UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH CAMPBELL, et al.,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 1:99CV02979 (EGS)**
NATIONAL RAILROAD PASSENGER CORPORATION,	)	**CLASS ACTION**
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW REGARDING CLASS CERTIFICATION

In accordance with the Court's December 2, 2013 and December 16, 2013 minute orders, Defendant National Railroad Passenger Corporation ("Amtrak") hereby submits its Response to Plaintiffs' Supplemental Memorandum of Law Regarding Class Certification (Dkt. 370) ("Supplemental Memorandum").

I. RECENT CLASS CERTIFICATION DECISIONS REINFORCE AMTRAK'S ARGUMENT THAT NONE OF PLAINTIFFS' VAGUE AND SHIFTING COMMONALITY THEORIES SUPPORTS CERTIFICATION IN THIS SPRAWLING CASE.

Plaintiffs ask this Court to certify a sprawling, nationwide Title VII class comprising employees and job applicants in hundreds of unique jobs and locations based on an apparent theory that Amtrak maintains "uniform" national policies from which decisionmakers are allowed to deviate. Based on Amtrak's research, it appears that no court has certified this kind of expansive Title VII class. Nor should the Court certify a class here.

In this case, Plaintiffs seek to certify a series of classes and/or subclasses:

- on behalf of more than 11,000 employees and job applicants,

- in more than 700 jobs,
- who are members of thirteen different unions,
- covered by twenty-four different collective bargaining agreements,
- challenging more than 55,000 job selection decisions and
- 24,000 discipline decisions,
- made by hundreds of managers,
- in hundreds of locations,
- during a more than sixteen-year period.

Plaintiffs also assert a hostile work environment claim, which purports to encompass allegations of discriminatory "terms and conditions of employment" and racial harassment at hundreds of locations nationwide at various points in time over sixteen years.

As Amtrak laid out in its prior briefing, Plaintiffs offer no glue with which to hold together thousands of individualized allegations into a single case and, consequently, cannot satisfy Rule 23(a)'s commonality requirement. See Dkt. 320 at 13-36; Dkt. 353-1 at 9-16; Dkt. 359 at 4-9. Plaintiffs' Supplemental Memorandum argues that class certification decisions made since briefing closed support a commonality finding here. That is not the case.

The latest iteration of Plaintiffs' shifting commonality theory argues that Amtrak has "uniform" policies that formally give managers no discretion, but in practice Amtrak permits managers to make selections using varied procedures and criteria adopted by local managers. See Dkt. 370 at 5-6;[1] see also Dkt. 353-1 at 9-15 (describing Plaintiffs' shifting commonality

[1] For example, Plaintiffs' Supplemental Memorandum includes the following internally contradictory argument:

> Amtrak does not invest its selecting managers with independent discretion: rather, they are invested only with authority that is supposed to be wholly dependent upon the collectively bargained national [best qualified and just cause] standard[s], arrived at via adherence to the single, corporately mandated, national policy and procedure. That Amtrak permits its nationwide

theories). This illogical theory is Plaintiffs' latest attempt to "repackage" the basic commonality theory that the Supreme Court conclusively rejected in Wal-Mart Stores, Inc. v. Dukes, Inc., 131 S. Ct. 2541 (2013). Because Plaintiffs do nothing more than repackage the Dukes commonality theory, it is not surprising that **none** of the new cases Plaintiffs cite support their shifting and illogical theory. To the contrary, recent class certification decisions reinforce that Plaintiffs' commonality theory cannot support certification.

A. Recent Class Certification Decisions Show That Commonality Does Not Exist Where, As Here, The Challenged Discretionary Decisions Were Not Bound By A Corporate Policy Or Practice, Were Made Locally, And Were Highly Individualized.

In their Supplemental Memorandum, Plaintiffs attempt to distance themselves from Dukes and also the Seventh Circuit's recent decision in Bolden v. Walsh Construction Co., 688 F.3d 893 (7th Cir. 2013). Plaintiffs state that "the Bolden-Wal-Mart scenario is virtually the polar opposite of Campbell."[2] Dkt. 370 at 6. Based on the Dukes decision itself, the recent

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> policy to be loosely enough applied by managers engaged in "selection roulette" – the variable and changing procedural wheel of fortune by which the basic standards are applied hither and yon – to foster discrimination convincingly shows that Amtrak's companywide policies result in the disparate treatment and disparate impact suffered by the Campbell class."

Dkt. 370 at 6 (emphasis in original). Plaintiffs, on the one hand point, to a purported "uniform" policy based on the collective bargaining agreements and, on the other hand, point to a "selection roulette" of localized, discretionary decisions.

[2] Plaintiffs also argue in conclusory fashion that this case is "virtually the same" as McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488 (7th Cir. 2012). Dkt. 370 at 4. This is not correct. In fact, Amtrak previously pointed out the vast differences in both the specific facts and legal theories advanced in McReynolds and this case and explained why those differences preclude a commonality finding here. See Dkt. 353-1 at 13-14. Plaintiffs offer **no rebuttal** to Amtrak's arguments.

Specifically, Amtrak explained that the McReynolds class—which asserted only a disparate impact claim—challenged **only two discrete policies** and was **far narrower** than the putative class here. The McReynolds court considered a discrete and concrete theory of common discrimination focused on two allegedly discriminatory employment practices. 672 F.3d at 488 (describing plaintiffs' disparate impact challenge to teaming policy that "permits brokers in the same office to form teams" and account distribution policy under which company established "competing brokers' records of revenue generated for the company" as criteria for deciding which broker will receive departed broker's accounts). Here, however, Plaintiffs make no similar targeted challenge; they point to no specific policy or practice alleged to have caused discrimination. See infra at 11-14. Although Plaintiffs ambiguously reference the "best qualified" and "just cause" standards in collective bargaining agreements, Plaintiffs make clear that they do not challenge either standard as causing discrimination. See Dkt. 355 at 9-12.

