UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
DOCKET NO. 3:08-cv-00540-MOC-DSC

LUANNA SCOTT, et al., on Behalf of Themselves and Others Similarly Situated,	)	
Plaintiffs,	)	
Vs.	)	ORDER
FAMILY DOLLAR STORES, INC.,	)	
Defendant.	)	

THIS MATTER is before the court on plaintiffs' Motion for Class Certification (#211), defendant's Response (#223), and plaintiff's Reply (#244). Having considered the parties' briefs and heard oral arguments on June 22, 2016, plaintiff's Motion is **GRANTED** and the proposed class is **CERTIFIED**.

I.

In this action, plaintiffs, female store managers of defendant Family Dollar Stores, contend that defendant created and continues to utilize a pay system that results in female managers being paid less than their male counterparts. They contend that the origin of the problem is found in a company-wide policy that places store managers who were promoted from within on a separate and ultimately lower pay path than those hired from outside the company. They have produced evidence that those promoted from within are overwhelmingly female and that those hired from outside are overwhelmingly male, resulting in similarly situated female managers earning substantially less than their male colleagues. They have proffered evidence which, if a jury were

to find persuasive, could support a finding that the pay policies originating from corporate headquarters in Mooresville, North Carolina, have had a disparate impact on women managers in the 46 states in which defendant does business.

Defendant argues that the court should not certify the class. In essence, defendant contends that while there were corporate policies, affidavits from 29 of its District Managers indicate that some 100,000 starting pay and pay increase decisions over the last 14 years were made in the field. It contends that those decisions had nothing to do with gender, but were based on the needs of the particular store, which in turn pivoted on the community that store served. At the hearing, defendant proffered a demonstrative "word cloud" exhibit drawn from those affidavits, which they contend was indicative of pay decisions being made in the field. Defendant argues that the court should not certify this matter for resolution as a class because the criteria for pay are embedded in its district managers' subjective discretion.

II.

Cases go up and the law comes down. Soon after this case was reassigned in 2011, this court granted defendant's Motion to Dismiss the Putative Class Action (#113) based on what the court then believed to be the clear mandate of Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). The appellate court determined, however, that this court had read Wal-Mart incorrectly and that the court should have allowed plaintiffs to amend their Complaint. It instructed this court to determine on remand whether "based on our interpretation of Wal–Mart, the proposed amended complaint satisfies the class certification requirements of Federal Rule of Civil Procedure 23." Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 108 (4th Cir. 2013). For the reasons that follow, the court determines that the Amended Complaint satisfies the class certification requirements of

Rule 23 when Wal-Mart is read in the manner provided by the appellate court.

III.

This is a proposed class action filed by plaintiffs on behalf of themselves and a proposed class of all female Store Managers employed or previously employed by defendant since 2002. Plaintiffs assert claims pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq*., and the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) *et seq*., based on what they allege to be widespread and pervasive gender discrimination in employment opportunities. As the appellate court found, the Amended Complaint contains substantial allegations of centralized control. Scott, 733 F.3d at 112. Plaintiffs seek class certification under Rule 23(b)(2), Federal Rules of Civil Procedure, as to Counts One, Two, and Three of the Amended Complaint (#158) and for equitable relief sought on their disparate impact and pattern-or-practice claims.

In considering a request to certify a class, the court first considers whether the alleged commonality and predominance are based on the "elements of the underlying cause of action." Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011). However, class certification is not contingent upon a finding that *every* issue in the case be common or predominant; instead, a single common issue is sufficient. "[F]or purposes of Rule 23(a)(2), even a single common question will do." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556-2557 (2011). Individualized questions are not relevant to either disparate impact or pattern-or- practice claims. Brown v. Nucor Steel-Berkeley, 785 F.3d 895, 914 (4th Cir. 2015) (hereinafter "Brown II"). In Brown II, the appellate court held as follows:

> [t]his Court's recent opinion in *Scott v. Family Dollar Stores, Inc.* specifically provides several ways that such a disparate impact claim may satisfy Rule 23 after

> *Wal–Mart*, including: (1) when the exercise of discretion is "tied to a specific employment practice" that "affected the class in a uniform manner"; (2) when there is "also an allegation of a company-wide policy of discrimination" that affected employment decisions; and (3) "when high-level personnel exercise" the discretion at issue.

