

1 **NOTICE OF MOTION**

2 Please take notice that, on July 25, 2003, at 10:00 a.m. before the Honorable Judge
3 Martin J. Jenkins, United States District Court, Courtroom 11, 450 Golden Gate Ave., San
4 Francisco, California, Plaintiffs will seek an order certifying this case as a class action under Fed.
5 R. Civ. Proc. Rule 23(b)(2). The plaintiffs will proceed upon this motion, the memorandum of
6 points and authorities, the accompanying declarations, and any further briefing and arguments of
7 counsel.

8 **RELIEF SOUGHT**

9 Plaintiffs request that this Court: 1) certify this case as a class action under Fed. R. Civ.
10 Pro. 23(b)(2); 2) appoint plaintiffs’ counsel to serve as counsel to the class; and 3) authorize
11 notice to the class of the pending action and of their right to opt-out under Fed R. Civ. Proc. Rule
12 23(d)(2).

13 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

14 Since at least 1997, female employees of Wal-Mart Stores have been paid less than
15 comparable male employees in every year and in every Wal-Mart region despite having, on
16 average, higher performance ratings and more seniority. Instead of improving, this pay disparity
17 has steadily widened over the last five years.

18 Female employees at Wal-Mart Stores also receive far fewer promotions to management
19 than do male employees, and those who are promoted must wait longer than their male
20 counterparts. Although the vast majority of Wal-Mart managers are drawn from the ranks of
21 hourly employees, and women comprise over *two-thirds* of those hourly ranks, women receive
22 only *one-third* of all promotions to management positions. This pattern of under-promotion has
23 been true since at least 1975 and occurs in every region in which Wal-Mart operates. Wal-Mart’s
24 track record is entirely anomalous in the retail industry, where women typically hold over 50% of
25 management jobs. Indeed, Wal-Mart’s own internal documents recognize that “we are far behind
26 the rest of the world.”

27 It is not surprising that Wal-Mart’s discriminatory promotion and pay policies and

1 practices have manifested themselves consistently throughout the company. Wal-Mart's
2 corporate headquarters in Bentonville, Arkansas monitors and controls – perhaps to an extent
3 never before seen in corporate America – the minute details of operations at its far-flung stores,
4 down to the temperature it sets for each store's heating and cooling system and the music played
5 in each store. The company's success is due in large part to its ability to closely monitor
6 activities in the field and maintain strict compliance with its internal policies and practices. Wal-
7 Mart has a highly sophisticated information technology system that allows the Bentonville Home
8 Office to monitor a wide range of each store's daily activities. Through dozens of daily reports
9 and regular store visits, Home Office ensures that all stores are on the company program. In
10 addition, Wal-Mart has carefully constructed and aggressively maintains a distinct, consistent
11 corporate culture throughout its operations. Every employee is educated daily on the culture, and
12 employees are rewarded for following the "Wal-Mart Way." The strong culture encourages
13 universal compliance with personnel policies and practices. As a result, store managers are
14 frequently moved across districts and regions without any loss in consistency of company
15 policies and practices.

16 Within Wal-Mart, the gateway from low-paying hourly jobs to the higher-paying
17 management positions is the management training program. An employee must complete the
18 management training program to become an Assistant Manager, the first rung on the
19 management ladder. Until three months ago, on the eve of the discovery cut-off, Wal-Mart
20 selected employees for the program entirely through a "tap on the shoulder" system. By design,
21 there was no system by which an employee could apply for, or even express an interest in, the
22 program. No written information was available to hourly employees about the program. Instead,
23 district and regional managers applied their own subjective views about who would be
24 appropriate for management. And, in the majority of all cases, a man was selected for the
25 training program rather than a woman, even though women comprised almost 80% of all hourly
26 supervisors. This lop-sided result is not surprising, as it is well understood that such highly
27 arbitrary and subjective systems are particularly vulnerable to the influence of unconscious

1 stereotypes. There is strong evidence that negative gender stereotypes permeate Wal-Mart at all
2 levels.

3 Pay decisions for both hourly and management employees are similarly left to the
4 manager, to whom company guidelines provide broad discretion to compensate store employees
5 according to his particular subjective assessment. As with promotions, these compensation
6 decisions disproportionately favor men in every major job category.

7 Wal-Mart executives at the highest level have long been aware that women have been
8 disproportionately excluded from management positions and underpaid compared to men. Wal-
9 Mart management prides itself – and rightly so – on quickly and effectively addressing
10 intractable problems when they adversely affect the company’s bottom line. In sharp contrast, to
11 address the identified obstacles to equal opportunity for its female workers, Wal-Mart has
12 belatedly implemented a few half-hearted measures for which no one at any level of management
13 has been held accountable. Although Wal-Mart pays lip service to the idea of diversity, it is
14 singularly uninterested in why so few women are promoted or whether its pay practices
15 disadvantage its female employees.

16 The Named Plaintiffs in this action, like women in every region of the United States, have
17 been the victims of Wal-Mart’s systemic discriminatory pay and promotion practices.¹ They seek
18 to certify a class of female employees in the Wal-Mart and Sam’s Club retail stores in the United
19 States who have been or will be subject to Wal-Mart’s pay and promotion policies and practices
20 in violation of Title VII. The case is appropriate for certification under Fed. R. Civ. P. 23(b)(2)
21 because the class has been subject to a common set of practices for which they seek injunctive
22 relief, back pay and punitive damages.

23 In support of this motion, plaintiffs’ experts have prepared detailed statistical, economic
24 and sociological studies. The statistical evidence of discrimination is of a consistency and
25

26
27 ¹ Plaintiffs propose Plaintiffs Betty Dukes, Patricia Surgeson, Christine Kwapnoski,
28 Deborah Gunter, Edith Arana, and Cleo Page as Class Representatives.

1 strength rarely seen before in Title VII gender litigation. The statistical significance of gender
2 disparities in compensation and promotion at Wal-Mart is vastly greater than levels described by
3 the Supreme Court as establishing a *prima facie* case. The statistics show that these disparities,
4 and the inference of discrimination that they create, consistently permeate the company, across
5 job categories, geography and time. Plaintiffs also submit the declarations of over 110 current
6 and former female employees whose stories explain this case in human terms that the numbers
7 cannot. The declarations document the struggles of each of these women to receive equal pay or
8 a chance to advance into management, often in the face of openly-expressed gender bias. While
9 these women have worked in stores from Anchorage, Alaska, to Ormond Beach, Florida, their
10 stories are remarkably and painfully similar. Together, this body of powerful evidence compels
11 the conclusion that these claims deserve class treatment.

12 **II. FACTS**

13 **A. Wal-Mart Has A Uniform Store and Management Structure with**
14 **Centralized Control from the Bentonville Corporate Headquarters**

15 Wal-Mart is the largest retailer in the world. Wal-Mart 10-K, 2003, Ex. 70 at 2.² Wal-
16 Mart's corporate headquarters, known as Home Office, is located in Bentonville, Arkansas. *Id.*
17 In 2002, Wal-Mart had over 3400 stores in the United States. *Id.* Wal-Mart operates discount
18 stores selling general merchandise. Larger stores that include a complete line of groceries, in
19 addition to general merchandise, are known as Supercenters, and stores that sell items in bulk are
20
21

22 ² All references to exhibit numbers throughout the brief refer to Exhibits to the
23 Declaration of Christine Webber. For convenience, all references to deposition testimony in this
24 brief are abbreviated as [Witness' Last Name] Dep. There is only one deposition cited for each
25 witness with the exception of Kevin Harper and Jeffrey Reeves, who were first deposed as
26 30(b)(6) witnesses on organizational structure for Wal-Mart Stores and Sam's Club, respectively,
27 and deposed a second time in their individual capacities. The first is referred to as Harper I Dep.
28 (or Reeves I) and Harper II Dep. (or Reeves II). Plaintiffs use a similar system for declarations.
Declaration of Betty Dukes is abbreviated as "Dukes Decl." Where there is more than one
witness or declarant with the same last name, a first initial is inserted (*e.g.* R. Harper Dep.).

1 known as Sam's Clubs.³ Ex. 70 at 8-10.

2 The field operations are divided geographically into six Wal-Mart divisions and one
3 Sam's Club division, each headed by a Divisional or Senior Vice President. Harper I Dep. at
4 215:3-4, Ex. 1; Sam's Club Organizational Charts, Ex. 71 at WMHO157785. Each division
5 contains approximately six regions. Harper I Dep. at 215:18-216:1, Ex. 1. There are a total of 41
6 regions: 35 Wal-Mart regions and six Sam's Club regions. Harper I Dep. at 176:5-7, Ex.1;
7 Reeves I Dep. at 76:21-23, Ex.2. Each region is supervised by a Regional Vice President (RVP),
8 who is based in Bentonville and travels for three weeks out of each month to the region. Harper I
9 Dep. at 184:1-10, Ex. 1. Because the regional management is based in Bentonville, Wal-Mart
10 has an unusually high concentration of executives and managers based in the Home Office.
11 Bendick Decl. at n.29. Regional management meets at least weekly with Bentonville-based
12 corporate and executive leadership to discuss developments in the individual stores. Martinez
13 Dep. at 164:13-18, 165:2-3, Ex. 3.

