requirements of Rule 23 can only be established "in fact" if supporting evidence meets some minimal standards of reliability. Indeed, the Supreme Court criticized the district court in *Dukes* for relying on expert testimony that did not meet the minimum reliability and relevance standards of *Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579 (1993*). Id.* at 2553-54. Both before and after *Dukes*, the overwhelming majority of Circuits ruled that these minimum standards apply fully at the class certification stage. *See, e.g.*, *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812-13 (7th Cir. 2012) (confirming district court must make conclusive ruling on *Daubert* challenge where expert testimony is critical to class certification); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (stating district court "correctly applied the evidentiary standard set forth in" *Daubert* in ruling on defendant's motion to strike plaintiffs' expert evidence submitted in support of class certification motion); *accord Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379-80 (5th Cir. 2007); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 5-6 (1st Cir. 2005); *In re Initial Pub. Offering Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); *see also Kottaras v. Whole Foods Mkt., Inc.*, 281 F.R.D. 16, 26 (D.D.C. 2012) (explaining that a "careful and searching analysis of all

evidence with respect to whether . . . certification requirements have been met, including expert opinions," must occur).[10]

Plaintiffs mistakenly argue that "class certification does not require a merits analysis, and as such, evidentiary standards are not applicable at this stage." Dkt. 340 at 2-3. This argument ignores the Supreme Court's ruling in *Dukes* that pattern or practice claims necessarily overlap with the merits of commonality arguments in Title VII cases. 131 S. Ct. at 2552. The Supreme Court in *Dukes* also made clear that the oft-misinterpreted prohibition in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), against conducting an inquiry into the merits at class certification only applies in the limited context of shifting the cost of notice required by Rule 23(c)(2). *Dukes*, 131 S. Ct. at 2552 n.6 (citing *Eisen*, 417 U.S. at 177). The Supreme Court warned that *Eisen* is "sometimes mistakenly cited to the contrary," and that any supposed prohibition against an inquiry into the merits "for any other pretrial purpose . . . is the purest dictum and is contradicted by our other cases." *Id.*

Since *Dukes*, courts in the D.C. Circuit recognize that *Eisen* does not preclude an inquiry into the merits at the class certification stage.[11] For example, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, a D.C. district court acknowledged that *Dukes* cemented the consensus among circuits that district courts must consider relevant evidence and resolve relevant factual disputes at the class certification stage. *See In re Rail Freight Fuel Surcharge*

[10] The Supreme Court recently heard oral argument in *Comcast Corp. v. Behrend*, No. 11-864, 2012 WL 113090 (U.S. June 25, 2012), in which it likely will decide whether class certification evidence must be admissible. The Supreme Court granted certiorari to answer the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Id.*

[11] In the D.C. Circuit, courts previously relied on *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810 (D.C. Cir. July 8, 2002) (per curiam), and *In re Nifedipine Antitrust Litigation*, 2009 U.S. App. LEXIS 3643 (D.C. Cir. Feb. 23, 2009) (per curiam), in holding that a district court may decline to assess the admissibility or probative value of evidence when making a class certification determination. Both *Rand* and *Nifedipine*, however, relied upon language in *Eisen*, which suggested that courts were prohibited from engaging in any merits inquiry at the class certification stage.

Antitrust Litig.,--- F.R.D. ----, MDL 1869, 2012 WL 2870207, at *12-17 (D.D.C. June 21, 2012) (explaining that Rule 23(a) and Rule 23(b) "require[] rigorous factual review that a court must perform" at class certification); *see also Kottaras*, 281 F.R.D. at 21-22 (holding "[i]t is appropriate, and indeed necessary, in some circumstances to consider a merits question" in determining a motion for class certification (internal quotation marks omitted)). Further, D.C. district courts have clarified that an inquiry into the admissibility or probative value of class certification evidence is necessary under *Dukes*. *See Kottaras*, 281 F.R.D. at 22 ("It is manifest that *Eisen* does not stand for the proposition that district courts should not scrutinize the probative value of evidence offered with respect to whether the requirements for class certification have been met.").