Id. at 916 (citation omitted).

Whether the plaintiffs will ultimately prevail on their claims or whether the defendant is likely to prove a defense are not relevant at this stage. Id. at 914. Certification by a court concerns commonality and not "the apparent merit of the claims. . . ." Brown v. Nucor Corp., 576 F.3d 149, 153 (4th Cir. 2009) (hereinafter "Brown I"). Ultimately, the purpose of a Rule 23(b)(3) certification ruling is not to decide the merits of the case, but to "select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013) (citation omitted). Thus, the court's task is to look at the purported class, not the merits or demerits of any particular class member's claims. Id.

With those parameters in mind, Rule 23 governs certification of a class action. "A district court has broad discretion in deciding whether to certify a class." Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001). "[F]ederal courts should give Rule 23 a liberal rather than a restrictive construction." Gunnells v. HealthPlan { "pageset": "Se5 Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003) (internal quotations and citations omitted). The party seeking class certification bears the burden of proof, Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1267 (4th Cir.1981), and must present evidence that the putative class complies with Rule 23. EQT Prod. Co. v. Adair, 764 F.3d 347, 357 (4th Cir. 2014).

In determining whether the party seeking certification has carried its burden, "a district court may need to 'probe behind the pleadings before coming to rest on the certification question.'"

Id. (quoting Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1432 (2013)). Here, the court has allowed substantial discovery to aid in that process and now has before it a substantial proffer of evidence by plaintiffs that is supportive of its request for class certification. Equally, defendant has submitted its own substantial proffer in opposition.

District courts are not required "to accept plaintiffs' pleadings when assessing whether a class should be certified." Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004). Rather, "the district court must take a 'close look' at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." Thorn v. Jefferson–Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006) (quoting Gariety, 368 F.3d at 365). While Rule 23 does not grant courts "license to engage in free-ranging merits inquiries at the certification stage," the court should consider the merits of the case to the extent "that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1194–95 (2013) (internal citations omitted). To obtain class certification, a plaintiff must satisfy the four requirements of Fed. R. Civ. P. 23(a). Additionally, the case must be consistent with at least one of the types of class actions defined in Fed. R. Civ. P. 23(b).

A.

The court has considered in detail plaintiffs' proffer submitted in support of is request for class certification to the extent "that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen, supra. Such consideration is in no way a merits determination and is not intended to be binding on this court for purposes of a later-filed motion for summary judgment, motion for decertification, or at any trial.

In substance, the Amended Complaint specifically alleged company-wide practices of (1) a salary range policy; (2) a pay raise percentage policy; (3) a 'built-in headwinds' policy; and (4) dual pay system for hirees and promotees. Scott, 733 F.3d at 116. Plaintiffs allege that as a result of this company-wide salary range policy, disparities exist between the number of women and the number of men in the upper pay levels of that range. Further, they contends that when exceptions are made above the range, those exceptions are made at the corporate level by corporate Vice Presidents, and that those exceptions are more often granted in favor of men. Id. Plaintiffs also allege that increases to a store manager's compensation is determined by the manager's prior performance ratings, that Regional Managers and Divisional Vice Presidents grant exceptions above the pay raise percentage, and that such decisions significantly favor men over women. Plaintiffs also allege that defendant has a biased "built-in headwinds" policy, which links pay to prior experience, prior pay, quartile rankings, and other criteria that have a disparate impact on women's salaries because they incorporate and perpetuate past discrimination. Plaintiffs also allege a dual pay system, which caps the compensation paid to individuals who are promoted from within below the level that those hired from outside can be paid.