14 Each region, in turn, contains approximately eleven districts; each district contains
15 approximately six to eight stores. Harper I Dep. at 141:20-21, Ex. 1; Butler Dep. at 39:14-18,
16 Ex. 4. Each district is run by a District Manager, who lives in the field. Harper I Dep. at 162:12-
17 22, Ex. 1. At Sam's Club, district managers are called Directors of Operations, but the job
18 responsibilities are identical. Burner Dep. at 145:17-24, Ex. 5. On personnel matters, District
19 Managers work in conjunction with Regional Personnel Managers (RPM). *See* RPM
20 Responsibilities Ex. 72 at WMHO 369676. The RPMs are based in Bentonville and are
21 responsible for recruiting and assist in selecting store management and monitoring personnel
22 policies. Harper I Dep. at 155:3-23, 190:3-6, Ex. 1; Ludwig Dep. at 132:13-18, Ex. 6. RPMs
23 visit the stores on a weekly basis and submit reports to five People Directors in the Home Office.
24 Ludwig Dep. at 136:22-137:15, Ex. 6; Wigger Dep. at 68:12-69:22, Ex. 7.

25

26 ³ There are also approximately fifty smaller stores which sell primarily groceries, called
27 Neighborhood Markets. Harper I Dep. at 19:1-5, (Ex. 1); Ex. 70 at 8.

1 Each Wal-Mart store has the same job categories, job descriptions and management
2 hierarchy. Harper I Dep. at 32:14-40:12, 45:25-46:7, 58:18-59:9, Ex. 1; Burner Dep. at 144:16-
3 145:12, 148:24-149:13, Ex. 5; Reeves I Dep. at 72:1-16, Ex. 2; Winkler Dep. at 172:7-15, Ex.
4 73; Ruiz Dep. at 130:22-25-131:1-3, Ex. 8; Job Descriptions, Ex. 74. At the bottom of the
5 ladder, the primary entry level hourly positions are cashier, sales associate and stocker. Harper I
6 Dep. at 42:15-43:10, Ex. 1; Wal-Mart Store Matrix of Essential Job Functions, Ex. 75. The first
7 step up is hourly Department Manager. Weaver Dep. at 45:3-9, Ex. 9. Other hourly supervisor
8 positions include Customer Service Manager (CSM), known as Check-Out Supervisor (COS) at
9 Sam's Club. Eldridge Dep. at 40:7-12, Ex. 10. The highest level hourly manager at Wal-Mart is
10 Support Manager. Harper I Dep. at 108:16-109:10, Ex. 1; Butler Dep. at 128:1-5, Ex. 4; *see also*
11 Wal-Mart Corporate Policy: Support Managers, Ex. 76.⁴

12 The next step up is to management trainee, a four-to-five month program which prepares
13 employees for positions as Assistant Managers. Harper II Dep. at 195:7-15, Ex. 11; Memo
14 regarding New Management Training Program, Ex. 77; Schaffner Dep. at 79:17-80:10, Ex. 12;
15 Kintzele Dep. at 44:6-11, 56:20-57:1, Ex. 13. The first salaried management position is
16 Assistant Manager. Harper I Dep. at 35:24-36:11, Ex. 1. Each store has several Assistant
17 Managers, varying with the size of the store. *Id.* The next level is Co-Manager, a position used
18 only in larger stores. *Id.* Harper I Dep. at 150:25-151:19, Ex. 1. The top store position is Store
19 Manager, called General Manager in Sam's Clubs. Reeves I Dep. at 165:20-166:9, Ex. 2.

20 The stores contain 40-50 different departments. Drogin Decl. at ¶ 31, Table 14. Certain
21 departments are highly gender segregated.⁵ In 2001, women made up over 95% of workers in the
22

23 ⁴ The equivalent management positions at Sam's Club are Front End Manager and
24 Receiving Manager. They report to Assistant Managers and are salaried. Reeves I Dep. at
165:20-166:9, Ex. 2.

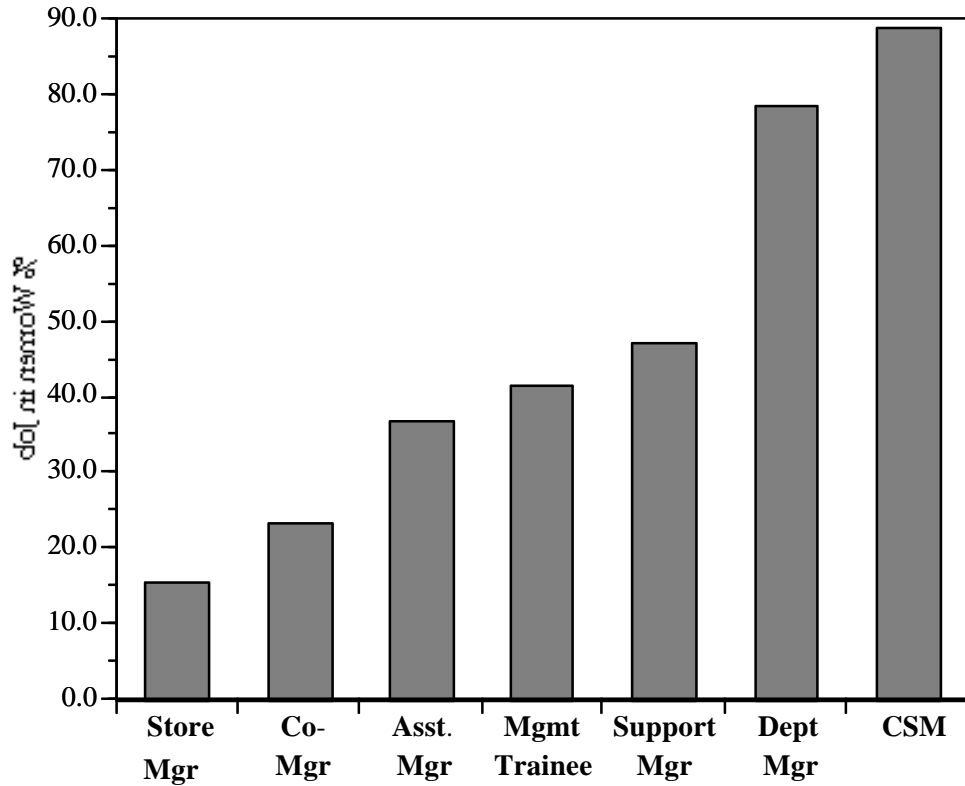
25 ⁵ *See, e.g.*, S. Hall Decl. at ¶ 2 (when she asked to transfer to Hardware, male Support
26 Manager asked, “[y]ou’re a girl, why do you want to be in Hardware?”); Collier Decl. at ¶ 9
27 (during manager meeting, male Store Manager was asked by female District Manager why he
always put women Assistant Managers over Softlines and he said it was “because that’s what

1 Jewelry, Infant/Toddlers, Health and Beauty Aids, Hosiery and Ladies Sportswear. *Id.* In
2 contrast, the Hardware, Dairy, Meat, Produce and Tire Balancing Departments were between 6%
3 and 27% female. *Id.* See Bielby Decl. at ¶ 22.

4 Women comprised 67% of all hourly workers and 78% of hourly Department Managers
5 in the stores in 2001. Drogin Decl. at ¶ 18, Table 3; ¶ 23, Table 7. In contrast, women made up
6 only 35.7% of Assistant Managers, 23% of Co-Managers and 14.3% of Store Managers. Drogin
7 Decl. at ¶ 23, Table 7. Moreover, at the top, Wal-Mart is, and always has been, run
8 predominantly by men. The Wal-Mart Executive Committee, the top 14 or 15 executives at Wal-
9 Mart, was comprised entirely of men until December 2000. Swanson Dep. at 61:9-14; 62:24-
10 63:1, Ex. 14. Tom Coughlin, the Executive Vice President of Wal-Mart Corporation, is
11 responsible for all aspects of Wal-Mart and Sam's Club retail operations. Coughlin Dep. at 12:4-
12 12, Ex. 15. Coleman Peterson, the Executive Vice President for People (the company's term for
13 "human resources"), has overall responsibility for personnel matters company-wide. Peterson
14 Dep. at 8:6-17, Ex. 16. All divisional vice presidents for Wal-Mart Stores' field operations are
15 men. Williams Dep. at 47:14-24, Ex. 17. Wal-Mart Stores and Sam's Clubs have 41 Regional
16 Vice Presidents, of whom only 5 are women. Drogin Decl. at ¶ 21; Jim Haworth Dep. at 174:16-
17 18, Ex. 18. At the district manager level, approximately 9.8% of the positions are held by
18 women. Drogin Decl. at ¶ 25, Table 9. Table 7 from the Drogin Declaration vividly portrays the
19 steady disappearance of women as one ascends the corporate hierarchy:

20
21 women know."); McKenna Decl. at ¶ 4 (despite having been a Sporting Goods associate, when
22 McKenna expressed an interest in becoming Sporting Goods department manager, male assistant
23 manager told her, "[y]ou don't want to work with guns."); Deno Dep. at 151:22-153:10, 209:1-
24 211:14, Ex. 69 (when she expressed an interest in a meat cutter position, male meat manager told
25 her that Wal-Mart does not hire women as meat cutters.); Page Decl. at ¶ 10 (store manager gave
26 sporting goods department manager position to male; "needed a man in the job.") Christensen
27 Decl. at ¶ 5 (District Manager told him female associate could not be promoted to the a.m.
28 assistant manager position because she was female) Jaso Decl. at ¶ 10 (denied position as
Electronics Department Manager because it was a man's job that carried a lot of responsibility
and required heavy lifting) Mott Decl. at ¶ 17 (told by male co-manager that she wouldn't want
to be Domestic Department Manager because lifting furniture was a "man's job").