Thus, the Court cannot avoid the pertinent inquiry even though it "necessarily" overlaps with the merits of Plaintiffs' pattern or practice claims. Instead, the Court must find "in fact" that there is a common answer to the question of why each putative class member was disfavored. *Dukes*, 131 S. Ct. at 2552 ("Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored." (emphasis in original)). The common answer must be based on "significant proof" (*id.* at 2553-54) of a uniform test or other biased selection procedure (*id.* at 2553), a common decision maker (*id.* at 2554, 2548), or a common mode of exercising discretion (*id.* at 2554-55).

Plaintiffs must establish actual compliance with each element of Rule 23 by a preponderance of the evidence. *See Rail Freight*, 2012 WL 2870207, at *17 ("The Court concludes that plaintiffs must establish the requirements of Rule 23 by a preponderance of the evidence, and that this standard applies to any factual disputes, including those among experts,

that bear on the decision whether to certify a class." (emphasis added)); *see also Messner*, 669 F.3d 802 at 811 ("Plaintiffs bear the burden of showing that a proposed class satisfies the Rule 23 requirements . . . . It is sufficient if each disputed requirement has been proven by a preponderance of evidence." (citations omitted)); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008) (holding that "the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements").

Here, Plaintiffs argue that this Court may rely on otherwise inadmissible evidence to make critical findings that would satisfy Plaintiffs' heavy burden of demonstrating commonality under Rule 23. *See* Pls.' Opp'n to Amtrak's Mot. to Strike Decls., Dkt. 340 at 2-3. In particular, Plaintiffs contend that Amtrak's job files encompassing some 55,000 selection decisions over a sixteen-year period are "inscrutable," "unreliable," and "incomplete." Dkt. 342 at 15-21; Dkt. 343 at 13-18. Based on these assertions, Plaintiffs argue that their statistical experts could not examine any common selection criteria or procedure, could not study decisions of common decision makers, and could not study whether local managers displayed a common mode of exercising discretion. Dkt. 342 at 10-21; Dkt. 343 at 7-18. Instead, the experts purportedly had no choice but to conduct gross, bottom-line studies. Dkt. 342 at 10-21; Dkt. 343 at 7-18.

Plaintiffs submit two declarations from their counsel and a handful of accompanying exhibits—any nothing more—to support their contention that the thousands of job files are "inscrutable," "unreliable," and "incomplete." *See* Second Decl. of Timothy B. Fleming, Dkt. 342-2; Decl. of Robert F. Childs, Jr., Dkt. 342-3.[12] The representations in the declarations

[12] Counsel's declarations contradict the prior testimony in this case. Amtrak HR managers—individuals who had personal knowledge of the job files, their use and how they were maintained by Amtrak—testified that job files contain comprehensive applicant flow data for each position, with tests, interview forms, hiring justification memoranda, interview evaluation forms, ranked lists of candidates, applicant rating forms, and other documents that relate to the various elements of the selection process. *See, e.g.*, Pls.' Mot. to Compel, Dkt. 168 at 7 ("Walls testified that Amtrak maintains a 'job file' for each hiring and/or promotion in which the interview process has been

regarding the job files lack any foundation and involve multiple layers of hearsay. *See infra* pp. 25-31. Counsel's declarations do not reveal any systematic effort to conduct an inventory of the thousands of pages of materials produced from the job files that could provide a reasonable foundation for their testimony. Dkt. 342-2; Dkt. 342-3. Moreover, counsel draws broad conclusions about the completeness and usefulness of the thousands of job files based on an extrapolation from counsel's review of six particular job files. Dkt. 342-3 ¶¶ 15-23; *see also* Dkt. 342-2 ¶¶ 13-18 (stating that Mr. Childs' description of job files is consistent with Mr. Fleming's observations). However, counsel's argument is incompetent and unreliable under Federal Rules of Evidence 701(c) and 702 and *Daubert*, 509 U.S. at 589-95, for many obvious reasons. First, counsel is certainly not an expert qualified to develop a scientific sample to be used to reliably extrapolate conclusions about the job files. *See* Fed. R. Evid. 701(c). Counsel asserts that one of his associates selected job files "at random," but provides no detail as to how that was accomplished. Dkt. 342-3 ¶ 15. Neither counsel nor his associate, however, had any qualifications to identify a random sample. *See* Dkt. 342-3; Dkt. 342-2. Second, the sample approach is hopelessly flawed because the sample size is far too small. *See* Dkt. 342-3 ¶ 15. There is no indication that the small sample is representative of all job files, or whether the approach has an acceptable margin of error. *See* Dkt. 342-3; Dkt. 342-2. Lastly, counsel cannot competently testify as to whether job files, as he said, "could not have formed a reliable or complete dataset for study by a statistical expert." Dkt. 342-3 ¶ 23. He is not a statistical expert. *See* Fed. R. Evid. 701(c). In short, surveys conducted by counsel cannot be relied upon unless they are "the product of reliable principles and methods" under Federal Rule of Evidence 702. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 197 (N.D. Cal. 2004) (excluding a survey designed