In support of their request for certification, plaintiffs have produced substantial evidence tending to show uniform corporate policies and of high-level corporate decision-making that has adversely impacted pay for women store managers. While defendant has countered with evidence that store manager's pay was determined in the field by district managers applying subjective criteria, plaintiffs have presented substantial evidence that even when such subjective criteria is taken into consideration, those in-the-field decisions overwhelmingly conform to uniform corporate policies that in the end have resulted in lower pay for women. See Plaintiffs' Exhs. ##35,

51A-51E, 52, 53A, 53C, 66-96D. Indeed, plaintiffs have produced evidence that before 2011, female Store Manager's salaries were always $4000 to $5000 less per year than their male peers in the same job. Exhs. ##68. 95D, 95E. Further, they have produced evidence that such disparities are statistically significant at more than 20 standard deviations in nine of the 14 years at issue (2003-2011); that there were 19 standard deviations in 2012-2013; and there were more than 14 standard deviations in the last two years (2014-2015). Plaintiffs' Exh. #68. Indeed the statistical significance of salary disparity between men and women Store Managers between 2007 and 2015 is confirmed by *defendant's* own expert, Dr. Saad. Plaintiffs' Exhs. ##53A, 95D, 95G (Saad).

Plaintiffs' allegations of a built-in headwinds policy is equally supported by their proffer. Plaintiffs' Exhs. ##51A, 51B, 51C; Exhs. ##95F-95G (Saad Depo. Exhs. #28 and #29); see also Exh. #35 (Dr. Fox's Report & Statistical Tables). As to the source of those headwinds, Dr. Saad determined that "[i]n all measures of prior experience, men who are hired as Store Managers are more experienced than women." Saad Depo. at 29:16-30:15 (Exh. #51A). Further, Dr. Saad testified that "women tend to have fewer years of experience than men, which affects their starting pay," (Saad Depo. at 32:2-7), that men's greater experience "translates to higher initial pay for men" (Saad Depo. at 38:12-19), that prior experience "is the primary criteria" upon which the salaries of externally hired Store Managers are based (Saad Depo. at 68:11-19), and that this "use of prior job experience makes a substantial difference" in the pay gap between male and female Store Managers. Saad Depo. at 43:15-23; see also Exhs. ##51A, 51B, 51C, 51D. Plaintiffs have presented evidence that the prior experience criteria promulgated by defendant at the corporate level adversely impacts not just female Store Managers' starting pay, but impacts subsequent pay increases. Saad Depo. at 38:12-19 (Exh. #51D). Dr. Saad testified that such disparity between

male and female pay raises are "entirely consistent with the . . . systematic differences in prior experience between men and women" because Family Dollar implements pay increases as a percent of base pay." Exh. #51D (Saad Depo.).

In support of their contentions that defendant has in place a dual-system salary policy that has a disparate impact on women, plaintiffs have also presented substantial supporting evidence. See Exh. #52; Exh. #35 (Dr. Fox Rpt. at 2-3, 5, 12-13 and Tables 1, 6-A, 6-B). Again, even defendant's expert determined that "[e]xternal hires tend to be paid more than internal promotees" and that this fact impacts women more than men because "[t]he share of SMs who are women is greater among those internally promoted than among those hired externally." Saad Depo. at 165:19-166:9 (Exh. #52). Plaintiffs' statistical expert also found that "the rate of females selected for Store Manager through outside hiring as opposed to internal promotion is less than the rate for males." Dr. Fox Exp. Rpt. at 5 & Table 1 (Exh. #35). Plaintiffs have produced Statistical Table 6-A (Exh. #77) in support of their argument that the salaries of persons hired from outside as Store Managers are substantially greater than persons promoted into that same job, and that Table 6-B (Exh. #78) shows that such disparities remain statistically significant by a wide margin even when adjusted to account for differences in district, region, store grade, and prior external experience. Id. Further, plaintiffs have produced evidence tending to show that the outside hirees are paid more than the inside promotees, to wit, as much as $6,240 more per year without accounting for such factors, and as much as $4,351 more per year when adjusted to control and account for all available factors other than gender. Id. As will be discussed later, the court finds this evidence to be significant.

Plaintiffs have also produced evidence that the built-in headwinds were not some in-the-

field anomaly, but were instead adopted and imposed by corporate management. See Exhs. ##1-30, 51F, 57A-57B, 58A-58J. Further, plaintiffs have produced evidence that corporate management not only adopted such policies, but personally enforced them through as system of reviewing all Store Manager's salaries in 2013 to assure that they conformed to such standards. See Exhs. ## 63A-63D; Exh. #193.