**PERCENTAGE OF WOMEN DECREASES
WITH EVERY STEP UP WAL-MART MANAGEMENT HIERARCHY**



Wal-Mart maintains a state-of-the-art information technology system, which permits the Home Office to monitor the smallest details of daily operations in each of its retail stores. Fielek Dep. at 8:10-13, 13:21-24, 14:10-22, Ex. 19; Annatone Dep. at 127:24-128:5, 132:19-133:9, Ex. 20. Remarkably, the Home Office controls the temperature in each store and selects the music that customers will hear. Goodwin Dep. at 271:3-272:17, Ex. 21; Guthrie Dep. at 15:16-19, Ex. 22 (temperature control); D. Carter Dep. at 243:6-21, Ex. 23. Bentonville controls the temperature in each store's freezer. Guthrie Dep. at 15:10-15, Ex. 22; D. Carter Dep. at 243:22-244:12, Ex. 23; Goodwin Dep. at 270:20-272:16, Ex. 21. Every store manager is connected at all times to the Home Office through the Managers' Workbench, a real-time computer link. Tang Dep. at 39:22-40:4, Ex. 24; R. Carter Dep. at 158:16-159:3, Ex. 78; Heilman Dep. at 196:7-20, Ex. 25; Mireles Dep. at 24:1-9, Ex. 26.

1 Wal-Mart's Home Office establishes all personnel policies, including compensation and
2 promotion guidelines. Hass Dep. at 15:21-16:3, Ex. 27. Personnel policies are virtually the same
3 for Wal-Mart Discount Stores, Supercenters, and Sam's Clubs. Coughlin Dep. at 42:21-43:5, Ex.
4 15; Carpenter Dep at 63:19-64:9, Ex. 28; Reeves II Dep. at 147:23-148:7, Ex. 33 (99% of the
5 policies are the same); Hottinger Dep. at 33:9-18, 35:21-40:19, 49:5-9, Ex. 29. The People
6 Division is then responsible for disseminating employment policies to the "field." Hass Dep. at
7 33:24-34:20, Ex. 27.

8 District managers are charged with ensuring that store operations are consistent with
9 "company program," also known as "management by exception." Harper I Dep. at 178:18-
10 179:11, Ex. 1. The Home Office monitors each store's operations electronically and generates
11 reports for each district manager showing which stores are not meeting one of the many company
12 standards set and monitored by the Home Office. Harper II Dep. at 38:17-43:8, Ex. 11; Harper I
13 Dep. at 133:3-15, 163:18-164:21, Ex. 1; Hass Dep. at 102:20-25, 105:3-15, Ex. 27; Crawford
14 Dep. at 26:22-27:9, Ex. 30. District managers use these "exception" reports to identify the
15 problems on which to focus when they visit the stores. Harper I Dep. at 178:18-179:11, Ex. 1.
16 Notes from these store visits are forwarded to the RVPs. Butler Dep. at 106:16-21, 108:25-
17 109:10, Ex. 4. District Managers also conduct quarterly STAR audits in each store to track
18 individual store compliance more formally. Wigger Dep. at 110:17-24, Ex. 7; 2001 Company
19 Accountability Goals, Ex. 79.

20
21
22 There are a variety of
23 "exception" reports on store-related personnel matters, including pay.
24 ; Crawford Dep. at 26:22-27:9, Ex. 30.

25 Accordingly, an elaborate organizational structure centered in Wal-Mart's Home Office,
26 coupled with common personnel policies and close monitoring for compliance, ensure that
27 common personnel policies and practices operate in its domestic stores.

1 **B. Wal-Mart Has A Strong Corporate Culture and Has Been Permeated By**
2 **Stereotypes**

3 1. Wal-Mart Has An Unusually Strong Corporate Culture, Which Reinforces
4 Consistency in Practices and Attitudes

5 Wal-Mart has carefully constructed and actively fosters a strong and distinctive corporate
6 culture, which is centrally controlled. This strong corporate culture promotes and sustains
7 uniformity of operational and personnel practices. Bielby Decl. at ¶ 21.⁶ “Wal-Mart Culture” is
8 the same throughout the company; it does not vary by division or by region. Muzingo Dep. at
9 159:25-160:17, Ex. 32; Swanson Dep. at 140:16-21, Ex. 14; Reeves I Dep. at 56:21-23; 103:17-
10 25; 156:10-17, Ex. 2. Many elements of the Wal-Mart Culture – such as the emphasis on
11 “promotion from within” – bear directly on personnel practices within the stores. Muzingo Dep.
12 at 93:20-94:11, Ex. 32.

13 The culture, also known as the “Wal-Mart Way,” is a company-wide value system. Wal-
14 Mart Culture Pocket Handbook, Ex. 80; Muzingo Dep. at 75:16-22, Ex. 32. Every new
15 employee goes through the same orientation process and, as part of that process, is trained about
16 the culture. Muzingo Dep. at 114:20-25, Ex. 32; Hass Dep. at 58:20-22; 62:19-21; 67:25-69:1,
17 Ex. 27; Goodwin Dep. at 126:1-6, 127:5-7, Ex. 21. New employees watch a video about the
18 company history and are introduced to the company’s philosophy (“The Three Basic Beliefs”).
19 Muzingo Dep. at 115:1-6, Ex. 32. The Associate Handbook, provided to all employees, also
20 describes the Wal-Mart Culture and personnel policies. Muzingo Dep. at 115:10-16, Ex. 32;
21 Hass Dep. at 51:24 - 57:13, Ex. 27; Associate Handbook, Ex. 81; Van Allen Dep. at 74:7-20, Ex.
22 34; Reeves I Dep. at 103:8-12, Ex. 2; Hottinger Dep. at 66:2-7, Ex. 29.

23 Thereafter, employees receive weekly training on culture topics at mandatory store

24 ⁶ Plaintiffs’ expert sociologist, Dr. William Bielby, analyzed Wal-Mart’s personnel
25 practices and culture to determine whether barriers exist for female employees and, if so, whether
26 Wal-Mart’s efforts to address these barriers have been adequate. Bielby Decl. at ¶¶ 6-10. Dr.
27 Bielby’s work has been widely accepted by federal courts in numerous Title VII class action
28 cases. *See e.g. Butler v. Home Depot*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997); *Stender v.*
Lucky Stores, 803 F. Supp. 259, 300-304 (N.D. Cal. 1992).

1 meetings. Wal-Mart store managers are provided with a detailed schedule of corporate “culture”
2 lessons and accompanying training materials to present at these weekly meetings. Muzingo Dep.
3 at 125:1-4, Ex. 32; “Culture Topics Index,” Ex. 82. The same Computer-Based Learning
4 Modules are used in all stores, including required training on culture topics. Poland Dep. at
5 49:25-50:10, 110:9-24, 113:4-114:11, Ex. 35; Muzingo Dep. at 129:4-131:14, Ex. 32. Wal-Mart
6 employs a wide variety of standardized communication tools which reinforce its culture,
7 including broadcasts of Wal-Mart TV from Home Office into all its stores; the broadcasts include
8 training on personnel and employment matters. Reeves I Dep. at 103:13-14, Ex. 2; Hass Dep. at
9 88:9-89:6, 92:8-13, 93:6-94:10, Ex. 27; Hottinger Dep. at 78:6-79:7, Ex. 29; Muzingo Dep. at
10 130:11-131:14, Ex. 32 (company intranet).

11 Culture is also an integral part of all management training programs. Muzingo Dep. at
12 143:2-145:2, Ex. 32. It is presented at company-wide Year Beginning and Holiday Meetings as
13 well as at the annual Shareholder meeting. Muzingo Dep. at 147:6-22, Ex. 32. At the
14 Bentonville headquarters, all Wal-Mart and Sam’s Club senior managers attend a Saturday
15 morning meeting which, once a month, is dedicated to presenting one of the company’s culture
16 lessons. Muzingo Dep. at 135:14-136:8, Ex. 32. Those senior managers, who travel frequently
17 to the stores, are then expected to communicate those culture lessons to the field. Muzingo Dep.
18 at 141:6-21, Ex. 32. Notes of the Culture Saturday meetings are put on the Pipeline and made
19 available to all store employees. Muzingo Dep. at 129:11-130:14, 138:24-139:1, Ex. 32; Culture
20 & History, Ex. 83, . Culture training is considered a “continual
21 process” for even the most senior Wal-Mart executives. Swanson Dep. at 141:13-15, Ex. 14.

22 The corporate culture is further reinforced by a number of significant internal practices.
23 First, Wal-Mart evaluates managers on their understanding of the culture and rewards employees
24 who show a strong commitment to it. Management Performance Appraisal, Ex. 85; Muzingo
25 Dep. at 167:25-168:5, Ex. 32. Second, Wal-Mart has a strong policy favoring promotion from
26 within. Peterson Dep. at 72:2-6, Ex. 16; Associate Handbook, Ex. 81. Thus, before an employee
27 becomes part of the management team, he or she will have been thoroughly steeped in the Wal-

1 Mart Culture. Finally, the company regularly moves store level managers from one retail facility
2 to another, often from one state to another, and between Wal-Mart and Sam's Club division.
3 Ludwig Dep. at 71:17-72:15, Ex. 6; Drogin Decl. at ¶ 34, Table 16; ¶ 35, Table 17. This practice
4 ensures that the Wal-Mart Culture is widely disseminated and that the dominant cultural
5 messages are the official culture, rather than any disparate local mores.