Additionally, while the McReynolds class involved a class of 700 African-American employees, Plaintiffs' proposed class in this case includes more than 11,000 employees as well as an additional number of applicants.

district court proceedings in Dukes, the Bolden decision, and other recent appellate court decisions, however, the Court should reject Plaintiffs' eleventh-hour attempt to repackage their commonality theory and deny class certification. See Dukes, 131 S. Ct. at 2552-57; Dukes v. Wal-Mart Stores, Inc., --- F. Supp. 2d ----, No. 01-cv-2252, 2013 U.S. Dist. LEXIS 109103, at *4-35 (N.D. Cal. Aug. 2, 2013) ("California Mini-Dukes"); Ladik v. Wal-Mart Stores, Inc., 291 F.R.D. 263, 268-73 (W.D. Wis. 2013) ("Wisconsin Mini-Dukes"); Bolden, 688 F.3d at 894-98; Davis v. Cintas Corp., 717 F.3d 479, 487-89 (6th Cir. 2013); Tabor v. Hilti of Am., Inc., 703 F.3d 1206, 1228-29 (10th Cir. 2013). Like this case, each of these cases involved a challenge to **discretionary decisionmaking**. As described in detail below, in each case the court found that the plaintiff(s) failed to show commonality, and, accordingly, class certification was denied.

Try as they might to disguise their claims, the lynchpin of Plaintiffs' claims here, as in Dukes, is that the "discretion exercised by their local supervisors over [promotion and discipline] matters violates Title VII by discriminating against [African-Americans]." 131 S. Ct. at 2547. Amtrak's prior class certification briefing exhaustively discusses why Dukes dictates that the Court to deny class certification here. See Dkt. 320 at 13-34; Dkt. 353-1 at 9-16; Dkt. 359 at 4-9.

1. Mini-Dukes Decisions

In the recent district court proceedings in the mini-Dukes cases, the courts have uniformly rejected alternative theories of commonality. See Cal. Mini-Dukes, 2013 U.S. Dist. LEXIS 109106, at *4-35; Wis. Mini-Dukes, 291 F.R.D. at 268-73. On remand to the Northern District of California, the Dukes plaintiffs asked the district court to certify a "down-sized" class

672 F.3d at 488. The plaintiffs in McReynolds worked in two job titles only, Financial Advisor and Financial Advisor Trainees. McReynolds v. Merrill Lynch, No. 05-cv-6583, 2012 WL 5278555, at *1 (N.D. Ill. July 13, 2012). By contrast, Plaintiffs here seek to certify a class including employees in hundreds of different jobs at hundreds of different work locations.

consisting of approximately 150,000 women working in Wal-Mart's California regions. Cal. Mini-Dukes, 2013 U.S. Dist. LEXIS 109106, at *25. The district court, relying heavily on Dukes, denied class certification, holding that:

- The "specific employment policies" identified by plaintiffs in support of their disparate impact claims were either (1) not common policies that applied across the class; or (2) not truly policies at all, but simply attempts to "repackage" the delegated discretion argument rejected by the Supreme Court. Id. at *25-33.
- Plaintiffs' attempt to use aggregate statistics across the challenged regions, instead of store-level statistics, was inconsistent with Dukes. Drilling down on the statistics revealed no proof of discrimination at all in many stores and districts and no "significant proof" of a "general policy of discrimination" when looked at as a whole. Id. at *11-15.
- Plaintiffs' additional anecdotal evidence and evidence regarding Wal-Mart's "common culture" did not constitute significant proof of a general policy of discrimination. For example, the small group of "top-level" management identified by Plaintiffs still had 56 members and there was no evidence even to suggest that more than a few of those managers were biased. Id. at *16-25.

The court noted that, even though there were now fewer plaintiffs at issue, there was still no logic behind why the new group of plaintiffs had been selected and there was nothing to tie them together. Id. at *33-34. The court explained that the plaintiffs continued "to challenge the discretionary decisions of hundreds of decision makers, while arbitrarily confining their proposed class to corporate regions that include stores in California, among other states" rather than identifying an employment practice and defining a class around it. Id. at *34. Simply

reducing the number of plaintiffs and confining them to a single region, the court held, could not resolve the problems the Supreme Court identified. Id. The court, therefore, found no commonality and denied class certification on both plaintiffs' disparate treatment and disparate impact claims. Id.

Similarly, in Wisconsin Mini-Dukes, the court was faced with a mini-Dukes class action on behalf of all employees in Wal-Mart's Region 14 (Wisconsin, Illinois, Indiana, and Michigan). Wis. Mini-Dukes, 291 F.R.D. at 264. Wal-Mart filed a motion to dismiss the class allegations as incapable of satisfying Rule 23(a)(2)'s commonality requirement based on the face of the complaint. The court held that the plaintiffs' class allegations failed as a matter of law and, therefore, dismissed those allegations without permitting discovery. Id. at 264-65, 269-73. The court found that plaintiffs had only "created a smaller version of the same problem" present in Dukes by decreasing the size of the class, but failing to identify any common question capable of resolution on a classwide basis. Wis. Mini-Dukes, 291 F.R.D. at 270. Instead, the court observed, the plaintiffs' claim remained essentially that Wal-Mart permitted its managers to exercise subjective discretion in making promotion and compensation decisions. Id. at 272.

In both California Mini-Dukes and Wisconsin Mini-Dukes, the plaintiffs unsuccessfully employed the same tactic Plaintiffs use here. In both cases, the plaintiffs attempted to repackage the original Dukes claims by alleging companywide policies (for example, purported uniform guidelines for promotion and a formalized application process). See Cal. Mini-Dukes, 2013 U.S. Dist. LEXIS 109106, at *29-35; Wis. Mini-Dukes, 291 F.R.D. at 271. Just as the California Mini-Dukes and Wisconsin Mini-Dukes courts saw through the plaintiffs' attempt to repackage their claims and disguise local variability as uniformity, the court should reach the same conclusion here. Plaintiffs still point to no common policy or practice that, in one stroke, "will

produce a common answer to the crucial question why was I disfavored." Dukes, 131 S. Ct. at 2552. Also, as in the mini-Dukes cases, Plaintiffs' proposed subclasses do nothing to solve their commonality problem. Their subclasses, based on manufactured distinctions, are expansive and encompass a vast array of different job selection criteria and decisionmakers. They are not based on a particular policy or practice common to each subclass. See Dkt. 320 at 15-19 (explaining in detail why certification of purported subclasses is inappropriate).