B.

Class certification under Rule 23(a) is appropriate if the class is "ascertainable" and if the following four requirements are met: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the representative's claims or defenses are typical of those of the class; and 4) the representative will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23.

i.

The court has first considered whether the class is ascertainable. In addition to the certification requirements of 23(a), Rule 23 requires that an order certifying a class action "define the class and the class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B). The Fourth Circuit has explained this component of certification as a "threshold requirement that the members of a proposed class be 'readily identifiable'" in reference to objective criteria. EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014). "The plaintiffs need not be able to identify every class member at the time of certification. But "if class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate." Id. (internal quotations and citation omitted). Here, the identities of all class members can be readily determined from defendants' business records. The court finds that the proposed class satisfies the

ascertainability requirement.

ii.

The numerosity component of Rule 23(a) requires that the class be so numerous as to make joinder of all members impracticable. Defendants do not dispute numerosity. Indeed, no specific number of claimants is required to sustain a class action, and the Fourth Circuit has approved putative classes that are small relative to the potential number of members in this action. See, e.g., Brady v. Thurston Motor Lines, 726 F.2d 136 (4th Cir. 1984) (certifying a class of 74 persons); Cypress v. Newport News General & Nonsectarian Hospital Association, 375 F.2d 648, 653 (4th Cir.1967) (certifying a class of 18). The court finds that the proposed class satisfies the numerosity requirement.

iii.

The commonality component requires that there be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Commonality requires the plaintiff to demonstrate that the class members all suffered the same injury, not that they merely suffered a violation of the same provision of law. Wal-Mart Stores, Inc., 131 S. Ct. at 2551. Although the rule of commonality "speaks in terms of common questions, 'what matters to class certification ... [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" EQT Prod. Co. v. Adair, 764 F.3d 347, 360 (4th Cir. 2014) (quoting Wal–Mart, 131 S. Ct. at 2551) (emphasis in original). Even a single common question will suffice for commonality, Wal-Mart 131 S. Ct. at 2556, "but it must be of such a nature that its determination 'will resolve an issue that is central to the validity of each one of the claims in one stroke.'" EQT Prod. Co. v. Adair, 764 F.3d 347, 360 (4th Cir. 2014) (quoting Wal-Mart at 2551).

The issue before the court is thus whether resolution of a claim or claims raised by plaintiffs can, in a single stroke, answer whether defendant has violated Title VII as alleged in the Amended Complaint as to the members of the putative class. While plaintiff has in its initial brief argued that the Fourth Circuit has already answered that question in this action, this court does not agree as the appellate court only had before it the *allegations* of the Amended Complaint. Indeed, the instructions of the appellate court make it clear that such determination is left to this court in the first instance. See Scott, 733 F.3d at 116-117. At this point, some several years later, the court has before it statistical, opinion, and other evidence which is probative of the issues on class certification. Wal-Mart Stores, Inc., 131 S. Ct. at 2552 & n.6.

In order to determine commonality, the court must examine the claims that plaintiffs and the purported class bring in this matter, as "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id. The elements of a disparate impact claim consists of three common questions – whether a statistical impact exists, whether the practice at issue is a business necessity, and whether there are suitable alternative criteria which would have less impact. 42 U.S.C. § 2000e-2(k)(1)(A). As to the disparate impact claim, the court agrees with plaintiffs that the evidence they have presented on their allegations of built-in headwinds, a dual-system of compensation, an annual pay raise percentage policy, and a salary range policy, supports certifying the class. Despite defendant's arguments to the contrary, the evidence produced cuts across the putative class.

First, plaintiffs have proffered evidence of a company-wide policy, that links prior experience and prior-pay to starting wages and subsequent pay increases for managers, creates "built-in headwinds" for women attaining equal pay with men in store management positions with

defendant. The Fourth Circuit has long held that similar prior-experience and prior-pay criteria violate Title VII when shown to have disparate impact and the defendant fails to carry its burden of proving (at trial) that such experience is a business necessity. Lewis v. Bloomsburg Mills, Inc., 773 F.3d 56, 568-569 (4th Cir. 1985). Plaintiffs have presented evidence indicating that the company-wide policy, as most company-wide policies do, originated at corporate headquarters. Thus, the statistical and opinion evidence discussed above is sufficient to satisfy plaintiffs' burden of showing commonality as to the alleged company-wide policy.

