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,	)	
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW
REGARDING CLASS CERTIFICATION

Pursuant to the Court's December 2 and December 16, 2013 Orders, the Plaintiffs hereby submit this Memorandum of Law Regarding Supplemental Authority on class certification issues in the above-captioned case.

The landscape of class certification has not changed significantly since the parties filed their principal class certification briefs. It is now well established that analysis of whether the Rule 23(a) and (b) requirements have been met "may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Connecticut Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1194 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). However, that overlap must necessarily be limited because "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id*. Instead, "[m]erits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 1195.

Evidence demonstrating the existence of supervisory discretion certainly does not automatically negate class treatment. See *Scott v. Family Dollar*, 733 F.3d 105, 113-114 (4th Cir.

2013) (reversing denial of class certification and remanding for further consideration, noting that even in cases where the complaint alleges discretion, if there is also an allegation of a company-wide policy of discrimination, or an allegation of discretionary authority exercised by high-level corporate decision-makers, which is applicable to a broad segment of the corporation's employees, the putative class may still satisfy the commonality requirement for certification); see also *Kassman v. KPMG, LLP*, 925 F. Supp. 2d 453 (S.D.N.Y. 2013) ("Significantly, however, the Court [in *Wal-Mart*] did not close the door altogether on the possibility of certifying a class based on a policy of giving discretion to lower-level supervisors."). The *Kassman* court denied defendant's motion to dismiss plaintiffs' class claims because plaintiffs alleged several specific headquarters-level policies had caused the discrimination. In doing so, *Kassman* acknowledged that "'in appropriate cases,' giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory – since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'" *Id.,* citing *Wal-Mart*, 131 S. Ct. at 2554 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988)).

Statistical evidence, in conjunction with anecdotal evidence, continues to play an important role in class certification decisions. In *Moore v. Napolitano*, 926 F. Supp. 2d 8 (D.C.D.C. 2013), this Court found that the Rule 23(a)(2) commonality requirement was met by aggregated statistical analysis, based mostly on pools approximating availability, in conjunction with the plaintiffs' anecdotal evidence. This was a very similar presentation to that made by the Plaintiffs in the case at bar. Further, this Court found that the predominance requirement of Rule

23(b)(3) is met where "[a]ll members of the class will rely on the same statistical evidence to make the same claim." *Id*. at 18.

I. DEFENDANT'S SUPPLEMENTAL AUTHORITY DOES NOT WARRANT DENIAL OF CLASS CERTIFICATION

A. *Bolden v. Walsh Construction Company*, 688 F. 3d 893 (7th Cir. 2012)

On August 27, 2012, Defendant filed a Notice of Supplemental Authority in Opposition to Plaintiffs' Motion for Class Certification, and therein cited the Seventh Circuit's decision in *Bolden v. Walsh Construction Company*, 688 F. 3d 893 (7th Cir. 2012). *Bolden* does not support a denial of the *Campbell* plaintiffs' motion for class certification here; quite the contrary, as demonstrated by the significant distinctions between *Bolden* and *Campbell v. Amtrak*.

In *Bolden*, twelve African American construction workers alleged discrimination on the basis of race in assignment of overtime and working conditions.[1] The workers sought certification of a class of all black Bolden employees from June 2001 until the present, who worked at any of the defendant's 262 project sites in Chicago. Conducting the rigorous analysis required by *Wal-Mart*, the Seventh Circuit found evidence that the construction sites were physically, functionally, and managerially separated: each had different superintendents, who employed different policies. The *Bolden* plaintiffs admitted that most superintendents with whom the plaintiffs had worked with did not discriminate; "their objections concerned only a handful of superintendents and foremen." *Id*. at 896.

The Seventh Circuit contrasted the facts of *Bolden* with those of its decision just six months prior in *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012). In *McReynolds*, the

[1] Unlike in the present case, the allegations of discrimination in *Bolden* were not systemic, but episodic. "Several plaintiffs testified that many sites where they worked were discrimination-free, while others were marked by severe racial hostility." 688 F. 3d at 896. In *Campbell*, legions of plaintiffs and class members testified to pervasive discrimination throughout the Amtrak system.

challenged policies were national policies of Merrill Lynch, not "practices that local managers can choose or not at their whim." *McReynolds* at 489-90. The local brokers' discretionary – and allegedly discriminatory – implementation of the national policy had a disparate impact. This is virtually the same as the *Campbell* Plaintiffs' claims in the case at bar. The Seventh Circuit stated:

> We held that a national class could be certified to contest this policy, which was adopted by top management and applied to all of Merrill Lynch's offices throughout the nation. This single national policy was the missing ingredient in *Wal-Mart*. The Court had said that a single policy spanning all sites could be contested in a company-wide class, 131 S.Ct. at 2553, consistent with Rule 23(a)(2), if all other requirements of Rule 23 also were satisfied; we took the Justices at their word.