6 Not surprisingly, Wal-Mart has been recognized by social scientists and management
7 scholars as an organization with a strong corporate culture. Bielby Decl. at ¶ 18. Typical of such
8 organizations, the Wal-Mart Culture is based in large part on the personal history and beliefs of
9 the company's founder, Sam Walton. Muzingo Dep. at 103:6-14, Ex. 32. Walton's
10 autobiography, "Made in America," is required reading for Wal-Mart management trainees.
11 Management Training Program Week 1 Trainee Guide, Ex. 86.

12 Many of "Mr. Sam's" traditions remain firmly entrenched in the culture. Following a
13 visit to a Korean factory in the 1980s, Walton instituted a Wal-Mart cheer, which is now
14 performed by employees every morning in each of the 3000 Wal-Mart stores. Walton & Huey,
15 MADE IN AMERICA at 200-202, Ex. 87; Muzingo Dep. at 85:18-86:21, Ex. 32. A similar
16 cheer is heard at every Sam's Club store. Oshier Dep. at 106:17-108:22, Ex. 37; Hottinger Dep.
17 at 85:14-22, Ex. 29. The cheer is also regularly done at Wal-Mart corporate meetings and events.
18 Muzingo Dep. at 86:23-87:3, Ex. 32.

19 2. There Is Strong Evidence That Gender Stereotypes Permeate Wal-Mart
20 and Wal-Mart Has Resisted Changes to Make the Company More
21 Hospitable to Women

22 Wal-Mart has held tightly to many traditions, including those which have made women
23 uncomfortable at Wal-Mart. Mr. Walton was a passionate quail hunter and, from the early days
24 of the company, invited a small group of his top managers for an annual quail hunt at his hunting
25 ranch in Texas. Schwindt Dep. at 57:14-61:10, Ex. 38; R. Harper Dep. at 116:10-24, Ex. 36.
26 When women finally reached the lower executive ranks of the company and a few were invited
27 to the event, many suggested that an activity other than hunting would allow more people to feel
28 comfortable participating. Reza Dep. at 98:17-25 ("I don't really like to kill animals, but I

1 went”), 99:22-100:13 (female executives have suggested skiing or river rafting instead), Ex. 39;
2 Schwindt Dep. at 59:12-18, Ex. 38 (organizers are aware that “a lot of [women] don’t like to
3 hunt”); R. Harper Dep. at 116:10-117:16, Ex. 36. Despite Wal-Mart’s professed commitment to
4 diversity, the suggestion was soundly rejected as interfering with “tradition,” and the annual quail
5 hunt remains today the corporate retreat for executives and senior management in the company.
6 Reeves II Dep. at 144:23-145:14, Ex. 33; Reza Dep. at 100:23-101:2, Ex. 39; R. Harper Dep. at
7 116:21-24, Ex. 36.

8 Indeed, Wal-Mart’s culture is so strong and conforming that new management hires often
9 encounter great difficulty becoming assimilated. Swanson Dep. at 26:5-10, Ex. 14; Reeves I
10 Dep. at 46:1-21, 56:15-20, Ex. 2 (“it takes about five years to be accepted in this organization.
11 The first year is tough for all external folks.”); R. Harper Dep. at 120:14-18, 122:14-123:1, Ex.
12 36 (marketing executive considered himself an outsider for first eleven years with company).
13 One former female Vice President of Sam’s Club Marketing, Rhonda Harper, an outside hire and
14 veteran of a number of large American corporations, described the Wal-Mart culture as a “very
15 tight, deep culture” and “very closed.” R. Harper Dep. at 121:9-15, Ex. 36. When asked about
16 her efforts to assimilate into the Wal-Mart culture, Harper explained:

17 I didn’t go hunting with them, I didn’t go fishing with them, I wondered if I had been able
18 to do some of those things if I might have assimilated more quickly into the organization.
19 R. Harper Dep. at 125:21-126:3, Ex. 36. Plainly, Wal-Mart’s culture exerts an enormous
20 influence on the company’s associates, treating as family the favored employees and treating as
21 foreigners the newcomers and the employees who fail to fit the Wal-Mart mold.

22 Other features of Wal-Mart’s environment are even more inhospitable to women. For
23 example, at regular Monday executive level Sam’s Club meetings, senior management often
24 referred to the female associates in the stores as “little Janie Qs” and “girls.” R. Harper Dep. at
25 103:21-105:11; 135:13-136:14, Ex. 36. One female executive, new to the company, raised an
26 objection to the use of these demeaning terms to the Sam’s Club President as well as to the
27 Executive Vice President. R. Harper 135:13-136:14, Ex.36. Her criticism was not well received

1 and there was no change in the regular use of the demeaning label.⁷

2 Female managers have been required to go to Hooter’s restaurants and strip clubs in the
3 course of business events. Howard Decl. ¶¶ 14, 17-19 (female store managers required to attend
4 lunch meetings at Hooter’s; female store managers forced by district manager to go to strip clubs
5 while on business trip). Indeed, Executive Vice President for People Coleman Peterson defended
6 this conduct, testifying that it was appropriate for a Wal-Mart district meeting to be held at a
7 Hooter’s restaurant, if it is considered to be the “restaurant du jour” and “one of the best places to
8 meet and eat. . .” in the town. Peterson Dep. at 264:11-16, Ex. 16. Numerous male Wal-Mart
9 managers testified that they regularly go to strip clubs while attending the annual sales meetings.
10 Riggs Dep. at 196:1-5, Ex. 40; J. Brown Dep. at 185:8-12, Ex. 41; Seaman Dep. at 321:1-3, Ex.
11 42; Sherman Dep. at 259:10-23, Ex. 43; Schaffner Dep. at 194:19-195:9, Ex. 12; Sims Dep. at
12 185:3-14, Ex. 44. *See also* Horton Decl. at ¶ 5 (stripper performed at store meeting to celebrate
13 store manager’s birthday). Further, at a company event in May 2001, Jim Haworth, Executive
14 Vice President of Operations and Chief Operating Officer for Wal-Mart Stores, sat on a chair that
15 looked like a leopard-skin stiletto high heel shoe, while surrounded by women singing and
16 dancing. Haworth Dep, at 215:12-218:9; R. Harper Dep. at 105:12-106:18. A photograph of the
17 event was later included in the employee newsletter. Haworth Dep. at 217:7-18, Ex. 126.

18 Wal-Mart had reinforced the stereotype that women are less assertive than men in training
19 sessions given to store managers at the Walton Institute.⁸ Participants were told the reason that
20 so few women had reached senior management at Wal-Mart was because “men have been more
21 aggressive in achieving those levels of responsibility. . .” Walton Institute Diversity Questions,
22 Ex. 89. In defending the half-hearted efforts undertaken by Wal-Mart in the past to address
23

24 ⁷ Indeed, the female executive was criticized by her boss for her “attitude of superiority”
25 and was counseled “not to be judgmental.” Swanson Dep. at 134:15-135:6, Ex. 14.

26 ⁸ The Walton Institute is a Bentonville-based management training center. All salaried
27 management must attend uniform management training at the Institute. Hass Dep. at 80:3-7, Ex.
28 27; Bosler Dep. at 40:2-23, Ex. 57.

1 under-representation of women, Divisional Vice President Larry Williams testified that Wal-
2 Mart did not do more because there was “no forcing the issue.” In his view, this would lead to
3 promoting unqualified women. Williams Dep. at 108:18-109:13, Ex. 17. This same view – that
4 additional efforts to promote women would lead to “lowering standards” and that better qualified
5 white males would be passed over – has been echoed repeatedly by other managers at these
6 Walton Institute meetings. Ex. 89. Thus, from the senior executives down through store
7 managers, the view that promoting women requires “lowering standards” is a frequently
8 expressed belief at Wal-Mart.

9 Wal-Mart’s own consultants and employee groups have highlighted for the company the
10 challenges to women that some of Wal-Mart’s traditions and its managers’ stereotypes have
11 erected.

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26 As early as 1992, a group of female Wal-Mart Home Office employees
27 formed the Women in Leadership Group, which identified a number of concerns for women

1 employees, some of which centered on the culture of Wal-Mart. Their concerns included:
2 “[s]tereotypes limit the opportunities offered to women,” “[c]areer decisions are made for
3 associates based on gender,” “aggressive women intimidate men,” “men are interviewed as the
4 replacements, women are viewed as support,” and “[m]en’s informal network overlooks
5 women.” Memo re: Women in Leadership, Ex. 90.⁹ The Women in Leadership group was
6 inactive from 1996 until 2002, after this suit was filed. Bilgischer Dep. at 42:22-43:24, Ex. 45.

7 **C. Under Wal-Mart’s Compensation System, Women Are Consistently Paid**
8 **Less than Men**

9 Pay for all Wal-Mart hourly employees is set at hire and adjusted after annual
10 performance evaluations and in some cases for exceptional “merit.” Shatz Dep. at 52:24-53:4,
11 66:6-19, 68:25-69:5. 82:7-13, Ex. 46; Crawford Dep. at 69:5-14, Ex. 30; Scantlin Dep. at 91:6-
12 22, Ex. 47; Raps Dep. at 244:7-16, Ex. 48; Harper II Dep. at 73:20-74:10, Ex. 1. Wal-Mart
13 establishes general compensation guidelines, but the guidelines permit, and even encourage,
14 managers to make idiosyncratic and subjective compensation decisions. Bielby Decl. at ¶ 40.