2. Bolden v. Walsh Construction Co.

Despite Plaintiffs' best efforts to cloak their commonality theory in a "single, corporately mandated, national policy and procedure," they point to no actual common policy or practice that explains any alleged disparities in promotions, discipline, or terms and conditions of work. See Dkt. 370 at 6. Rather, they point to "deviations or variations" in the "commonly applicable procedures" that permitted the "infusion of subjective qualities" and the "influx of racially discriminatory bias." See Dkt. 303 at 7, 21. As the Seventh Circuit explained in Bolden, however, the exercise of independent discretion by multiple managers is incompatible with Rule 23(a) commonality. 688 F.3d at 896.

In Bolden, the Seventh Circuit rejected the plaintiffs' argument that allowing hundreds of local supervisors to make subjective decisions regarding work hours, overtime, and promotions, without reference to any objective criteria, constituted a general policy of discrimination. Id. at 898 ("[Dukes] tells us that the local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity."). Here, as in Bolden, the crux of Plaintiffs' commonality theory is that local variability leads to subjective decisionmaking. As in Bolden, Plaintiffs do nothing more than "repackage local variability as uniformity," which is plainly insufficient to show commonality. Id. Plaintiffs have stated the following in prior class certification briefing:

- "Depositions 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." Dkt. 303 at 7.
- "[I]t is Amtrak's managers' usage of discretionary decision-making processes ('Selection Roulette') and those Amtrak managers' subjective judgments resulting therefrom . . . in other words, the discretionary decision-making processes leading to subjective and biased implementation of the 'best qualified' and 'just cause' standards in specific cases and decisions – that cause discrimination." Dkt. 355 at 10-11.
- "Amtrak permits its nationwide policy to be loosely enough applied by managers engaged in 'selection roulette' – the variable and changing procedural wheel of fortune by which the basic standards are applied hither and yon . . . ." Dkt. 307 at 6.

The non-existent and irrelevant distinctions Plaintiffs point to between this case and Bolden do not support a commonality finding here. First and foremost, although Plaintiffs vaguely point to "a very definite (and elaborate) set of corporate-wide policies," which allegedly was lacking in Bolden, they do not point to any common policy or practice that they allege was the mechanism of discrimination. See Dkt. 370 at 4-6. Plaintiffs here, like the plaintiffs in Bolden, fail to allege any policy or practice that binds the class together. Instead, Plaintiffs refer to generic, unnamed policies that do not set forth any specific requirements Plaintiffs challenge. Thus, they have not identified a policy or practice—beyond localized discretion epitomized by the so-called "selection roulette"—that allegedly affected all putative class members in the same way. The plaintiffs in Bolden pointed to several different policies that allegedly "present[ed]

common questions." 688 F.3d at 898. But, like the allegedly "variable" processes Plaintiffs challenge here, all of those policies "boil[ed] down to the policy affording discretion" to local managers, which is insufficient under Dukes to support a companywide class. Id.

Second, Plaintiffs provide a conclusory and irrelevant summary of, in their view, distinctions in how the railroad industry workforce is structured compared to the construction industry workforce. See Dkt. 370 at 4-5. Plaintiffs do not explain, however, how these structural differences affect the commonality analysis in any way. They do not explain how the structure of the railroad industry workforce poses a common question of law or fact that, in one stroke, "will produce a common answer to the crucial question why was I disfavored." Dukes, 131 S. Ct. at 2552.

Third, Plaintiffs suggest that Wanda Hightower's testimony provides a common answer to the question "why was I disfavored" because it shows that Amtrak's top executives allegedly intended to ignore, condone, and permit companywide racial discrimination. See Dkt. 370 at 6-7. As discussed in Amtrak's prior briefing, the testimony of one former employee—who worked for Amtrak for only twenty-two months—does not and cannot raise an inference that **every** Amtrak manager exercised discretion in the same way and that **every** selection and discipline decision made during the **sixteen-year class period** was discriminatory. See Dkt. 320 at 21 & n.9, 31-34.

Finally, Plaintiffs' additional attempts to distinguish their hostile work environment ("HWE") claims from the claims considered in Bolden similarly fail. In Bolden, the Seventh Circuit held that the plaintiffs' proposed HWE claims did not meet commonality standards because the putative class members could not have experienced common working conditions

across numerous work sites.[3] 688 F.3d at 898-99. The plaintiffs' problem in Bolden was not purely a "numbers" problem. The issue was not, as Plaintiffs suggest, solely that the plaintiffs presented evidence regarding only 12 of 262 worksites. See Dkt. 370 at 7-8. Commonality was not present because, among other reasons, the plaintiffs each had different experiences regarding the racial hostility, if any, found at a worksite and their claims would turn on site-specific or even superintendent-specific questions. See Bolden, 688 F.3d 898-99. The same is true here. Plaintiffs' hostile work environment allegations are highly individualized and not subject to common proof. The putative class members worked in hundreds of different locations, performing hundreds of different jobs, at different times, on different shifts, with thousands of different supervisors and co-workers over sixteen years. Plaintiffs offer no evidence whatsoever that all workers experienced harassment, much less the same kind or degree of alleged harassment. Additionally, even if racial harassment occurred, each worker would have to establish either that the harassment was committed by a supervisor or that Amtrak knew about the harassment and failed to take appropriate remedial action, facts that will vary with each worker and each incident, an issue the Bolden court did not reach. In other words, the host of individualized issues associated with claims dispersed by time, department, and geography cannot be resolved on a classwide basis. See Dkt. 320 at 18-19, 34-36 (explaining that failure to allege common form of harassment defeats commonality finding and highlighting Plaintiffs' highly individualized and divergent HWE allegations).