As to their claim that defendant has a "dual-system" of compensation, plaintiffs have produced evidence which would support their claim that defendant pays less to persons promoted to store managers than the persons hired from outside the company to the same position, and that such system has a disparate impact on women as they are disproportionately *promoted* to Store Manager positions rather than hired from outside. See Plaintiffs' Exh. #52; Exh. #35 at 2-5, 12-13; Exhs. ## 67, 77, 78. Plaintiffs have presented evidence that gender disparities here are at a rate of 31 standard deviations, and that those deviations resulted in significantly less pay for women than their male counterparts. In Brown II, less than 3 standard deviations were sufficient for class certification. Brown II, 785 F.3d at 908. Thus, the evidence presented is sufficient to satisfy plaintiffs' burden of showing commonality as to the alleged dual-system of compensation. Again, plaintiff has alleged and proffered evidence that corporate management has centrally imposed an annual pay raise limit which is linked to a percentage of base pay. Defendants' own expert confirmed that because men hired from outside tend to come with more experience, such experience translated to higher base pay and from that point forward higher annual pay increases. Saad Depo. at 38:12-19 (Plaintiffs' Exh. #51D). Similarly, the corporate salary range policies

could, if later proved at trial, lock in disparities between male and female as they appear to work hand-in-hand with the annual pay raise percentage. Thus, plaintiff may well be able to show that these company-wide policies, like the previous two discussed, result in lower pay for women. Indeed, this policy could as plaintiffs suggest perpetuate initial pay disparities throughout a Store Manager's career.

The court has also considered defendant's central argument that no specific employment practice can be analyzed on disparate impact grounds because the challenged criteria are embedded in the subjective discretion of individual District Managers. This court has already been down that road and that reasoning was soundly rejected by the appellate court in this case. Scott, 733 F.3d at 113. More recently, the Supreme Court also rejected similar arguments in Bouaphakeo v. Tyson Foods, Inc., 136 S. Ct. 1036, 1048 (2016). Despite defendant's arguments in its brief and at the hearing, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1981), remains good law even after Wal-Mart. The Court in Watson held that the three elements of a disparate impact claim apply to criteria embedded in the subjective discretion of individual supervisors just as much as any other practice having disparate impact on women or minorities. Id. at 990-991. In Wal-Mart, the Court further held that disparate impact claims based on subjective discretion of supervisors are appropriate for class certification because they are not based on individual-by-individual determinations. Wal-Mart, 11 S.Ct. at 2554. And in this case, the appellate court has already held that that Watson and Wal-Mart "recognized that giving discretion to lower level employees may form the basis of Title VII liability under a disparate impact theory, but to do so, the plaintiffs must first identify the 'specific employment practice that is challenged.'" Scott, 733 F.3d at 113 (citing Wal-Mart, 11 S.Ct. at 2555). The Court held in Watson that

> [D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.

Watson, 487 U.S. at 989-991.

The decision in Watson was codified in the 1991 amendments to Title VII. If the court accepts defendant's contention that that its delegation of unfettered subjective discretion makes it impractical to identify "specific" elements of its pay-setting process that are capable of separation for analysis, then the pay-setting process as a whole must be "analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(ii). Here, plaintiffs have by proffer presented evidence of an "overall disparity" in salaries resulting from the pay-setting process as a whole, which includes the subjective discretion it claims to have delegated to District Managers. Dr. Fox Decl., ¶5c, d, g, h, i, ¶¶15-19, ¶¶44-57, Tables R-13A & B (Pltf. Exh. 214). The specific criteria have been shown to have disparate impact by both parties' experts. Dr. Fox Decl., ¶5a, e, f, k, ¶¶20-33, ¶39, ¶¶64-66, Tables R-4A, R-4B, R-4C, R- 4D (Pltf. Exh. 214).