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16 ⁹ Such stereotypes persist to this day. *See, e.g.*, Durfey Decl. at ¶ 10 (a female assistant
17 manager in Utah was told repeatedly by a store manager that retail is “tough” and not
18 “appropriate” for women); Scott Decl. at ¶¶ 8, 9, 12 (male store manager told Scott that “[m]en
19 are here to make a career and women aren’t. Retail is for housewives who just need to earn extra
20 money”); Mathis Decl. at ¶ 12 (male store manager told female associate that women have to be
21 “bitches” to survive in Wal-Mart management); Kwapnoski Decl. at ¶ 16 (female receiving area
22 manager told by store manager to “doll-up,” dress a little better and “blow the cobwebs off [her]
23 make-up”); Lovejoy Decl. at ¶ 6 (male area manager told female associate that she could not get
24 promoted to the overnight supervisor position because she had children and because she would
25 be the only woman working overnight); Zumbrun Decl. at ¶ 5 (during interview for ICS team
26 leader, male assistant manager asked her, “[b]eing a female, what makes you more qualified for
27 this job than a male employee?” She was also told that the ICS staff was mostly male and that
28 they might have a problem with a female boss; male was hired); Donovan Decl. at ¶ 6 (male
manager told her “you aren’t part of the boy’s club, and you should raise a family and stay in the
kitchen” instead of seeking advancement); Martin Decl. at ¶ 13 (told by male co-manager, “you
need to grow some balls”); Rajas Decl. at ¶ 5 (male district manager told her to resign as an
Assistant Manager and find a husband with whom she could settle down to relieve work-related
stress); Deno Dep. at 166:15-167:7, 234:2-236:6, Ex. 69 (male manager said women only made
store manager to meet a quota, that women should be home barefoot and pregnant and women
weren’t qualified to be managers because men had an extra rib).

1 The Home Office annually sets the minimum hourly wage rate for each store, based upon
2 the local labor market. Heinle Dep. at 19:10-17, Ex. 49, Field Associate Compensation
3 Guidelines, 1997, Ex. 93 at WMHO151976; Crawford Dep. at 74:9-20, Ex. 30. Jobs are grouped
4 into “classes” by the Home Office; every department manager or cashier at any retail store in the
5 country will be assigned the same class. Ex. 93; Harper II Dep. at 16:7-18:1, Ex. 11;
6 ; Crawford Dep. at 69:15-20, Ex. 30. Home Office also establishes, for
7 each class, a minimum wage rate that is progressively higher than the minimum rate for the store.
8 *See, e.g.*, Ex. 93, FYE 2003 Field Non-Exempt Associate Pay Guidelines, Ex. 94; Crawford Dep.
9 at 72:14-21, 73:18-25, Ex. 30. For example, in 2002, all “Class 2” jobs had a minimum starting
10 rate of \$0.25 above the minimum start rate for the store. *See, e.g.*, Ex. 94; Shatz Dep. at 62:12-
11 18, Ex. 46.

12 Store Managers set the pay for each hourly employee.
13 ; Shatz 52:16-53:4, 66:6-19, 68:25-69:5, Ex. 46; Hom Decl. at ¶ 12. The guidelines authorize
14 Store Managers to adjust starting pay by as much as \$2.00 per hour, although district managers
15 receive exception reports whenever pay is set at 6% or more above the minimum set by
16 guideline. Ex. 93, 94; Shatz Dep. at 66:20-23, Ex. 46. But Wal-Mart provides no guidance on
17 what circumstances would justify such an adjustment. Ex. 94 at WMHO 366905; Shatz Dep. at
18 66:6-11, 70:9-18, Ex. 46. Without proper criteria, inappropriate gender-based factors therefore
19 can, and do, affect pay decisions.¹⁰ Bielby Decl. ¶ 37.

21 ¹⁰ Tallent Decl. at ¶ 10 (during department manager meeting, male store manager said,
22 “[m]en need to be paid more than women because they have families to support”); Young Decl.
23 at ¶ 10 (during store meeting, male assistant manager responded to question from female
24 associate about why men made more than women by stating that men were working as heads of
25 their households while women were just working for the sake of working); Scott Decl. at ¶ 8
26 (when single mother personnel manager asked why male associate was receiving a merit raise,
27 male assistant manager told her it was because he “has a family to support”); Kwapnoski Decl. at
28 ¶ 12 (store manager told plaintiff that he gave male associate larger raise because he had “a
family to support”); McDonald Decl. at ¶ 7 (female associate told by male Department Manager
that male employees will always make more than females because “God made Adam first, so
women would always be second to men”); Odle Decl. at ¶¶ 8, 10, 11 (when female assistant

1 The process for setting starting pay is similar for Assistant Managers and Co-Managers,
2 except that compensation decisions are made by District Managers (for AMs) or RVPs (for Co-
3 Managers), in consultation with RPMs. Memo re: Management Wages, Ex. 91 (“the Home
4 Office is the one who determines hiring, firing, wages, transfers and promotions for the
5 management associates with input from the District Manager”). The Exempt Associate Pay
6 Guidelines establish a broad salary range () for Assistant Managers. Simpson
7 Dep. at 95:15-19, Ex. 50; Assistant Manager and Fresh Managers Performance Matrix Salary
8 Structure, Ex. 92. District Managers are given almost no guidance as to where in the range an
9 Assistant Manager or Co-Manager should be paid, other than to consider store size. Simpson
10 Dep. at 92:8-17, 104:19-25, 105:7-106:14, Ex. 50, Ex. 92;

11 . See, e.g., T. Hall Decl. at ¶ 18; Stumpf Decl. at ¶ 9.

12 Employees ordinarily receive pay increases after their first 90 days and annually
13 thereafter, based upon the employee’s performance evaluation score. Shatz Dep. at 80:21-82:6,
14 102:15-21, Ex. 46; Ex. 93, Ex. 94, ; Blackburn Dep. at 45:18-46:10, Ex. 51; McNair Dep.
15 at 76:11-17, Ex. 52. Wal-Mart’s guidelines set a percentage range for the increase, tied to the
16 evaluation score, but endorse the exercise of management discretion in these decisions as well.¹¹
17 Harper I Dep. at 45:17-21, Ex. 1; Scantlin Dep. at 91:6-14, Ex. 47; Simpson 125:24-126:9, Ex.
18 50. For example, if an Assistant Manager receives an “outstanding” performance evaluation, the

19 _____
20 manager requested raises for two female associates because they were making less than their
21 male counterparts, male general manager said, “[t]hose girls don’t need any more money; they
22 make enough as it is.” She later asked why a male assistant manager was making over \$10,000
23 more than she was, male director of operations told him it was because he “supports his wife and
24 his two kids”); Brown Decl. at ¶ 5 (when she asked department manager about why her pay was
lower than a less qualified male, manager said, “[y]ou don’t have the right equipment. . . you
aren’t male, so you can’t expect to be paid the same.”).

25 ¹¹ Performance increase decisions for hourly employees are made by Store Managers.
26 Shatz Dep. at 103:4-104:13-16, Ex. 46; Blackburn Dep. at 68:10-69:12, 82:19-83:5, Ex. 51.
27 Performance increases for Assistant and Co-Managers are made by District Managers in
28 consultation with Store Managers. ; McNair Dep. at 118:23-
123:1, Ex. 52.

1 guidelines call for a salary increase of between five and seven percent. Simpson Dep. at 126:5-9,
2 Ex. 50. As with the start rate, a manager may exceed Home Office guidelines in setting the
3 amount of an individual performance increase. Shatz Dep. at 81:22-82:1, Ex. 46.

4 Finally, managers are permitted to award merit increases for “exceptional performance.”
5 Shatz Dep. at 82:11-13, Ex. 46. All employees, through Co-Managers, are eligible for merit
6 increases. Simpson Dep. at 85:24-87:15, 110:3-14, Ex. 50; ;
7 Crawford Dep. at 86:4-8, 141:7-11, Ex. 30; McNair Dep. at 31:6-14, 79:9-15, 80:24-81:2, Ex.
8 52; Ex. 93; Ex. 94; Wal-Mart has declined to provide criteria for identifying
9 “exceptional performance.” ; Shatz Dep. at 86:24-87:12,
10 Ex. 46. Instead, Wal-Mart has chosen to permit managers to decide for themselves what is
11 “exceptional.” *Id.* The guidelines provide a suggested range of 5% to 6% and only allow one
12 merit increase each year. Ex. 92; Shatz Dep. at 87:13-88:17, Ex. 46; Blackburn Dep. at 76:15-19
13 (once a year), Ex. 51. Yet managers have discretion on how much, within the range, to award for
14 a merit increase, and may even award more than one per year. *See e.g.*, McNair Dep. at 91:17-
15 20, Ex. 52; Schatz Dep. at 106:4-15, Ex. 46.