Bolden, 388 F. 3d at 898.

In contrast, Walsh Construction had no relevant company-wide (or Chicago-wide) policy to challenge – other than "(a) its rule against racial discrimination, and (b) its grant of discretion to superintendents in assigning work and coping with offensive language or bigoted conduct." *Id*. Neither policy warranted certification of a class because the *Bolden* plaintiffs did not contest the first, while the second practice was precisely what *Wal-Mart* said was insufficient, i.e., the construction company had no policy at all. Its superintendents, who were dispatched from project to project (as were the foremen), "are in charge" and had total discretion over hiring, pay, and job assignments. *Bolden*, 688 F.3d at 894, 896. Indeed, the court observed that "[t]his is the norm in the construction industry, where the availability of labor and the tasks to be performed changed frequently, making flexibility essential." *Id.* at 894. When one phase of construction is finished, the journeymen needed for the next phase may be entirely different, and, additionally, on-site management "must mesh tasks assigned to Walsh's workers with those handled by subcontractors." *Id.*

None of that is true for Amtrak. The railroad's workforce positions are stable; the tasks are stable; the railroad operation does not proceed in phases, as does construction, but systematically. The availability of labor and the tasks to be performed do not change frequently, and there is no need to mesh tasks with those of subcontractors. The railroad operates on Thursday just as it does on Monday, and in November as it does in April. See generally Report of Plaintiffs' Expert Thomas Roth.

Most importantly, unlike Walsh Construction Company, Amtrak *does* have actual nationwide employment policies – lots of them – and all of them are supposed to be followed by every manager throughout the company, in every location. The furthest thing from the truth is any notion, as was the case in *Wal-Mart* and again in *Bolden*, that Amtrak has no policy at all, or a policy of not having a policy. Quite the contrary, Amtrak has a very definite (and elaborate) set of corporate-wide employment policies, under an umbrella of national collective bargaining agreements (themselves substantially similar, particularly within the crafts) that set nationwide collectively-bargained standards that are incorporated into the corporate-wide employment policies. The *Campbell* Plaintiffs have presented reams of evidence of the existence of actual Amtrak company-wide policies, far more like those in *McReynolds* (actually, Amtrak's are far more numerous, specific, and detailed) and fundamentally opposite from those in *Bolden*. Thus, the claims of the *Campbell* class members are tethered both to Amtrak national corporate employment policy, administered by Amtrak's HR Department, and also to nationally applicable sets of rules that go beyond those present even in *McReynolds*: Amtrak's collective bargaining agreements that are nationally bargained, nationally applicable, and centrally administered by Amtrak's corporate Labor Relations Department.

Most importantly, unlike *Bolden*, where "multiple managers exercise independent discretion," 688 F. 3d at 896, Amtrak's managers are *never* supposed to exercise *independent* discretion. The national collective bargaining agreements provide the basic standards for selections: the "best qualified" individual for promotions and "just cause" for discipline. Roth Expert Rebuttal Report, ¶8; *see* Doc. 344, p. 10. Critically, 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 standard, arrived at via adherence to the single, corporately mandated, national policy and procedure. That 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 – to foster discrimination convincingly shows that Amtrak's companywide policies result in the disparate treatment and disparate impact suffered by the *Campbell* class. That is to be contrasted with the *Wal-Mart* Court's observation, cited in *Bolden*, that "'[t]he whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.'" 388 F. 3d at 897, quoting *Wal-Mart*, 131 S.Ct. at 2553. "'… [I]t is a policy *against having* uniform employment practices." *Id.*, quoting *Wal-Mart* at 2554 (emphasis in original).

Thus, the *Bolden-Wal-Mart* scenario is virtually the polar opposite of *Campbell, et al. v. Amtrak*.

Furthermore, Amtrak's corporate practice of discrimination, as evinced Wanda Hightower's testimony describing how corporate headquarters top executives thwarted effective enforcement of anti-discrimination measures arising from previous Amtrak civil rights cases, goes well beyond any evidence noted by the court in *Bolden* to show the intent of top Amtrak

executives to ignore, condone, and permit company-wide racial discrimination against African-Americans.