Similarly, plaintiffs' pattern-or-practice claim looks to the pattern alleged rather than the individualized decisions. In Bell v. EPA, 232 F.3d 546 (7th Cir.2000), the Court of Appeals for the Seventh Circuit held that "[i]n a pattern and practice disparate treatment case, statistical evidence constitutes the core of a plaintiff's prima facie case." Id. at 553. Here, plaintiff has produced multiple regression analysis studies indicating gender-based pay disparities, amounting to considerable evidence of a classwide pattern-or-practice of discrimination. Bazemore v. Friday, 478 U.S. 385, 400 (1986). See Plaintiffs' Exh. #35, Dr. Fox Rpt. at 2-21 (disparities of 20 to 30 standard deviations).

The court concludes that both methods of proving disparate impact have been sufficiently

established by plaintiffs' statistical evidence and the expert opinions of *both* sides' experts. The commonality and predominance standards of Rule 23 can be satisfied with statistical proof that ties class members' claims together, notwithstanding individualized differences that might have controlled in the absence of such common proof. Bouaphakeo, 136 S. Ct. at 1043-1045. Here, the statistical evidence of disparate impact and a pattern-or-practice of discrimination provides the "glue" which makes the class cohesive and which makes the "'common, aggregation-enabling issues in the case . . . more prevalent or important than the non-common, aggregation-defeating individual issues.'" Id. at 1045. The requirement of commonality is met.

iv.

The court has also considered the adequacy of representation. Based on the performance of counsel thus far, the court finds that the adequacy of representation requirement of Rule 23(a) is satisfied.

C.

In addition to meeting the four prerequisites of Rule 23(a), "the class action must fall within one of the three categories enumerated in Rule 23(b)." Gunnells v. HealthPlan Servs., Inc., 348 F.3d 417, 423 (4th Cir. 2003). Here, plaintiffs seek certification under Rule 23(b)(2) and (3).

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i.

Rule 23(b)(2) authorizes class treatment where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). Certification under this provision is appropriate "only when a single injunction or

declaratory judgment would provide relief to each member of the class." Wal–Mart Stores, Inc., 131 S. Ct. at 2557. Based on the allegations of the Amended Complaint and the proffer submitted by plaintiffs, the court finds that defendant's alleged unlawful conduct involves concerns "generally applicable to the class." Should plaintiffs prevail on their claims, declaratory or injunctive relief enjoining defendant would provide relief to each member of the class. While the court can foresee that such a Judgment would be multifaceted, it would nonetheless be one Judgment applicable to all. The fact the plaintiffs seek monetary damages in this action does not prevent certification under Rule 23(b)(2). See, e.g. Pender v. Bank of Am. Corp., 269 F.R.D. 589, 599 (W.D.N.C. 2010) ("Rule 23(b)(2) can still be satisfied even where a declaratory judgment is 'merely a prelude to a request for [monetary relief]'") (quoting Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 763 (7th Cir. 2003) and holding that certification was appropriate where declaratory relief was sought in addition to monetary relief). Here, plaintiff seeks declaratory and injunctive relief to end what they contend is a discriminatory employment practice (or an array of practices). The court finds it appropriate for plaintiffs to maintain the action under Rule 23(b)(2). The court therefore finds that the requirements for certification under Rule 23(b)(2) are met.

ii.

In addition, Rule 23(b)(3) authorizes class treatment where all requirements of Rule 23(a) are met and where: (1) questions of law or fact common to class members predominate over any questions affecting only individual members; and (2) proceeding as a class is superior to other available methods of fair and efficient adjudication of the controversy. Fed.R.Civ.P. 23(b)(3). The requirement that common, rather than individual, questions of law or fact predominate "is similar

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to but more stringent than the commonality requirement of Rule 23(a)." Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006) (internal quotation marks and citation omitted). The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623 (1997).