16 In sum, Wal-Mart deliberately grants its managers broad discretion at critical junctures in
17 making compensation decisions for employees in the field. While Wal-Mart’s policies provide
18 managers with broad discretion, (Shatz Dep. at 53:20-54:1, Ex. 46) store managers have
19 exceeded even these generous bounds. Such decisions to exceed corporate compensation
20 guidelines appear on the Payroll Exception report, thus alerting district managers. Blackburn
21 Dep. at 110:1-2, Ex. 51; Shatz Dep. at 66:6-72:2; 20:15-25, Ex. 46. Wal-Mart is, therefore,
22 aware of how its Store Managers are using their discretion, but it has done nothing to rein them
23 in or ensure this discretion is exercised fairly.¹²

24
25 ¹² Proposed class representatives have experienced pay discrimination. Named Plaintiff
26 Cleo Page, who worked in the Union City and Livermore, California stores after transferring
27 from Tulsa, Oklahoma, was paid a lower hourly rate than a male associate who held a similar
28 position although he had worked at Wal-Mart for a shorter time and had less supervisory
experience. Page Decl. at ¶ 11. Similarly, Named Plaintiff Patricia Surgeson, who worked in the

1 Finally, the major part of store manager's compensation is tied to store profitability.
2 ; Crawford Dep. at 140:20-141:6, Ex. 30. Performance
3 evaluations are not a factor, nor is a manager's ability to execute policies fairly. Crawford Dep.
4 at 137:6-11, Ex. 30; Simpson Dep. at 117:7-16, Ex. 50.

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6 Not
7 surprisingly, female class members have complained of being assigned to smaller or "problem"
8 stores that generate lower profits. See Servatius Decl. at ¶¶ 2, 13-16, 21; M. Howard at ¶¶ 10-13;
9 T. Hall Decl. at ¶¶ 27-28; N. Martin Decl. at ¶ 11; Stumpf Decl. at ¶¶ 17, 28. Their complaints
10 are reflected in the statistical results, which reveal that female store managers are paid less than
11 their male counterparts, as described more fully below.

12 **D. Wal-Mart's Promotion Policies Rely on Excessive Subjectivity and Act To**
13 **Exclude Women**

14 All Wal-Mart stores use the same policies for making promotions to all in-store positions.
15 For promotions above department manager,¹³ Wal-Mart has a very subjective process that has
16 systematically disadvantaged women.¹⁴

17 Vacaville, CA store from 1997-2001, transferred from department manager of Lay-Away to the
18 Cash Office in the hope of being promoted to management, and the male employee who replaced
19 her in Lay-Away was paid more than she had been paid for doing the same job. Surgeson Decl.
20 at ¶¶ 8, 9. Plaintiff Betty Dukes has worked at the Wal-Mart store in Pittsburg, California since
21 1994. She has been paid significantly less than male employees with less seniority performing
22 similar work. Dukes Decl. at ¶ 19.

23 ¹³ At the very lowest level, promotion from hourly associate to hourly department
24 manager, Wal-Mart has a policy that requires stores to post all such openings. Job
25 Announcements Company Policy, Ex. 96. For the most part, in these lower-paying positions
(\$20,000-\$25,000 range), women have been able to express their interest through posting and
obtain these promotions. Wal-Mart's workforce data do not show any significant disparities in
promotion to hourly department manager positions as a whole and, therefore, the plaintiffs do not
seek class certification of this particular claim.

26 ¹⁴ There are no minimum education or prior experience requirements for any hourly or
27 field management position, with the exception of store pharmacists, who must have a degree and
a state license. Wal-Mart's Supplemental Response to Interrogatory No. 22, Ex. 97.

1 *Promotion to Hourly Support Manager* – Support manager, the highest level hourly
2 position, serves as an important feeder job for the Management Training Program. Harper I Dep.
3 at 108:16-109:10, Ex. 1. *See also* Wal-Mart Corporate Policy: Support Managers, Ex. 76 and
4 Drogin Decl. at ¶ 53. While the company job posting policy includes support manager among the
5 hourly positions that should be posted, Wal-Mart’s internal data shows that most openings to
6 support manager (80%) were not, in fact, posted. Job Announcements Policy, Ex.96; Drogin
7 Decl. at ¶ 44. Wal-Mart also allows store managers to apply their own unwritten criteria when
8 selecting candidates.¹⁵ Store Manager, Art Mireles, for example, testified that he relied on
9 factors such as teamwork, ethics, integrity and the ability to get along with others. Mireles Dep.
10 at 180:20-181:4, Ex. 26. Such unwritten, subjective criteria are particularly vulnerable to the
11 influence of stereotypes. Bielby Decl. at ¶ 39. Wal-Mart’s workforce data, discussed more fully
12 below, reveal that women associates have indeed received far fewer of these promotions to
13 support manager than would be expected in a non-discriminatory system.¹⁶

14 *Corporate Guidelines for Promotions into In-Store Management Positions* – Wal-Mart
15 has company-wide promotion guidelines, which set forth the minimum requirements for
16 advancement into salaried positions within the retail stores. Promotional Guidelines, Ex. 98.
17 Individual regions or divisions are not allowed to have written management promotion guidelines
18 different from the company requirements. Harper II Dep. at 218:13-219:25, Ex. 11 (Divisional

19
20 Historically, Wal-Mart preferred managers who did *not* have a college degree. Walton & Huey,
MADE IN AMERICA at 216-218, Ex. 87.

21 ¹⁵ In some cases, these criteria have clearly reflected gender bias. *See, e.g.*, Houchins-
22 Post Decl. at ¶ 5 (male Co-Manager said he would not hire a “squatter” or “someone who squats
23 to pee” for the Support Manager position.).

24 ¹⁶ For example, Named Plaintiff Edith Arana had more than ten years’ retail experience
25 when she began her employment with Wal-Mart in Duarte, California where she worked from
26 1995 to 2001. She applied for, but was denied, a support manager position in August 1998 and
27 again in October 2000. Arana Decl. at ¶¶ 19, 31. Plaintiff Page was also denied a support
manager position offered to a less qualified male associate. Page Decl. at ¶ 7. Plaintiff Dukes,
28 was unable to apply for many support manager positions which were not posted, and were filled
by men. Dukes Decl. at ¶¶ 14, 15.

1 Vice President developed division specific promotion standards; upon learning of them, the
2 Home Office rescinded them). The basic requirements are that candidates have an “above
3 standard” evaluation, at least one year in their current position, be current on training, not be in a
4 “high shrink” department or store, and be on the Company’s Rising Star list.¹⁷ Promotional
5 Guidelines, Ex. 98. The promotion guidelines also require that management candidates be
6 willing to relocate, a requirement discussed further below. *Id.*

7 *Promotion to Assistant Manager Trainee* – The Management Training program is the
8 primary way hourly employees can enter salaried management. Kintzele Dep. at 44:6-18, Ex.
9 13. Any hourly employee, regardless of job position, is eligible for assistant manager training.
10 Weaver Dep. at 102:4-17, Ex. 9; Monfils Dep. at 161:22-162:7, Ex. 53; Ludwig Dep. at 151:6-
11 152:5, Ex. 6. Until January 2003, Wal-Mart did not post openings for the training program
12 (Harper II Dep. at 180:23-181:10, Ex. 11) nor did it have any system available for employees to
13 express an interest in the program. Kintzele Dep. at 42:3-8, Ex. 13. Wal-Mart did not provide
14 any written information to employees about what the management training program is or how to
15 apply. Harper II Dep. at 204:19-22, Ex. 11; June 27, 2002 Email from Jarrells-Porter re: Urgent
16 Project, Ex. 100.¹⁸

17 District managers, subject to the approval of Home Office-based Regional Vice
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19
20 ¹⁷ The Rising Star designation is a company-wide program to identify employees who are
21 viewed as “potential leaders of tomorrow.” To be designated a Rising Star, an employee had to
22 be recommended by his/her supervisor based largely on subjective criteria. The names of
23 “Rising Stars” were, until recently, posted on the “Rising Star Wall” in the “Winners Win” room
24 in the Bentonville Home Office. Training Resources: Rising Star, Ex. 99 at WMHO 217266.
25 These pre-selected “Stars” were given priority for promotion.

26 ¹⁸ Earlier this year, Wal-Mart implemented a one-time-only opportunity to express an
27 interest in the management training program. Employees were given only one week in which to
28 express general interest; no specific positions in specific stores or districts were identified. The
29 program materials stressed the negative aspects of the trainee position, but none of its potential
30 upside. Bielby Dep. at 169:13-172:5, Ex. 56. When plaintiffs sought discovery of the documents
31 explaining the development of the new “program,” Wal-Mart claimed attorney-client privilege.
32 Seligman Dec. at ¶ 14.