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used." (citing Deposition of Brenda Walls, Dkt. 168-11 at 60-67)); *see also* Deposition of Brenda Walls, Dkt. 170-3, at 60-61, 101; Deposition of Suzanne Allan, Dkt. 170-4, at 117-19; Deposition of Sarah Ray, Dkt. 170-5, at 30-31.

by counsel in the midst of litigation as methodologically unsound and unreliable under Federal Rule of Evidence 702, and explaining that surveys made under such circumstances are usually rejected "on grounds of being unreliable hearsay"). As such, the declarations must be stricken from the record and cannot be relied upon to justify Plaintiffs' use of bottom-line studies.

Class certification requires a careful inquiry, and a court's "findings must be made based on adequate admissible evidence to justify class certification." *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (emphasis added) (vacating class certification because "the district court erroneously applied too lax a standard of proof").[13] Plaintiffs rely on a series of inapposite district court cases to counter this basic point. For example, Plaintiffs cite to two district court cases out of the Ninth Circuit—*Gonzalez v. Millard Mall Services, Inc.*, 281 F.R.D. 455, 459 (S.D. Cal. 2012), and *Bell v. Addus Healthcare, Inc.*, No. 06-5188, 2007 WL 3012507, at *2 (W.D. Wash. Oct. 12, 2007)—despite the clarification by the Ninth Circuit Court of Appeals in *Ellis* that *Daubert* fully applies to motions to strike at the class certification stage and that courts must undergo a "rigorous analysis" beyond mere admissibility to assess commonality. *Ellis*, 657 F.3d at 982 ("[T]o the extent the district court limited its analysis of whether there was commonality to a determination of whether Plaintiffs' evidence on that point was admissible, it did so in error."). In addition, the district court cases cited by Plaintiffs discussed evidence that was potentially inadmissible for technical reasons not addressing the core of reliability, or evidence that was not central to the class certification decision. *See, e.g.*, *Sherman v. Am. Eagle Exp., Inc.*, 2012 WL 748400, at *2-3 (E.D. Pa. Mar. 8, 2012) (evidence consisted of company documents and policies produced by the defendant that were challenged on relevancy and

[13] Numerous courts have held that admissibility standards apply at the class certification stage. *See Unger*, 401 F.3d at 319 (reporting cases from Third, Fourth, Seventh, and Ninth Circuits in requiring admissible evidence at class certification stage); *see also Lujan v. Cabana Mgmt., Inc.*, --- F.R.D. ----, 2012 WL 3062017, at *9-10 (E.D.N.Y. July 26, 2012) (holding that evidence submitted at class certification stage must be admissible).

authenticity grounds); *Carrier v. Am. Bankers Life Assurance Co. of Fla.*, Civil No. 05-CV-430-JD, 2008 WL 312657, at *2-3 (D.N.H. Feb. 1, 2008) (declaration that provided detailed foundation of testimony that reported results of review of records challenged on the grounds that the underlying records did not provide accurate information).

Plaintiffs here cannot satisfy their burden of establishing compliance with Rule 23 by a preponderance of the evidence because their commonality arguments depend on faulty, bottom-line statistical studies. Plaintiffs' request that the Court overlook their flawed methodology and unreliable statistical conclusions based entirely upon the biased testimony of counsel that lacks foundation and reports rank hearsay is untenable, especially where all reliable evidence on record such as Amtrak HR manager deposition testimony supports the utility of job files. Counsel's unreliable testimony cannot serve as the foundation for certifying a class of this scale, involving approximately 11,500 employees. Given that this case has now been litigated for twelve years, it is inconceivable that Plaintiffs must rest their hope of class certification on their counsel's argument offered as testimony that "tens of thousands of documents discovered, and thousands of attorney hours expended" (Dkt. 303 at 41), yielded nothing useful but only "inscrutable" and "incomplete" records of 55,000 selection decisions. The Court should strike such inherently unreliable testimony and disregard it for purposes of deciding all pending motions.