[3] The Seventh Circuit also held that, even if commonality was satisfied, an HWE class would be unmanageable and therefore would not satisfy Rule 23(b)(3), because it would require numerous mini-trials. Bolden, 688 F.3d at 898 (explaining at least one trial per site would be required to determine site-specific conditions). Here, Plaintiffs' subclasses do nothing to alleviate the need for hundreds, if not thousands, of mini-trials. Plaintiffs have not explained how their arbitrary "Craft" distinctions would negate the need for mini-trials to resolve the innumerable individualized issues raised by an HWE claim by employees working at hundreds of different locations, performing hundreds of different jobs, at different times, on different shifts, with thousands of different supervisors and co-workers. See Dkt. 320 at 18-19, 34-36, 41-42 (describing varied experiences within Craft groupings and highlighting lack of commonality and manageability of HWE claims).

3. Davis v. Cintas Corp.

The Sixth Circuit's decision in Davis reinforces that commonality is not established where, as here, the plaintiffs challenge discretionary decisionmaking but do not point to a specific employment practice that ties the reasons for those discretionary decisions together. In Davis, the Sixth Circuit affirmed the district court's denial of class certification, finding no commonality where individual managers at different locations made hiring decisions for **one position (Sales Representative)** based on local needs and preferences. See 717 F.3d at 488-89. The court found no commonality despite the defendant-company's Meticulous Hiring System, which established well-defined steps for the Sales Representative selection process. See id. As is true here, the plaintiffs' claim in Davis was that subjective, localized decisions made by certain supervisors and managers favored non-African-Americans, not that the use of any objective criteria led to racial bias. See id. at 488. Where, as here and in Davis, plaintiffs challenge largely subjective selection decisions made in many locations over a long time, there is no commonality. See id. at 488-89; cf. Tabor, 703 F.3d at 1229 (holding that even if company's performance management and reporting system had an overall disparate impact on women seeking outside sales position, "haphazard" application of policy meant that it could not establish commonality).

B. None Of The New Employment Discrimination Cases Plaintiffs Cite Support Their Vague And Shifting Commonality Theory.

While the decisions discussed above illustrate why there is no commonality here, none of the recent cases employment discrimination Plaintiffs cite supports a commonality finding in this case. First, Plaintiffs' sprawling class is much closer to Dukes and far afield from the more narrowly focused classes addressed in the cited cases, all of which involved challenges to **a single job** or **closely related jobs**. See Scott v. Family Dollar Stores, 733 F.3d 105, 108

(4th Cir. 2013) (store managers), petition for cert. filed (U.S. Jan. 24, 2014); Kassman v. KPMG LLP, 925 F. Supp. 2d 453, 460 (S.D.N.Y. 2013) (client service and support professionals in five jobs); Moore v. Napolitano, 926 F. Supp. 2d 8, 35 (D.D.C. 2013) (U.S. Secret Service special agents). In contrast to these cases, Plaintiffs here seek certification of a class or subclasses encompassing over 700 jobs with varied required skills across dozens of locations. Plaintiffs cite no cases that certified classes in such a context since Dukes.

Second, the cases Plaintiffs cite involved targeted challenges to **particular** employment practices, but Plaintiffs make no similar challenge here. See Scott, 733 F.3d at 116 (identifying four specific companywide practices allegedly implemented by high-level managers upon which plaintiffs based commonality argument); Kassman, 925 F. Supp. 2d at 464 (discussing specific policies alleged in plaintiffs' complaint and finding allegations sufficient to withstand motion to dismiss at pleadings stage); Moore, 926 F. Supp. 2d at 12-13, 29-30 (describing discrete policy alleged to have affected everyone in class in same manner).

For example, in Moore, the plaintiffs (African-American special agents in the U.S. Secret Service) challenged a single, well-defined Merit Promotion Program ("MPP"), which produced a score and ranking for each candidate for promotion and was used to make all promotion decisions. See 926 F. Supp. 2d at 12-13, 29-30. Here, in contrast, Plaintiffs assert that selection practices varied across jobs, locations, and managers to such an extent that they denigrated the various practices under the heading "Selection Roulette," a mantra repeated throughout Plaintiffs' class certification papers. See Dkt. 303 at 7, 37; Dkt. 344 at 11-12; Dkt. 370 at 6. Plaintiffs later attempted to revise their commonality theory by claiming that the selection practices were constrained by general uniform policies and collective bargaining provisions.[4]

[4] Plaintiffs' eleventh- hour allegations are the subject of Amtrak's pending motion to strike, and, in any event, they do not establish commonality. See Dkt. 353-1 at 9-16; Dkt. 359 at 4-9.

See Dkt. 344 at 10-11; Dkt. 370 at 6. Even if those allegations could be reconciled with their earlier commonality theory based solely on "Selection Roulette," Plaintiffs do not allege—let alone show—that any general policies or collective bargaining agreement provisions were discriminatory. Dukes requires Plaintiffs to point to a specific policy or practice that affected everyone in the putative class in the same way, not simply that common policies or practices applicable to class members exist. The common policy or practice must be the mechanism of discrimination that Plaintiffs challenge. The common policy or practice must answer the question—for each putative class member—"why was I disfavored." Dukes, 131 S. Ct. at 2552 (holding that, to establish commonality, plaintiff must offer proof that common evidence will provide common answer to question why each class member was disfavored). The court in Moore deemed the MPP to satisfy the standard set forth in Dukes. See id. at 2553 (explaining plaintiff may establish commonality if employer used biased testing procedure or companywide evaluation method). Here, there is no selection or discipline policy commonly applicable to the class that Plaintiffs challenge as discriminatory. Plaintiffs identify no specific testing procedure or other companywide evaluation method that has been shown to cause a disparate impact against African-Americans. Plaintiffs cannot, therefore, establish commonality.