In assessing whether certification is warranted under this rule, the court should consider the non-exhaustive list of factors articulated in Rule 23(b)(3), which are pertinent to a court's "close look" at the predominance and superiority criteria. Fed.R.Civ.P. 23(b)(3)(A)-(D); Amchem, 521 U.S. at 615. Those factors are the:

(A) interest of members of the class in individually controlling the prosecution or defense of separate actions;
(B) extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(C) desirability or undesirability of concentrating the litigation of the claims in the particular forum;
(D) difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3)(A)-(D). "In determining whether the predominance standard is met, courts focus on the issue of liability." Ruffin v. Entm't of the E. Panhandle, No. 3:11-CV-19, 2012 WL 5472165, at *10 (N.D.W. Va. Nov. 9, 2012) (citing Zapata v. IBP, Inc., 167 F.R .D. 147, 165 (D. Kan. 1996)).

Here, the predominance standard of Rule 23(b)(3) is satisfied because plaintiffs have proffered evidence of class-wide pattern-or-practice and/or disparate impact that could establish liability, and result in class-wide entitlement to: (1) affirmative injunctive and declaratory relief to undo the effects of such disparate impact and/or class-wide pattern-or-practice; and (2) a presumption of individualized harm for each class member. Although defendant maintains that

common proof does not exist to allow the court to adjudicate the claims of plaintiffs and all putative class members together, the court finds otherwise as discussed earlier.

Regarding the superiority inquiry, the court has carefully considered the factors articulated in Rule 23(b)(3)(A)-(D) and considered the alternatives to a class action. Class treatment is a superior method for adjudicating each putative class member's claims for several reasons. First, it will allow class members to seek relief from defendant's allegedly wrongful conduct that they would otherwise be unable to pursue because of financial limitations or fear of retaliation. Second, the relatively small amount of damages (when compared with litigation costs) sought in this case provides little incentive for class members to pursue individual claims. Finally, allowing the action to proceed as a class action will resolve all issues in a single case and promote judicial economy. The court finds that plaintiffs satisfactorily showed at the hearing that a class trial would be straightforward and that if liability is there determined, the experts have already identified a streamlined methodology for determining damages. The court therefore finds that the superiority prong of Rule 23(b)(3) is satisfied.

IV.

As explained in the above analysis, the court finds that plaintiffs have met their burden of showing that all requirements of Rule 23(a) and that class certification is appropriate pursuant to both Rule 23(b)(2) and Rule 23(b)(3). The court will therefore grant plaintiffs' motion for class certification at this time. The court notes, however, that "[a]n order that grants or denies class certification may be altered or amended before final judgment," Fed. R. Civ. P. 23(c)(1)(C). See also Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the

litigation."); Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 544 (E.D. Va. 2000) ("the Court is duty bound to monitor its class decision and, where certification proves improvident, to decertify, subclassify, alter, or otherwise amend its class certification.").

ORDER

IT IS, THEREFORE, ORDERED that:

(1) defendant's Motion for Leave to File its Supplemental Expert Declaration (#248) is **GRANTED**, and the court has deemed the declaration (#248-1) attached thereto as **FILED**, and has fully considered that opinion;

(2) plaintiffs' Motion for Class Certification (#211) is **GRANTED,** and the case shall proceed with respect to the claims of the Amended Complaint as a class action under Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3);

(3) the **CLASS** for plaintiffs' claims is defined as follows:

> *All female employees employed by Family Dollar as a Store Manager during the period, in whole or in part, from July 2, 2002 forward.*

(4) plaintiffs Luanna Scott, Diane Conaway, Dorothy Harson, Carol Dinolfo, Charlene Hazelton Carrizales, Ruby Brady, Shelly Hughes, Teresa Fleming, and Nancy Fehling are designated as class representatives for such claims;

(5) Robert L. Wiggins, Jr., Ann K. Wiggins, Gregory O. Wiggins, Rocco Calamusa, Jr., and Kevin W. Jent, who are the attorneys of record for the appointed class representatives, are authorized to serve as class counsel to represent the class; and

(6) the parties are **DIRECTED** to confer and jointly submit, within thirty (30) days of the date of this Order, proposed class notice documents in conformance with Rule 23(c)(2), which the court will consider before issuing notice to the class.

As this matter is the type of matter that can be resolved by skilled attorneys, the parties are encouraged to engage in *serious* settlement discussions before submitting the class notice documents to the court for approval.

Signed: June 24, 2016