2. Statements Indicating A Lack Of Personal Knowledge And Statements Based On Hearsay Are Inadmissible And Should Be Stricken.

As noted above, Plaintiffs rely on the declarations of Mr. Fleming and Mr. Childs for several briefs, including their Memorandum in Opposition to Defendant's Motion for Summary Judgment on Disparate Impact Claims (*see* Dkt. 343 at 14-15, 17-18) and their related Response to Defendant's Statement of Material Facts as to Which There Is No Genuine Dispute (*see* Dkt. 343-1 ¶¶ 7, 15, 27). It is axiomatic that factual submissions concerning summary judgment must

be admissible as evidence. A court may strike affidavits "(1) for which the affiant lacks personal knowledge; (2) that set forth facts inadmissible at trial; or (3) to which the affiant is not competent to testify." *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 224 F.R.D. 261, 263 (D.D.C. 2004) (striking statements that constituted "unsubstantiated opinion for which [declarant] lacks the first-hand knowledge and personal experience necessary to render her competent to attest to any sets of facts underlying her statements"). As such, "an affidavit based merely on information and belief is unacceptable." *Id.* at 263-64.

A court may also strike affidavits that are "impermissible hearsay, conclusory or self-serving," rather than based on the declarants' personal knowledge. *Id.* at 264. Specifically, "Rule 56(e)'s personal knowledge requirement renders statements made on information and belief, facts which the affiant believes but does not know are true, insufficient." *Id*. at 265 (citing *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996)); *see also Reese v. Meritor Auto., Inc.*, 5 F. App'x 239, 244 (4th Cir. 2001) (rejecting affidavits that were "[r]eplete with hearsay and often conclusory"); *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997) (stating that speculative or "conclusory allegations . . . without factual support, are insufficient" evidence); *Johnson v. U.S. Capitol Police Bd.*, Civil Action 03-00614 (HHK), 2005 WL 486743, at *2 (D.D.C. Mar. 2, 2005) (striking declaration in its entirety because declarant lacked personal knowledge relevant to plaintiffs' claims and her allegations were unsupported by any record evidence).

a. The Court Should Strike The Inadmissible Portions Of Timothy Fleming's Declaration.

Mr. Fleming's declaration contains statements that are not based on personal knowledge, are speculative, and lack foundation, all in violation of Rule 602 of the Federal Rules of Evidence. Mr. Fleming's declaration also contains or refers to statements made by other

individuals that are offered for the truth of the matter asserted and, therefore, constitute inadmissible hearsay under Rule 802 of the Federal Rules of Evidence. Accordingly, as to each specific evidentiary objection identified below, the Court should strike Mr. Fleming's declaration.[14]

Evidence Objected To	**Objection**
6. ". . . Some of it, as it was explained to me, was technology antiquated. Our consultants found that the employment data was extremely difficult to sort, assess, and use for statistical analysis. There were enormous difficulties in merging this data for purposes of statistical analysis."	The statements lack foundation and are based on hearsay. Fed. R. Evid. 602 and 802.
7. "Due to the condition of the electronic data, I proposed to Amtrak counsel that the parties work together to construct a joint database that both sides could use. Amtrak declined to do so."	The statement lacks foundation and is based on hearsay. Fed. R. Evid. 602 and 802.
8. "During discovery, we also learned that Amtrak had maintained no applicant flow data, relating to either hiring or promotions."	The statement lacks foundation and is based on hearsay. Fed. R. Evid. 602 and 802.
10. "Eventually, in a deposition during the course of class certification discovery, we learned that Amtrak Human Resources offices in various parts of the country maintained paper files of promotion decision making, known internally as 'job files.'"	The statement lacks foundation and is based on hearsay. Fed. R. Evid. 602 and 802.
14. "At the time of job files review project, it quickly became apparent that the job files themselves contained generally incomplete information regarding applicant flow. The job files held documentation on the promotions and hiring process that was inconstant, incomplete, and sometimes inscrutable."	The statements lack foundation, are speculative and conclusory, and are based on hearsay. Fed. R. Evid. 602 and 802.
16. "In our Birmingham office, we [sic] an extensive review of the information contained in the job files was undertake by WCQP staff and attorneys."	The statement lacks foundation and is speculative and conclusory. Fed. R. Evid. 602.
17. ". . . [B]ut at some point, we realized that such an applicant flow database was not worthwhile because the necessary information to be inputted, derived from the job files, was incomplete and inconsistent."	The statement lacks foundation, is speculative and conclusory, and is based on hearsay. Fed. R. Evid. 602 and 802.