In Scott, the plaintiffs' complaint specified four specific companywide practices applicable to the single job at issue (Store Managers) and implemented by high-level corporate decisionmakers. 733 F.3d at 116-17. Specifically, the plaintiffs identified (1) a salary range policy; (2) a pay raise percentage policy; (3) a method for evaluating and determining compensation based on prior experience, prior pay, rankings, and other specific criteria; and (4) a dual pay system for internal and external Store Manager hires. Id. at 116. The court observed that high-level corporate decisionmakers (for example, corporate vice presidents) with

broad authority over company employees were responsible for implementing the four policies and making Store Manager pay decisions. Id. at 116-17. The court noted that, if pay decisions were left to the discretion of low-level managers, then Dukes would have foreclosed any possibility of demonstrating commonality. See id. at 117. Based on two key facts—(1) identification of specific policies (2) implemented by high-level corporate decisionmakers—however, the court determined that the plaintiffs were not, as a matter of law, foreclosed from showing commonality. Id. at 117; see also infra at 14-15 (explaining that Scott court did not actually rule on whether plaintiffs had demonstrated commonality). Here, in contrast to Scott, Plaintiffs point to **no specific policy**. See supra at 11-14. Nor do Plaintiffs challenge decisions made by high-level corporate decisionmakers. Rather, Plaintiffs challenge selection and discipline decisions made by local supervisors and managers.[5] See, e.g., Dkt. 344 at 10-12 (acknowledging that Plaintiffs' claims challenge local, discretionary selection and discipline decisions). Thus, neither of the determinative facts on which the Scott court relied is present here.

Third, neither the Scott court nor the Kassman court actually ruled on class certification. These decisions have little to do with this case because they were analyzed under very different standards than the standard applicable to Plaintiffs' class certification motion. Plaintiffs' Supplemental Memorandum mischaracterizes the Scott decision—the Scott court did not "reverse denial of class certification," as Plaintiffs contend. Dkt. 370 at 2. In Scott, a two-judge majority permitted the plaintiffs to amend their complaint to assert a new commonality theory challenging specific policies and practices as applied to hiring decisions made by high-level managers for one specific job, Store Managers. 733 F.3d at 105, 112-117. But see id. at 119-35

[5] Plaintiffs' opening class certification brief suggested that Amtrak's Chief Executive Officer ("CEO") made all selection decisions, in an attempt to demonstrate commonality. See Dkt. 303 at 7. As explained in Amtrak's opposition, the facts contradict this dubious assertion. See Dkt. 320 at 21 n.9.

(Wilkinson, J., dissenting) (criticizing harshly majority's decision and explaining that discretion limited by broad corporate policies is precisely what the Dukes court found to defeat commonality). While the Scott court permitted the plaintiffs to amend the complaint, citing the Fourth Circuit's policy favoring liberal amendment of complaints, the court specifically stated that they were **not** "rul[ing] on the sufficiency of the allegations in the proposed amended complaint concerning the companywide policies or on whether certification of the putative class will ultimately be warranted." Id. at 117.

Likewise, the Kassman court denied a motion to strike class allegations as "premature" at the pleadings stage before the parties had conducted any discovery. See 925 F. Supp. 2d at 464-65. Additionally, although the Kassman court denied the defendant's motion to strike, the court noted that, "[r]elying on Dukes, the defendant [made] a forceful argument that [the plaintiffs would] be unable to satisfy Rule 23(a)(2)'s commonality requirement." Id. at 464.

C. The Non–Title VII Authority Discussed In Plaintiffs' Supplemental Memorandum Does Not Support A Commonality Finding Here.

None of the non–Title VII cases cited in Plaintiffs' Supplemental Memorandum supports a commonality finding here. Plaintiffs' Supplemental Memorandum briefly summarizes the facts and holdings of four cases, including two described as "large class actions," see Dkt. 370 at 14-16, but offers no explanation why these fundamentally different cases support a commonality finding here. See Dkt. 370 at 12-13 (citing DL v. Dist. of Columbia, No. 05-cv-1437, 2013 U.S. Dist. LEXIS 160018 (D.D.C. Nov. 8, 2013) ("DL Remand"); id. at 13-14 (citing MD v. Perry, 294 F.R.D. 7 (S.D. Tex. 2013)); id. at 14-15 (citing Cason-Merenda v. VHS of Mich., Inc., No. 06-cv-15601, 2013 U.S. Dist. LEXIS 131006 (E.D. Mich. Sept. 13, 2013), vacated sub nom. In re VHS of Mich., Inc., No. 13-113 (6th Cir. Jan. 6, 2014));[6] id. at 15-16 (citing Kenneth R. v.

[6] A copy of the Sixth Circuit's order vacating the district court's decision is attached as Exhibit A.

Hassan, 293 F.R.D. 254 (D.N.H. 2013)).

In DL Remand, the court certified four subclasses of children alleging that **one** agency (the Office of the State Superintendent of Education) failed to provide services required under **four discrete provisions** of the Individuals with Disabilities Education Act ("IDEA").[7] 2013 U.S. Dist. LEXIS 160018, at *25-29. The DL Remand court found that each subclass challenged a **specific** policy or procedure that fell within the purview of a **single** decisionmaker and, therefore, found Rule 23's commonality requirement satisfied. Id. at *28-29.

The plaintiffs in MD, foster children in Texas, alleged classwide injuries purportedly caused by specific state policies and practices regarding caseworker workloads, which led to overworked caseworkers. See 294 F.R.D. at 19. The plaintiffs claimed that Texas's practice of overburdening caseworkers violated the class members' Fourteenth Amendment substantive due process rights. Id. The court certified a general class and three subclasses finding that the state's specific practices regarding caseworker workloads created an "unreasonable risk of harm," which was sufficient to be actionable. Id. at 38-45.

In Kenneth R., the court granted in part a motion for class certification in a lawsuit claiming that the State of New Hampshire unnecessarily institutionalizes people with serious mental illnesses. 293 F.R.D. at 271. Finding that the plaintiffs established commonality, the court cited the plaintiffs' substantial evidence suggesting that the state's policies and practices created a systemic deficiency in the availability of a discrete set of community-based mental

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[7] The court in DL Remand previously had certified one class of all children allegedly denied IDEA services. See DL v. Dist. of Columbia, 713 F.3d 120, 127-28 (D.C. Cir. 2013) ("DL Appeal"). The defendant appealed the certification order, and the D.C. Circuit reversed, holding that proof that the IDEA was violated as to each class member was insufficient to establish commonality. Id. The D.C. Circuit held that to establish commonality a plaintiff must identify a specific policy or practice that affected all class members in the same way. Id. Reversing class certification, the court found that the harms class members allegedly suffered involved different policies and practices under the IDEA and that the plaintiffs identified no single or uniform policy or practice that bridged all of their claims. Id.

health services and that the deficiency caused the harm alleged by all class members. Id. at 267-68.