Still, in *Bolden*, the Seventh Circuit made clear that *Wal-Mart* explains that "a multi-store (or multi-site) class could satisfy Rule 23(a)(2) if the employer used a procedure or policy that spanned all sites. 388 F. 3d at 897 (citing *General Telephone v. Falcon*, 457 U.S. 147 (1982). Amtrak does use a policy spanning all sites. Mere "'factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members.'" *Moore v. Napolitano*, 926 F. Supp. 2d 8, 29, citing *Encinas v. J.J. Drywall Corp.,* 265 F.R.D. 3, 8 (D.D.C. 2010) F.R.D. at 8 (quoting *Bynum v. District of Columbia*, 217 F.R.D. 43, 46 (D.D.C. 2003)). Moreover, the common features of the Plaintiffs' evidence in this case is of the same type, and may be more detailed in many respects, than the two types of evidence – statistical and anecdotal – in *Moore v. Napolitano* which resulted in a finding of commonality and, ultimately, class certification.

The Seventh Circuit also described problems with the hostile work environment claim in *Bolden* that are not present in *Campbell, et al. v. Amtrak*. None of the *Bolden* plaintiffs had worked at Walsh since 2002, although the proposed class covered the time period from 2001 to the present (then 2012). Further, the twelve *Bolden* plaintiffs offered evidence only as to a few of the defendant's 262 construction sites. In contrast, the *Campbell* Plaintiffs here have provided ample evidence of the existence of racial discrimination and hostility across numerous, inter-linked locations over the entire claims period. Significantly, whereas the 262 construction sites in *Bolden* were isolated from each other, the entire Amtrak transportation system is connected – conceptually by corporate policies, management, human resources, labor unions, and collective bargaining agreements, and literally by rail and the trains that run along them, as well as

technologically by computer and telephone systems (e.g., reservations, scheduling, crew assignments, transportation operation coordination, commissary systems, *etc.*). Unlike those in *Bolden*, the Amtrak workplaces are intrinsically inter-connected.

Although the *Bolden* court was also concerned that hostile work environment classes would encounter manageability problems in the form of multiple trials, it left open the option for plaintiffs to "propose site- or superintendent-specific classes, which the district court may certify if all requirements of Rule 23(a) and Rule 23(b)(3) are met." *Id.* at 899. The *Campbell* Plaintiffs have proposed alternative classes and sub-classes, as necessary. See also *DL v. District of Columbia*, *infra*.

To the extent that the *Bolden* court was critical of the plaintiffs' expert in that case, such findings are, of course, not applicable to the instant matter. Plaintiffs here have responded to Amtrak's objections to the Plaintiffs' expert reports and have shown that their experts' statistical evidence is admissible and persuasive, and the sort of statistical analytical problems found in *Bolden* do not arise in *Campbell*. Indeed, the types of pools analysis and aggregations performed here by Dr. Bradley are appropriate for many of the same reasons set forth in this Court's recent employment discrimination class certification decision in *Moore v. Napolitano*, 926 F. Supp. 2d 8 (D.D.C. 2013).

In *Bolden*, the expert assumed the appropriate unit of analysis was all of the Chicago-area construction sites. Here, the Plaintiffs' expert did a national statistical study because Amtrak's national policies demonstrated their coast-to-coast reach in all departments within the company. In addition, the expert performed craft-specific statistical analyses, the appropriateness of which was indicated by the specific opinion of another expert, the Plaintiffs' collective bargaining

agreement expert Thomas Roth. Certainly, nothing in *Bolden* suggests any ground for rejecting the Plaintiffs' experts' analysis and report in this case.

B. *Comcast v. Behrend*, 113 S.Ct. 1426 (2013), and *D.L. v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013)

On May 14, 2013, Amtrak filed a Second Notice of Supplemental Authority in Opposition to Plaintiffs' Motion for Class Certification, providing the Court with cites to *Comcast v. Behrend*, 113 S.Ct. 1426 (2013) and *D.L. v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013).