[14] In addition to striking portions of the declaration based on these specific evidentiary objections, the Court also should strike Mr. Fleming's declaration under Federal Rules of Evidence 701(c) and 702 and *Daubert*, as described in greater detail in Section II.B.1 above.

Evidence Objected To	Objection
18. ". . . Amtrak had told us in discovery that it did not maintain any computerized applicant flow data. Second, at the time, the employment data that Amtrak had produced was, as set forth above, both incomplete and inconsistent. It had been kept, and was produced in the litigation, in a variety of media and in a variety of formats, and the various forms contained inconsistent fields of data. Amtrak had, we were told, changed its employment data systems several times. Thus, the data that we had was generally unusable."	The statements lack foundation and are based on hearsay. Fed. R. Evid. 602 and 802.
19. ". . . Both sides knew that the data was unusable for expert analysis in this case. As it turned out, it took approximately two years for Amtrak's consultants to construct the Joint Database, given the previously described state of the data."	The statements lack foundation, are speculative, and are based on hearsay. Fed. R. Evid. 602 and 802.
21. ". . . Based on those various communications, and on the mutually understood reasons for the desire to create a Joint Database, I believed that the parties' agreement was that the Joint Database would provide the platform for each side to present its statistical analysis, and argument based thereon, to the Court in this case. To my knowledge, Mr. Black never mentioned that either side should, or could, supplement the Joint Database with additional data. On the contrary, the agreement was to include in the Joint Database all usable employment data that Amtrak possessed. Indeed, it turned out that Amtrak did have a small amount of applicant flow data, and this data was to be, and at the very end of the construction of the Joint Database was, included. I believed, and I still believe, that the substance and spirit of the agreement to create the Joint Database was to include all usable data in it, and that the Joint Database itself would be the sole basis for statistical analysis in this case. The inclusion of the small amount of applicant flow data that [was] included at the very end was consistent with this understanding."	The statements lack foundation and are speculative and conclusory. Fed. R. Evid. 602.

Evidence Objected To	Objection
23. "Although it is still the case that the information available from the job files was insufficient, incomplete, and unreliable, so as to preclude creation of a usable applicant flow database from it, I also believe that to do so would have violated the spirit, if not the letter, of the Joint Database agreement. The entire point of the Joint Database was to avoid embroiling the litigation further with intractable debate over the construction and content of the database underlying each side's statistical analysis. To the extent that there was not specific language in that agreement making that clear, it was only because Mr. Childs and I knew that it was not possible to do so in any event."	The statements lack foundation and are speculative and conclusory. Fed. R. Evid. 602.

b. The Court Should Strike The Inadmissible Portions Of Robert Childs' Declaration.

Like Mr. Fleming's declaration, Mr. Childs' declaration contains statements that fail to satisfy Rule 602 and Rule 802 of the Federal Rules of Evidence. Mr. Childs' declaration contains statements that are not based on personal knowledge, are speculative, lack foundation, or constitute inadmissible hearsay. Accordingly, as to each specific evidentiary objection identified below, the Court should strike Mr. Childs' declaration.[15]

Evidence Objected To	Objection
8. "As a result of our review of the job files materials, we discovered that the job files contained incomplete and inconsistent documentation and information. Documentation and/or information that appeared in some of the job files did not appear in others. Some job files (but not all) contained some applicant data, such as applications or interview scoring sheets, but, in nearly every file, complete information of this type did not exist for each applicant."	The statements lack foundation, are speculative and conclusory, and are based on hearsay. Fed. R. Evid. 602 and 802.
9. ". . . [B]ut we realized that such an applicant flow database was not worthwhile because the necessary information to be inputted, derived from the job files, was incomplete and inconsistent."	The statement lacks foundation, is speculative and conclusory, and is based on hearsay. Fed. R. Evid. 602 and 802.