In Cason-Merenda, an antitrust action alleging that hospitals improperly exchanged wage information and suppressed wages, the court certified a class of one job-type—registered nurses ("RNs")—allegedly affected by the suppressed wages. 2013 U.S. Dist. LEXIS 131006, at *1. The defendants did not contest that the plaintiffs could establish commonality. Id. at *23. Nevertheless, the court briefly analyzed commonality and found Rule 23(a)(2) satisfied because common evidence would answer two key questions for all class members—(1) whether defendant hospitals agreed upon a common course of action and (2) whether the exchange of wage data led to a depression in RN wages.[8] Id. at *24-25.

Assuming, for argument purposes only, that those nonbinding cases were correctly decided, none of them supports a commonality finding in this case for at least two reasons. First, in each case, the plaintiff(s) presented evidence of a discrete policy or practice that was the alleged source of harm and carried out by a discrete actor. See DL Remand, 2013 U.S. Dist. LEXIS 160018, at *22-29; MD, at 38-45; Kenneth R., 293 F.R.D. at 266; Cason-Merenda, 2013 U.S. Dist. LEXIS 131006, at *23-25. As discussed above, Plaintiffs present no such evidence here. See supra at 11-14.

Second, differences between the substantive claims in DL Remand, MD, Kenneth R., and Cason-Merenda and the claims in this case reinforce why commonality is not established here. None of the claims in those cases challenged discretionary decisionmaking or involved questions

[8] The defendant in Cason-Merenda pursued a Rule 23(f) appeal of the district court's decision. Upon consideration of the defendant's Rule 23(f) petition, the Sixth Circuit vacated the district court's class certification decision and remanded the matter for further consideration in light of Comcast v. Behrend, 133 S. Ct. 142 (2103). See Exh. A (vacating district court's order certifying class and directing district court to reconsider certification decision in light of Comcast).

of intent. Resolution of the plaintiffs' claims in those cases turned on objective obligations and a common course of conduct by discrete actors that resulted in a common injury. Cf. Dukes, 131 S. Ct. at 2552 (explaining that crux of inquiry in Title VII matter is "**the reason for a particular employment decision**" and requiring plaintiff to show that Title VII claims "will produce a common answer to the crucial question **why was I disfavored**" (emphasis added)). The claims in those cases challenged centralized procedures and practices by discrete decisionmakers rather than tens of thousands of decisions by countless decisionmakers. The plaintiffs did not seek to litigate the merits of any individual, fact-specific claims, like the plaintiffs in Dukes did and Plaintiffs do here. See DL Remand, 2013 U.S. Dist. LEXIS 166018, at *26-27 (discussing distinctions between IDEA claims at issue and Title VII claims in Dukes); see also Lane v. Kitzhaber, 283 F.R.D. 587, 595-96 (D. Or. 2012) (highlighting distinctions between disability cases, like Kenneth R., and Dukes, and explaining that, in disability cases, unlike Title VII cases, courts have consistently certified classes before and after Dukes).

II. RECENT AUTHORITY SUPPORTS THE CONCLUSION NOT ONLY THAT EXPERT CLASS CERTIFICATION EVIDENCE MUST BE RELIABLE AND RELEVANT UNDER *DAUBERT* BUT ALSO THAT PLAINTIFFS' EVIDENCE DOES NOT MEET *DAUBERT*'S STANDARDS.

Plaintiffs concede that the recent authority suggests that evidence offered to meet Rule 23 requirements must be relevant and reliable under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). See Dkt. 370 at 10 n.2; see also Comcast, 133 S. Ct. at 1431 n.4 (explaining that defendant must present Daubert challenge at class certification stage to preserve issue for appeal); Moore, 926 F. Supp. 2d at 16 n.2 (concluding class certification evidence must meet Daubert's relevance and reliability standards); cf. In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 255 (D.C. Cir. 2013) (holding Rule 23 requires court take a "hard look" at expert statistical models relied on to show predominance).

Citing Bolden and Moore, Plaintiffs incorrectly argue that those authorities support the relevance and reliability of their statistical analysis in this case. See Dkt. 370 at 8-9. Neither case, however, supports a finding that Plaintiffs' statistical evidence here is relevant or reliable.

First, the court in Moore said nothing that would remotely sanction the statistical aggregation that Plaintiffs' experts conducted in this case. In Moore, the plaintiffs' aggregated statistical analysis studied a common, well-defined selection procedure (the MPP) for **one particular job** (Special Agent). Here, in contrast, Plaintiffs admit that there are varied selection procedures and criteria for hundreds of different jobs and local decisionmakers. See, e.g., Dkt. 303 at 17; Dkt. 344 at 11-12; Dkt. 370 at 6. Plaintiffs ignored these fundamental distinctions and conducted a "national statistical study." Dkt. 370 at 8. Plaintiffs argue that their national statistical study was appropriate because "Amtrak's national policies demonstrated their coast-to-coast reach." Id. As discussed above, however, Plaintiffs do not challenge any national policy as discriminatory and instead challenge local managers' alleged discretion to depart from policies by implementing their own varied selection procedures and criteria. See supra at 11-14. Thus, Plaintiffs justification for doing an aggregated, national statistical study is unsupported. Plaintiffs' artificial "Craft" group aggregation similarly is unsupported. Plaintiffs' experts aggregated by a "Craft" construct simply because counsel directed them to do so. See Dkt. 331-1 at 6-7, 12, 21-22 (explaining why "Craft" group studies are irrelevant and highlighting that selection decisions are made locally, not at the "Craft" level); Dkt. 357 at 6-7, 14-17 (discussing lack of factual basis to support Plaintiffs' experts' belated rationale for "Craft" grouping). Craft has no relationship to the actual selection decisionmaking processes or criteria, which involved the decisions of hundreds of local managers and varied by manager and job. See Dkt. 331-1 at 6-7, 12, 21-22; Dkt. 357 at 6-7, 14-17.