1 Presidents, select management trainees through a “tap on the shoulder.” Kintzele Dep. at 86:20-
2 23, Ex. 13 (store managers nominate candidates); M. Miller Dep. at 65:2-13, Ex. 54; Martinez
3 Dep. at 147:16-148:6, Ex. 3; Butler Dep. at 134:25-135:11, Ex. 4; Schaffner Dep. at 103:22-
4 104:10, Ex. 12; Email from Jarrells-Porter re: Urgent Project (referenced in paragraph above),
5 Ex. 100; Harper II Dep. at 206:12-16, Ex. 11; Wesbescher Dep. at 204:7-21, Ex. 55. Since the
6 promotion guidelines only set forth the minimum requirements for advancement, district
7 managers inevitably apply unwritten criteria to decide which of the hundreds of employees under
8 their supervision they will select for management training.¹⁹ Kintzele Dep at 79:21-80:20, 106:1-
9 9, 110:11-111:8, Ex. 13; Heilman Dep. at 108:13-20. Ex. 25; M. Miller Dep. at 65:2-13, Ex.54
10 (Sam’s Club management trainees selected if general or assistant manager sees potential);
11 Guthrie Dep. at 77:11-22, 80:3-18, 82:11-83:3, Ex. 22 (criteria for promotion to TLE
12 management trainee are subjective); Goodwin Dep. at 183:15-23 (common sense relied on to
13 decide which employees were promotable), 236:10-14, Ex. 21. They are not required to review
14 recent performance appraisals. Kintzele Dep. at 90:13-2, Ex. 13. There is no oversight or other
15 monitoring of these unwritten criteria. *See* Bielby Decl. at ¶ 39; Schwindt Dep. at 134:15-18;
16 195:13-196:4 Ex. 38; Kintzele Dep. at 46:8- 47:4, Ex. 13. Thus, it is not surprising that women
17 have been discriminated against with respect to advancement into the Management Training
18 Program.²⁰

19
20 ¹⁹ There is evidence that these criteria reflect explicit gender bias. *See, e.g.,* Crawford
21 Decl. at ¶ 5 (when she asked male district manager why a male had gotten an assistant manager
22 position over her, he told her that it was because the male was “head of his household” and that
23 as a married woman, she did not “need” the position); Rojas Decl. at ¶¶ 2, 5 (upon meeting the
24 male store manager in store where she was to complete management training, he said, “I don’t
25 like college graduates,” (which she was) and “I don’t like female managers”); T. Hall Decl. at ¶¶
26 5, 16 (male store manager told a male assistant manager that all women should be “at home with
27 a bun in the oven” and “barefoot and pregnant.” Male assistant manager told room of associates
28 that the only reason that Wal-Mart needed female assistant managers was to ensure that women
associates had someone with whom they could discuss their periods).

²⁰ Plaintiff Page repeatedly expressed interest in the assistant manager trainee program,
for which she was fully qualified, but was never promoted. Page Decl. at ¶ 9. Plaintiff Christine

1 *Promotion to Assistant Manager and Co-Manager* – In 1998, Wal-Mart implemented a
2 computerized Management Career Selection (MCS) system, which would make it possible to
3 post all management openings in the retail stores. Mitchell Dep. at 204:10-25, Ex. 58;

4 . Wal-Mart has, however, deliberately chosen not to post Assistant
5 Manager or Co-Manager openings as a matter of policy. Harper II Dep. at 160:3-9, 161:3-5, Ex.
6 11; Kintzele Dep. at 41:17-42:2, 42:19-21, 129:15-18, Ex. 13). *See also* MCS RPM Training,
7 Ex. 102 at WMHO 378025; Spragg Dep. at 256:11-2; 258:19-20, Ex. 68. Wal-Mart decided not
8 to post these jobs, even though Wal-Mart’s executives concede that job posting would allow the
9 company to identify and attract talented candidates and would assist with diversity. Peterson
10 Dep. at 162:15-23, 166:24-167:3, Ex. 16; Coughlin Dep. at 95:22-96:21, Ex. 15. As with
11 management trainee openings, district managers, in conjunction with store managers and RPMs,
12 use their own subjective assessment to select the “best” candidate for Assistant Manager and Co-
13 Manager vacancies, subject only to the minimum corporate guidelines explained above. Kintzele
14 Dep. at 129:25-130:22, 131:17-135:16, 144:23-145:5, Ex. 13.

15 *Promotion to Store Manager* – Wal-Mart does post openings for most store manager
16 positions on MCS. Kintzele Dep. at 152:9-22, Ex. 13; Lippert Dep. at 182:8-11, Ex. 59 (less
17 than 30% of club manager openings at Sam’s Clubs not posted on Sam’s Club posting system).

18
19
20 Kwapnoski has worked at Sam’s Club since 1986 and at the Sam’s Club in Concord, California
21 since 1994. Kwapnoski Decl. at ¶¶ 1, 4. Although her outstanding performance was recognized
22 with several merit raises and excellent evaluations, Ms. Kwapnoski was repeatedly denied
23 promotion into a managerial position. Finally, two weeks after this lawsuit was filed, and with
24 fifteen years experience at Sam’s Club, Ms. Kwapnoski was promoted to an area manager
25 position, the lowest level salaried job at Sam’s Club. In March 2003, Ms. Kwapnoski began the
26 Management Training Program to become an assistant manager. *Id.* at ¶ 21. Plaintiff Surgeson
27 asked an assistant manager how she could join the Management Training Program, as she saw no
28 information about the program at the store. Ms. Surgeson received no information or
encouragement about receiving management training. Surgeson Decl. at ¶ 10. *See also*
Connaker Decl. at ¶¶ 8-9; Crom Decl. at ¶¶ 6-9; Dobbs Decl. at ¶¶ 45-46; Earwood Decl. at ¶¶ 9-
11; T. Hall Decl. at ¶¶ 7-8; K. Johnson Decl. ¶¶ 10-16; Lehman Decl. at ¶¶ 6, 12, 14; Scott Decl.
at ¶¶ 10-17.

1 However, it is not an open posting system.²¹ Candidates are first required to obtain permission
2 from their district manager before they are allowed to post. Kintzele Dep at 157:19-158:15, Ex.
3 13. District managers may withhold permission for any reason. *Id.* See Stumpf Decl. at ¶ 20;
4 Martin Decl. at ¶ 11. For those candidates who are given permission to post, they must take and
5 pass an on-line assessment. Kintzele Dep. at 155:1-156:19, Ex. 13. Regional Vice Presidents,
6 with input from District Managers and RPMs, select the candidate based upon whatever
7 subjective criteria they choose to apply beyond the corporate minimum guidelines.²² Kintzele
8 Dep. at 165:22-167:1, 168:19-169:16, Ex. 13; Spragg 223:6-224:19, Ex. 68; Grimm Dep. at
9 177:13-178:19, Ex. 60.

10 **E. Wal-Mart's Workforce Data Reveals that Discretionary Compensation and**
11 **Promotion Decisions Have Consistently Disadvantaged Female Employees**

12 1. Female Employees Are Consistently Paid Less Than Their Male
13 Employees in the Same Position Even Though They Have Higher
14 Average Performance Evaluation Scores, More Seniority and Lower
15 Turnover Rates

16 Dr. Richard Drogin, a statistician, analyzed Wal-Mart payroll and personnel data. He
17 found that women at Wal-Mart earn less than men holding the same job, for nearly all jobs, in
18 every year since 1996. Among hourly workers, women earned about \$1100 less than did men in
19 2001. For management employees, the gender pay gap was \$14,500. Drogin Decl. at ¶ 20. The
20 average total earnings for men and women in field management jobs and the three largest hourly
21 jobs in 2001 were:

22 ²¹ Sam's Club only notifies current general managers of the general manager vacancies,
23 and general managers must nominate assistant managers for promotion to store manager/general
24 manager positions. Eldridge Dep. at 222:8-23, 258:8-18, Ex. 10.

25 ²² These criteria may include gender stereotypes. *See, e.g.,* Howard Decl. at ¶ 23 (male
26 district manager told a female store manager in Indiana that a single mother should not run a
27 store and that she should instead be at home with her child). Moreover, several declarants
28 explain how they applied over and over for different Store Manager positions on the MCS
system. Often they heard nothing about who was given the position. Just as often, they learned
that the positions had gone to men. *See* Kellems Decl. at ¶ 26 (posted for eighteen positions);
Stumpf Decl. at ¶¶ 19-30 (numerous unsuccessful store manager postings); Hittle Decl. at ¶ 9
(posted for ten positions); McCarthy Decl. at ¶ 15 (posted for sixteen positions).

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Average Earnings by Gender for 2001			
Job	Men	Women	Difference
Regional Vice Pres.	\$419,435	\$279,772	\$139,663
District Manager	\$239,519	\$177,149	\$62,370
Store Manager	\$105,682	\$89,280	\$16,402
Co-Manager	\$59,535	\$56,317	\$3,218
Asst. Manager	\$39,790	\$37,322	\$2,468
Mgmt. Trainee	\$23,175	\$22,371	\$804
Dept Head	\$23,518	\$21,709	\$1,809
Sales Associate	\$16,526	\$15,067	\$1,459
Cashier	\$14,525	\$13,831	\$694

Drogin Decl. at ¶ 25, Table 9; ¶ 26, Table 10. These pay differences were found consistently across regions. Drogin Decl. at ¶ 76. The differences in pay between men and women could not be explained by *seniority or turnover*. Drogin Decl. at ¶ 28, Table 12. Women have longer average tenure (4.47 years) than do men (3.13 years) and lower turnover. *Id.* The differences could not be explained by *performance*. Women in hourly positions on average have higher performance ratings (3.91) than do men (3.84).²³ Drogin Decl. at ¶ 30, Table 13. The disparity in pay between comparably-employed women and men has increased every year since 1997. Drogin Decl. at ¶ 67.

Dr. Drogin also looked at the pay gap, over a five-year time period, for men and women hired in the *same* year into the *same* position. For employees hired into hourly positions in 1996, the average pay for men was \$0.35 per hour more than for women. For those 1996 hires who stayed at Wal-Mart through 2001, the gap in pay for men and women increased to \$1.16 per hour on average. In other words, with each additional compensation decision after hire, the average pay gap increased.