[15] In addition to striking portions of the declaration based on these specific evidentiary objections, the Court also should strike Mr. Childs' declaration under Federal Rules of Evidence 701(c) and 702 and *Daubert*, as described in greater detail in Section II.B.1 above.

Evidence Objected To	Objection
10. ". . . Amtrak had told us in discovery that it did not maintain any computerized applicant flow data. Second, at the time, the employment data that Amtrak had produced was, as set forth above, both incomplete and inconsistent. It had been kept, and was produced in the litigation, in a variety of media and in a variety of formats, and the various forms contained inconsistent fields of data. Also, Amtrak had, we were told, changed its employment data systems several times. Thus, the data that we had was generally unusable."	The statements lack foundation, are speculative, and are based on hearsay. Fed. R. Evid. 602 and 802.
11. ". . . Both sides knew that the data was unusable for expert analysis in this case. As it turned out, it took approximately two years for Amtrak's consultants to construct the Joint Database, given the previously described state of the data."	The statements lack foundation and are speculative. Fed. R. Evid. 602.
12. "The agreement for the Joint Database was intended to, and, from the Plaintiffs' standpoint, we thought, had solved the data problem because, with a Joint Database, both sides could analyze the same data and present to the Court their respective statistical analyses regarding the workforce and the operation of Amtrak's promotion and hiring selection policy."	The statement lacks foundation, is speculative, and is based on hearsay. Fed. R. Evid. 602 and 802.
13. ". . . I believed that the agreement was that the Joint Database would provide the platform for each side to present its statistical analyses, and argument based thereon, to the Court in this case. Mr. Black never mentioned that either side should, or could, supplement the Joint Database with additional data. On the contrary, the agreement was to include in the Joint Database all usable employment data that Amtrak possessed. Indeed, it turned out that Amtrak did have a small amount of applicant flow data, and this data was to be, and at the very end of the construction of the Joint Database was, included. I believed, and I still believe, that the substance and spirit of the agreement to create the Joint Database was to include all usable data in it, and that the Joint Database itself would be the sole basis for statistical analyses in this case. The inclusion of the small amount of applicant flow data that was included at the very end was consistent with this understanding."	The statements lack foundation and are speculative. Fed. R. Evid. 602.

Evidence Objected To	Objection
14. "Although it is still the case that the information available from the job files was insufficient, incomplete, and unreliable, so as to preclude creation of a usable applicant flow database from it, I also believe that to do so would have violated the spirit, if not the letter, of the Joint Database agreement. The entire point of the Joint Database was to avoid embroiling the litigation further with intractable debate over the construction and content of the database underlying each side's statistical analysis. To the extent that there was not specific language in that agreement making that clear, it was only because I knew that it was not possible to do so in any event."	The statements lack foundation and are speculative and conclusory. Fed. R. Evid. 602.

III. CONCLUSION

With respect to the four new arguments raised for the first time by Plaintiffs in their class certification Reply, as well as Plaintiffs' reference to two previously settled actions involving Amtrak and the portions of the declarations of Mr. Fleming and Mr. Childs that are insufficient under applicable evidentiary standards, Amtrak respectfully requests that the Court strike those portions of the applicable pleadings for the reasons set forth above.

Dated: November 16, 2012

Respectfully Submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Joyce E. Taber, Esq.
Grace E. Speights (#392091)
William E. Doyle (#498522)
Joyce E. Taber (#478681)
1111 Pennsylvania Avenue NW
Washington, DC 20004
(202) 739-3000 (phone)
(202) 739-3001 (facsimile)
gspeights@morganlewis.com
wdoyle@morganlewis.com
jtaber@morganlewis.com

Attorneys for Defendant
National Railroad Passenger Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2012, a copy of the foregoing Memorandum of Points and Authorities in Support of Defendant's Motion to Strike Plaintiffs' New Arguments Raised in Plaintiffs' Reply in Support of Class Certification and Portions of the Declarations of Timothy Fleming and Robert Childs, was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Joyce E. Taber
Joyce E. Taber (#478681)