Second, Plaintiffs' argument that the Moore court's approval of the plaintiffs' pools analysis somehow supports a finding of relevance and reliability here is a classic "straw man" argument. See Dkt. 370 at 2, 8, 12 n.12 (discussing Moore court's reliance on plaintiffs' pools analysis). Amtrak has never criticized Plaintiffs for using a multiple pools method—it is how Plaintiffs' experts **applied** that statistical method in terms of aggregation, extrapolated benchmarks, and other issues that made their studies irrelevant and unreliable. See Dkt. 331-1 at 9-32. The court in Moore said nothing regarding extrapolated benchmark analyses to suggest that Plaintiffs' experts' analyses in this case are relevant or reliable.

Third, Plaintiffs do not and cannot meaningfully distinguish the plaintiffs' aggregated statistical analysis rejected by the Seventh Circuit in Bolden and Plaintiffs' flawed aggregated studies here. In Bolden, the Seventh Circuit found insufficient the plaintiffs' statistical evidence that aggregated across all work sites and did not "attempt to control for variables other than race." Bolden, 688 F.3d at 896-97 ("The sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in [Dukes]: it begs the question."). The Seventh Circuit's reasoning is equally applicable here. Plaintiffs' experts aggregated tens of thousands of selection and discipline decisions across thousands of local decisionmakers, hundreds of different locations, 730 jobs, 13 unions, and 24 collective bargaining agreements. See Dkt. 320 at 1, 25-30; Dkt. 334 at 2. Additionally, Plaintiffs' experts in this case failed to control for relevant factors such as seniority, which they concede plays a role in making decisions under the collective bargaining agreements. Dkt. 320 at 25-30; Dkt. 331-1 at 3-4, 12-16; Dkt. 357 at 17-18; Dkt. 334 at 2; cf. Tabor, 703 F.3d at 1224 ("When the challenged employment practice involves employer discretion, the plaintiff's statistical analysis must control for the constraints placed upon the decisionmaker's discretion. This is necessary especially in cases where an

employer combines subjective criteria with the use of more rigid standardized rules or tests." (internal citations and quotation marks omitted)).

Finally, Plaintiffs' experts' statistical analyses are plainly insufficient to support Plaintiffs' latest repackaging of their commonality theory. Plaintiffs allege that local Amtrak managers engaged in discriminatory decisions because they deviated from uniform national policies and implemented their own, varied selection procedures and criteria. See Dkt. 370 at 6. But Plaintiffs' experts conceded that they did not study the decisions of any local managers or of any particular selection practice or criteria. See Dkt. 331-1 at 9-25 (describing Plaintiffs' experts' failures to conduct any study relevant to commonality inquiry, including their admitted failures to study decisions of any particular decisionmakers despite recognizing that local managers made challenged decisions). Thus, Plaintiffs' experts simply failed to conduct a study that had **any relationship** to the Plaintiffs' theory of commonality. Instead, Plaintiffs' experts conducted highly aggregated, "bottom-line" studies that say nothing about local decisionmaking or selection practices. See Dukes, 131 S. Ct. at 2555 (explaining that regional pay disparity cannot establish store-by-store disparity, which plaintiffs were required to show to support their commonality theory); see also Dkt. 331-1 at 24-26 (explaining Plaintiffs' statistical analyses bear no relationship to Plaintiffs' original commonality theory); Dkt. 357 at 10-20 (discussing various reasons Plaintiffs' aggregated, national statistical studies fail to support Plaintiffs' new commonality theory, which relies on decisionmakers' alleged deviation from purported uniform national policies).

In contrast, the analysis done by Dr. Donald Deere, Amtrak's expert, demonstrated significant variation in outcomes at the local level and shows that there is no common pattern of discrimination that would support class certification. Compare Dkt. 320-3 at 28-32 & Tables 1-3

(reporting that more than 60% of locations indicated no statistical differences), and Dkt. 356-2 at 5-15 (discussing lack of consistent pattern of selection disparities across analyses focused on job and city combinations), with Cal. Mini-Dukes, 2013 U.S. Dist. LEXIS 109106, at *12-15 (finding plaintiffs' pay and promotion statistics insufficient to support commonality finding where plaintiffs "[had] not identified statistically significant disparities in even a majority of the relevant decision units"), and Davis, 717 F.3d at 489 (affirming district court's finding that plaintiff's expert evidence was unpersuasive where it aggregated data from all locations nationwide in support of class claims).

III. *COMCAST* REQUIRES PLAINTIFFS TO SHOW THAT DAMAGES CAN BE DETERMINED ON A CLASSWIDE BASIS TO ESTABLISH PREDOMINANCE UNDER RULE 23(B)(3), AND PLAINTIFFS CANNOT SATISFY THAT REQUIREMENT.

As laid out in Amtrak's prior briefing, Plaintiffs cannot satisfy Rule 23(b)(3) because they cannot show that common questions predominate. Common questions would not predominate in this case because of the highly individualized nature of Plaintiffs' claims. Class-member-by-class-member inquiries would be required to address individual liability and damages issues. The countless individual issues raised by the putative class members' claims (and Amtrak's defenses to those claims) would require resolution of tens of thousands of individual questions that cannot be answered through common evidence. See Dkt. 320 at 35-41.