In *Comcast*, the Supreme Court considered the appropriateness of class certification under Rule 26(b)(3) for a proposed class of more than 2 million current and former Comcast subscribers who sought damages for alleged violations of the federal antitrust laws. 133 S. Ct. at 1429-30. At the district court level, the plaintiffs proposed four theories of antitrust violation, but the court accepted only one (the "overbuilder" theory) that was capable of proof on a classwide basis. On appeal, Comcast argued that certification was improper because the plaintiffs' damages model failed to distinguish damages caused by the overbuilder theory from damages caused by the plaintiffs' three other rejected theories. The Third Circuit agreed that the overbuilder theory class satisfied Rule 23(b)(3)'s predominance requirement and refused to consider Comcast's argument about the damages model because the case was not at the "merits" stage, holding that "[a]t the class certification stage," the proposed class did not have to "tie each theory of antitrust impact to an exact calculation of damages." *Id*. at 1431 (quoting *Behrend v. Comcast Corp*., 655 F.3d 182, 206 (3d Cir. 2011) (quotations omitted)). The Supreme Court reversed. Although "[c]alculations need not be exact, ... any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Id*. at 1433 (quotations omitted). Because the *Comcast*

plaintiffs' class-wide liability was predicated on a damages model that included, without distinction, all four of their original theories of antitrust violation impact, the model did not match the single theory of liability upon which class certification was based, making class certification improper. *Id*. 1433-35.

Comcast thus means only that the expert analysis submitted in support of class certification must actually support the theory of liability *classwide*.[2] There is nothing remarkable about this holding. The Court merely held that reliable expert damages evidence was necessary to support a Rule 23(b)(3) finding of predominance.[3] There is no need whatsoever in an employment civil rights case for damages to be actually computed prior to class certification, and Amtrak has never asserted that they must. (In an employment discrimination case, a violation may not even produce economic damage *per se*: although backpay is an economic loss remedy, compensatory damages are a make-whole for an emotional distress-type of injury, not economic loss, and injunctive relief does not address economic loss at all.) Moreover, [r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well

[2] To the extent that *Comcast* and this Court's decision in *Moore v. Napolitano* suggest that consideration of whether expert testimony is admissible under Rule 702 and *Daubert* should occur at the class certification stage. see *Wal-Mart*, 131 S. Ct. at 2553-54, Plaintiffs assert that, for reasons expressed elsewhere, their expert analysis and statistical reports are admissible and match the theories of liability upon which their motion for class certification is based.

[3] Importantly, however, nothing in *Comcast* prevents courts from certifying a class as to liability, but not damages, utilizing Rule 23(c)(4), as long as the proposed liability class meets the requirements of Rule 23(a) and (b). Two class cases, specifically remanded for reconsideration after *Comcast*, have been recertified for liability purposes, with the understanding that individual damage calculations might occur separately later. See *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig*., 722 F.3d 838 (6th Cir. 2013); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013). Other cases, in light of *Comcast* and *Wal-Mart*, have followed that trend. See *Johnson v. Nextel Communs*., 2013 U.S. Dist. LEXIS 141445, 46-47 (S.D.N.Y. Sept. 30, 2013); *Miri v. Dillon*, 292 F.R.D. 454 (E.D. Mich. 2013); *Jacob v. Duane Reade*, 2013 U.S. Dist. LEXIS 111989 (S.D.N.Y. August 8, 2013); *In re Motor Fuel Temperature Sales Practices Litig., MDL No. 1840*, 2013 U.S. Dist. LEXIS 50667, (D. Kan. April 5, 2013).

nigh universal." *Id.* at 1437 (Ginsburg, J., dissenting). Thus, because *Comcast* is a fundamentally different type of case, an antitrust case, its utility for examining an employment civil rights case for class treatment purposes is necessarily limited. (Although the Court's opinion cited *Wal-Mart* a few times, it did not do so for any of the key *Wal-Mart* analytical points at stake here. The dissent, to which four justices joined, remarked that "[t]he Court's ruling is good for this day and case only." *Id.* at 1437.)

More important is the fact that in *Campbell*, unlike *Comcast*, the Plaintiffs do not present multiple competing theories of liability that have different damages models. The Plaintiffs present two basic theories, both common to employment discrimination cases: disparate treatment and disparate impact. There is no conflict between these analyses, either in terms of liability or damages (the latter of which would not even be determined until individual Stage Two *Teamsters*-style proceedings). As stated by this Court recently:

> While "[f]unctionally the disparate treatment and disparate impact models have different aims," the same statistical evidence is often relevant to both disparate treatment pattern and practice claims and disparate impact claims.
> ….
> Despite the differences between pattern and practice disparate treatment claims and disparate impact claims, "an important point of convergence" is that both "are attacks on the systemic results of employment practices."
> ….
> "Consequently the proof of each claim will involve a showing of disparity between the minority and majority groups in an employer's workforce." *Id.* … [B]oth the disparate treatment and disparate impact claims can be proven using the same statistical showing ….