The Supreme Court's decision in Comcast reinforces Amtrak's argument that Rule 23(b)(3) certification is inappropriate where individualized liability and damages determinations are required. See 133 S. Ct. at 1432-34. In Comcast, the Supreme Court held that a plaintiff seeking certification of a damages class under Rule 23(b)(3) must establish "through evidentiary proof" that damages can be determined on a classwide basis and reaffirmed that Rule 23(b)(3)'s predominance requirement is more demanding than Rule 23(a)'s commonality requirement. Id.

at 1432; see also Dkt. 366 at 1 ("In [Comcast], the Court ruled that a class cannot be certified under Rule 23(b)(3) where damages cannot be determined on a class-wide basis but require numerous, individualized determinations."). The Comcast Court emphasized that for Rule 23(b)(3)'s predominance requirement to be satisfied, the class proponent must proffer a method of measuring damages that can be applied classwide. 133 S. Ct. at 1433; see also Rail Freight, 725 F.3d at 253 ("No damages model, no predominance, no class certification."). Here, neither liability nor damages can be proven on a classwide basis and individual questions will predominate.

Plaintiffs describe Comcast as "nothing remarkable" and argue it is not useful here because it is an antitrust case.[9] Dkt. 370 at 9, 11. Yet several federal courts—most importantly the D.C. Circuit—have recognized Comcast's significance within or outside the antitrust context and held that damages must be capable of measurement on a classwide basis in order for the class to be certified.[10] See, e.g., Rail Freight, 725 F.3d at 253-55 (explaining in antitrust case that Comcast raised the bar for Rule 23(b)(3) certification); Bright v. Asset Acceptance, LLC, 292 F.R.D. 190, 202-03 (D.N.J. Aug. 1, 2013) (finding predominance not met in consumer class action where plaintiff argued he could present, but did not actually present, reliable damages methodology, and individual damages issues would overwhelm common issues); Roach v. TL Cannon Corp., No. 10-cv-591, 2013 U.S. Dist. LEXIS 45373, at *8-10 (N.D.N.Y. Mar. 29, 2013)

[9] Plaintiffs' argument that the Supreme Court's decision in Comcast is irrelevant because Comcast was an antitrust case is ironic given Plaintiffs' reliance on several fundamentally different cases, including antitrust cases. See supra Section I.C (discussing why fundamentally different cases do not support certification here).

[10] Citing several post-Comcast decisions in which courts certified liability-only classes, Plaintiffs once again vaguely suggest that Rule 23(c)(4) issue certification is appropriate in this case. See Dkt. 370 at n.3. As discussed in Amtrak's prior briefing, Plaintiffs improperly raised Rule 23(c)(4) for the first time in their class certification reply but later abandoned any request for Rule 23(c)(4) issue certification. See Dkt. 353-1 at 4-6; Dkt. 359 at 2-3. As Plaintiffs previously stated, they "have not moved for separate issue certification." Dkt. 355 at 2. Accordingly, the Court should not consider issue certification as a basis for certification in this case. If the Court is inclined to consider issue certification under Rule 23(c)(4) sua sponte, Amtrak again respectfully requests the opportunity to brief the substantial issues raised by the application of that provision to the facts and legal theories involved in this case. See Dkt. 353-1 at 5-6 (providing brief summary of several reasons why issue certification would not make sense in this case).

(rejecting certification in wage and hour case where individual questions would overwhelm common questions despite plaintiffs' relatively mechanical formula for calculating damages). In Rail Freight, the D.C. Circuit explained that, "[b]efore [Comcast], the case law was far more accommodating to class certification under Rule 23(b)(3)." 725 F.3d at 255. The Rail Freight court succinctly summed up one of Comcast's key holdings—**"No damages model, no predominance, no class certification."** Id. at 253. Here, Plaintiffs have not shown—and cannot show—that damages are capable of measurement on a classwide basis. Certification under Rule 23(b)(3), therefore, is inappropriate.

Plaintiffs also argue that Comcast is irrelevant here because "there is no need whatsoever in an employment civil rights case for damages to be actually computed prior to class certification." Dkt. 370 at 10. Even if there is no such need, Plaintiffs' argument misses the point. The problem for Plaintiffs' case here is not that they have not calculated damages prior to class certification. The problem is that they **cannot** at any stage proffer a method of measuring damages that can be applied classwide. See Comcast, 133 S. Ct. at 1433; Rail Freight, 725 F.3d at 253-55. Plaintiff's prayer for back pay and compensatory and punitive damages demands individualized determinations that cannot be calculated formulaically. See Dkt. 320 at 40-41 (explaining Dukes court rejected "trial by formula" approach to calculating back pay and explaining why neither compensatory nor punitive damages can be resolved classwide with common proof). The individualized nature of Plaintiffs' claims and the Supreme Court's rejection of a "trial by formula" approach make it impossible to determine damages—or liability—on a classwide basis here. This alone precludes certification under Rule 23(b)(3).

Plaintiffs appear to suggest that the procedures referenced in Teamsters v. United States, 431 U.S. 324 (1977), somehow satisfy (or relieve them of) Comcast's requirement that damages

be capable of measurement on a classwide basis. Dkt. 370 at 10; see also Dkt. 303 at 31 (suggesting that Teamsters framework resolves all Rule 23(b)(3) predominance concerns). As discussed in Amtrak's prior briefing, however, Teamsters procedures cannot solve the predominance or manageability problems related to Plaintiffs' request for Rule 23(b)(3) certification. See Dkt. 320 at 42-43; Dkt. 353-1 at 7-8; Dkt. 359 at 3-4. Plaintiffs' two-phase Teamsters proposal offers no way to efficiently manage the thousands of jury trials Dukes requires to decide Amtrak's defenses and determine damages. See Dkt. 353-1 at 7-8; Dkt. 359 at 3-4. Plaintiffs' proposed plan contemplates over 11,000 Teamsters hearings, which would take twenty-seven years to complete. See Dkt. 359 at 3-4. Teamsters hearings would involve individualized issues as to liability, defenses, back pay, and compensatory and punitive damages, and common issues would not predominate during these proceedings. Such an approach is plainly unmanageable and cannot satisfy Rule 23(b)(3).

For the foregoing reasons and all the reasons set forth in Amtrak's prior briefing, Amtrak respectfully requests that the Court deny Plaintiffs' Motion for Class Certification in its entirety.

Dated: February 12, 2014

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February 2014, a copy of the foregoing Defendant's Response to Plaintiffs' Supplemental Memorandum of Law Regarding Class Certification 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/ Grace E. Speights
Grace E. Speights