Moore v. Napolitano, 926 F. Supp. 2d 8, 18-20 (D.D.C. 2013), quoting *Segar v. Smith*, 738 F.2d 1249, 1266-67, 238 U.S. App. D.C. 103 (D.C. Cir. 1984).[4]

In *D.L. v. District of Columbia*, following the Supreme Court's decision in *Wal-Mart,* the District of Columbia filed a motion to decertify a class, which then consisted of the following:

> All children who are or may be eligible for special education and related services, who live in, or are wards of, the District of Columbia, and (1) whom defendants did not identify, locate, evaluate or offer special education and related services to when the child was between the ages of three and five years old, inclusive, or (2) whom defendants have not or will not identify, locate, evaluate or offer special education and related services to when the child is between the ages of three and five years old, inclusive.

See D.L. v. District of Columbia, 2013 U.S. Dist. LEXIS 160018, *7-*12 (November 8, 2013). The district court denied the motion, finding that each member of the plaintiff class had suffered a common injury ("denial of their statutory right to a free appropriate public education") and that plaintiffs also presented a common question (whether class members received a FAPE, or "free appropriate public education"). *Id*. The District of Columbia appealed.

In light of *Wal-Mart*, the D.C. Circuit agreed with the defendant that the lower court's decision to define

> the class by reference to the District's pattern and practice of failing to provide FAPEs speaks too broadly because it constitutes only an allegation that the class members "have all suffered a violation of the same provision of law," which the Supreme Court has now instructed is insufficient to establish commonality given that the same provision of law "can be violated in many different ways."

DL v. District of Columbia, 713 F.3d 120, 126 (D.C. Cir. 2013), quoting *Wal-Mart,* 131 S.Ct. at 2551. As a result, the D.C. Circuit vacated the class certification order and remanded the case to

[4] *Moore* found that pools analyses, and aggregations across a number of years, similar to those performed by Dr. Bradley in this case, satisfy *Daubert*. See, e.g., *McReynolds v. Sodexho Marriott Servs., Inc*. (McReynolds III), 349 F. Supp. 2d 30, 45 (D.D.C. 2004).

the lower court "for reconsideration of whether a class, classes, or subclasses may be certified, and if so, thereafter to redetermine liability and appropriate relief." *Id.* at 129.

On remand, Judge Royce L. Lamberth granted plaintiffs' motion to certify four subclasses and to amend their complaint to reflect the subclasses. *D.L. v. District of Columbia*, 2013 U.S. Dist. LEXIS 160018 (November 8, 2013).[5] The subclasses solved the overbreadth problem by breaking down the Individuals with Disabilities Education Act ("IDEA") violations into discrete statutory obligations paired with specific District of Columbia policies and procedures designed to fulfill the statutory obligation. *Id*. at *21-*26. Thus, where the initial class spoke of broad "ChildFind" program violations under IDEA, the subclasses are limited to violations of distinct parts of the "ChildFind" process. The Rule 23 commonality requirement was satisfied because each subclass presents a common contention that can be resolved with "one stroke, as required by *Wal-Mart*." Further supporting commonality, the court noted that the development and administration of the District's IDEA policies and procedures were highly centralized. *Id.* at *29.

In the present case, if subclasses are deemed to be necessary for any of the class claims, as they were in *D.L.*, the Plaintiffs have proposed specific subclasses which adequately address any concerns about overbreadth or commonality that might linger following *Wal-Mart*.

Similar to the D.C. Circuit in *D.L.*, following *Wal-Mart*, the Fifth Circuit vacated class certification in a case alleging systemic problems in the Texas foster care system and requesting broad, injunctive relief. Like in *D.L.*, the appellate court remanded the case for a more rigorous

[5] Pursuant to Rule 23(f), the District has appealed the subclass certifications. The district court refused to stay discovery while the issue is on appeal. *See D.L. v. District of Columbia*, 2014 U.S. Dist. LEXIS 385 (January 3, 2014).

analysis. *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012). On remand, the district court found that the plaintiffs satisfied Rule 23(a)'s commonality requirement for their general class because they alleged a deprivation of a legally-protected right (the class members' Fourteenth Amendment rights), identified a common policy or practice on the part of the defendants (those relating to caseworker workloads), presented evidence that shows that the policy or practice may impair that right, and identified common questions of law or fact that will resolve their claim (such as whether the risk of harm from large workloads is so unreasonable as to rise to a constitutional violation). *M.D. v. Perry*, 2013 U.S. Dist. LEXIS 121557 (S.D. Tex. 2013).

On remand, the district court ultimately certified the plaintiffs' requested "General Class" (about 12,000 children in the Texas foster care system) as well as three of the four requested subclasses: a Licensed Foster Care Subclass, a Foster Group Home Subclass, and a Basic Care GRO Subclass. *M.D. v. Perry*, No. 2:11-CV-84 (S.D.Tx. Aug. 27, 2013).

II. LARGE CLASS ACTIONS, SUCH AS THIS ONE, ARE STILL CERTIFIED BY FEDERAL COURTS AROUND THE COUNTRY

The federal courts continue to certify large class actions. For example, in *Cason-Merenda v. VHS of Mich., Inc.*, 2013 U.S. Dist. LEXIS 131006 (E.D. Mich. Sept. 13, 2013), the court was asked to consider certification of a proposed Rule 23(b)(3) class of over twenty thousand (>20,000) registered nurses (RNs), who are or were employed by the eight (8) defendant hospitals from December 12, 2002 to the present. The *Cason-Merenda* plaintiffs alleged that the defendant hospitals violated § 1 of the federal Sherman Act, 15 U.S.C. § 1, which has, in turn, caused a reduction in the wages paid to RNs. The hospitals opposed certification, arguing primarily that the "extraordinarily diverse" compensation structures in the various area hospitals made any finding of commonality, typicality, or predominance in the plaintiffs' case impossible. *Id.* at *7-*14. In support of their claims, the *Cason-Merenda*

plaintiffs presented expert analysis that the court had previously ruled admissible under *Daubert*; the court stated that the expert testimony provided a sufficient basis on which to show antitrust impact through common evidence, and that the hospital defendants' various challenges to plaintiffs' expert's approach would be resolved at trial. After a rigorous analysis of the evidence, the court found that the plaintiffs had met all requirements for Rule 26(b)(3) certification. Finally, the court held that a class action was the superior method for adjudicating the controversy, noting the unlikelihood individual actions being filed due to the cost of litigation.

In *Kenneth R. v. State of New Hampshire*, 2013 U.S. Dist. LEXIS 132648 (September 17, 2013) (not for publication), the plaintiffs sought certification under Rule 26(b)(2) of a class of all persons with serious mental illnesses who are unnecessarily institutionalized in one of New Hampshire's institutional treatment facilities or are at serious risk of same. According to the plaintiffs, New Hampshire's pattern or practices relating to the funding and provision of community-based services has had the effect of creating a system-wide deficiency in community services that adversely affects a large class of persons (likely hundreds) with serious mental illnesses, in violation of the Americans with Disabilities Act and the Rehabilitation Act. *Id.* *3-*13. The defendants opposed class certification, pointing to the individual differences in disabilities as well as differences in current and future treatment preferences between potential class members. The defendants argued that, although similar cases had been certified in other states in the past (e.g., integration cases following *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)), after *Wal-Mart* such differences and particularity of circumstances necessarily doomed plaintiffs' arguments for commonality, typicality, or adequacy of representation, and, ultimately, class treatment. *Kenneth R. at* *5. The court rejected this argument:

> Although it may be a matter of degree, and perhaps discretion, as to where the line should be drawn, the court is persuaded that

> common questions – such as, whether there is a systemic deficiency in a core set of community-based mental health services and whether this deficiency has placed class members at serious risk of unnecessary institutionalization or continued unnecessary institutionalization – are at a low enough level of generality (or high enough level of specificity) to pass muster under *Wal-Mart*.

Id. at *9.

Likewise, the *Kenneth R.* court found the other requirements of Rule 23(b)(2) certification to be met, particularly in light of the plaintiffs' requested injunctive relief aimed at producing a single declaration or injunction while leaving individual treatment determinations for later (presumably following some change in the process brought about through injunctive relief). *Id.* at *12. That relief program is similar to that which the *Campbell* Plaintiffs seek here.

III. CONCLUSION

For all the reasons discussed herein, and in the Plaintiffs' initial and reply memoranda, and all the evidence submitted in support of class certification, Plaintiffs' class certification motion should be granted.

Respectfully submitted this 22nd day of January, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of January, 2014, I filed electronically the foregoing Supplemental Memorandum with the Clerk of the Court, using the CM/ECF system. 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/ Timothy B. Fleming
Timothy B. Fleming