²³ Wal-Mart did not produce complete data on performance ratings for salaried employees until after the discovery cut-off. Drogin Decl. at ¶ 30, n.10.

1 Dr. Drogin conducted numerous multiple regression analyses to determine whether other
2 factors might explain these disparities in pay. Results, known as “t-values,” larger than 2.0 are
3 considered statistically significant.²⁴ Drogin Decl. at ¶ 66. His initial regression of total annual
4 earnings controlled for seniority, weeks worked, part time status, and store location. The results
5 showed that women are paid at least 9.3% less than similarly situated men in every year. The
6 initial regression resulted in a t-value of - 120.5 in every year, which is *highly* statistically
7 significant and many times greater than the legal threshold of *two* standard deviations. *Id.* at ¶
8 67.

9 Dr. Drogin then ran a second set of analyses using hourly pay rate, in lieu of annual
10 earnings, to take into account any possible effect from regular and overtime hours worked. The
11 analysis controlled for seniority, whether hired within the year, part-time/full-time status, store,
12 job position, whether the employee was ever hired into a retail store, management and gender.
13 Again, women made less than men and the disparities were statistically significant (t-value -
14 62.3). The disparities steadily widened from \$.18 per hour to \$.34 per hour from 1997 to 2001.
15 Drogin Decl. at ¶ 74. Dr. Drogin then added performance rating as a control factor in the
16 regression analysis, but only for 2001 when data was reasonably complete. Women were paid
17 \$.37 less than comparable men in 2001 and the results were highly significant with a t-value of -
18 102.65. Not surprisingly, the disparity increased because Dr. Drogin’s earlier analysis found that
19 women have higher average performance ratings scores than do men. Drogin Decl. at ¶ 30,
20 Table 13; ¶ 75, Table 28.

21 The bottom line is that Dr. Drogin found that women employees at Wal-Mart are paid
22 less than men in every year, in virtually every job, even when relevant non-discriminatory factors

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24 ²⁴ Under both social science and judicial standards, roughly two or more standard
25 deviations (a .05 level of statistical significance) are considered statistically and legally
26 significant. *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-311 & n.14, 17
27 (1977); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984); *Contreras v. City of Los Angeles*,
28 656 F.2d 1267, 1273 n.3 (9th Cir. 1981). Two to three standard deviations may be sufficient to
establish a *prima facie* case of discrimination. *Hazelwood*, 433 U.S. at 312 n.17. In his
declaration, Dr. Drogin refers to standard deviations either as “t-values” or “Z-values.”

1 were considered. This pattern was found in every one of the 41 Wal-Mart regions. Drogin Decl.
2 at ¶ 76.

3 2. Female Employees in Wal-Mart Stores Are Far Less Likely to Be
4 Promoted Than Their Male Counterparts and, When They Are Promoted,
5 Women Take Longer Than Do Men

6 Wal-Mart boasts of a strong “promote from within” policy,

7 Yet,

8 women are disproportionately employed in lower-paying jobs. They hold about 65% of the
9 hourly jobs, but only 33% of the management positions – a pattern that is consistent in all 41
10 regions across the country. Drogin Decl. at ¶ 18, Table 3; ¶ 76. Dr. Drogin conducted a
11 promotion analysis to determine how many women one would expect would be promoted in a
12 non-discriminatory system. He analyzed the available pools for promotion, using the proportion
13 of incumbents in each of the historical feeder jobs for the particular promotion.²⁵ The results
14 showed a consistent pattern of under-promotion of women into each of the higher-level jobs in
15 the stores. The pattern was found in nearly every region of Wal-Mart for each job. In no region
16 was there a statistical disparity that favored women. Drogin Decl. at ¶ 63, Table 26.

17 *Support Manager* – Dr. Drogin’s analysis of promotions into support manager found that,
18 between 1997 and early 2002, women received 2891 fewer promotions than would be expected
19 from their representation in the feeder jobs. This result had a high degree of statistical
20 significance (Z-value = -54.38). Drogin Decl. at ¶ 54, Table 22.

21 *Management Trainee* – Dr. Drogin found that, for the same time period, women received

22 ²⁵ Dr. Drogin analyzed Wal-Mart’s available job posting data but found that it was not a
23 reliable source of information about who is interested in promotion. Drogin Decl. at ¶ 45-48.
24 The data for the hourly job posting system showed that only 20% of the actual moves into
25 support manager were captured by the job posting system. The vast majority of jobs were filled
26 outside the posting system. Similarly, the MCS system for managerial jobs included virtually no
27 data on assistant manager or co-manager promotions. While there was data on posting and
28 promotion into store manager positions, the system does not permit open bidding and is thus not
a valid measure of availability. Applicants must be pre-approved before they post, and the
system allows for individual exceptions to eligibility criteria. Drogin Decl. at ¶ 47.

1 2952 fewer promotions into management training than would be expected, controlling for feeder
2 job, district and year of move. Again, the results showed a statistically significant shortfall (Z-
3 value = -60.81) that is “virtually impossible to occur by chance, if promotions were selected at
4 random from the availability pool.” Drogin Decl. at ¶ 57, Table 23. This pattern was found in
5 every region of Wal-Mart.

6 *Co-Manager* – Women received 346 fewer promotions than expected based on their
7 representation in the feeder pool. The result was statistically significant (Z-value = -13.81).
8 Drogin Decl. at ¶ 59, Table 24.

9 *Store Manager* – The store manager positions are filled by co-managers and assistant
10 managers. Obviously, as women have been under-promoted to the first-level management
11 positions, their representation in the feeder pools for store manager is commensurately
12 diminished. Despite their lower representation in the feeder pools, women still received 155
13 fewer promotions than would be expected from their availability, a statistically significant
14 disparity (Z-value = -7.72). Drogin Decl. at ¶ 61, Table 25.

15 Dr. Drogin also studied the time that it took employees to reach management positions.
16 He found that, for the select group of women who do move up the ladder, it consistently takes
17 them longer than comparable men. On average, it took women 4.38 years from date of hire to be
18 promoted to assistant manager, while men took only 2.86 years. To reach Store Manager,
19 women on average took 10.12 years from hire date, compared with 8.64 years from hire for male
20 employees. Drogin Decl. at ¶ 29.

21 These promotion analyses provide strong support for the conclusion that Wal-Mart
22 promotion practices adversely affect women and do so in a consistent way across the entire
23 country.

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3. The Representation of Women in Management at Wal-Mart is Far Lower Than That of Comparable Employers Operating in the Same Labor Markets

The under-representation of women in management at Wal-Mart is markedly different from the employment patterns of other major retailers. While Wal-Mart employs an in-store management workforce with 34.5% women, comparable retailers employ 56.5% female management, a staggering 22 percent difference. Bendick Decl. at ¶ 31.

Labor economist Marc Bendick compared, or benchmarked, Wal-Mart against 20 comparable general merchandise retailers, much as Wal-Mart itself benchmarks its workforce with other retailers. His analysis relied on workforce data from EEO-1 reports provided by the companies to the EEOC. Rather than simply comparing the percentage of female management in each company overall, Dr. Bendick broke down the company-to-company comparisons into 375 local labor markets, comparing Wal-Mart only to the other firms that compete for labor in the same local labor area.²⁶ For each local labor market, Dr. Bendick calculated the average proportion of women among managers in all firms in the specific market, including Wal-Mart. He then calculated the “shortfall” – the number of additional female managers that Wal-Mart would have if it utilized women in management at the same rate as these market averages.

Dr. Bendick found that, in 1999, Wal-Mart had a cumulative shortfall of 4,004 female in-store managers, compared to the expected number based on the representation of women in the large chain retail industry, a 22% difference. Bendick Decl. at ¶¶ 30, 31. Put differently, “for every *seven* women managers Wal-Mart actually employed, *three* additional women managers were “missing.” Bendick Decl. at ¶ 30 (emphasis in original). Dr. Bendick determined that this result was highly statistically significant. The shortfall corresponds to 47 standard deviations, meaning that the probability that the result was due to chance alone was “less than one chance in many billions.” Bendick Decl. at ¶ 32. The shortfall was consistent throughout the country, found in four out of every five Wal-Mart stores, in 49 out of 50 states (including California), and

²⁶ This analysis ensured that differences in employment patterns among the firms are not a function of differing markets.

1 in both urban and non-urban communities. Bendick Decl. at ¶¶ 44, 45.

2 Dr. Bendick then conducted the bench-marking analysis for the period 1975 – 2002 and
3 found that Wal-Mart had a consistent shortfall in female managerial representation in every year
4 examined. He found that by 1999, Wal-Mart had not yet achieved the level of representation for
5 women managers that comparable firms had 25 years ago. Dr. Bendick concluded that:

6 [t]he scale, pervasiveness, and consistency of under-representation of women among
7 Wal-Mart’s managers suggests that such under-representation is deeply rooted in the
8 organization’s corporate culture and the company-wide employment attitudes, policies
9 and practices that reflect and maintain that culture.

Bendick Decl. at ¶ 67.

10 Notably, Dr. Bendick’s results are consistent with the results of Wal-Mart’s own internal
11 bench-marking studies, which also concluded that Wal-Mart falls significantly behind other
12 comparable firms. *See* discussion *infra* at Section II.F. Wal-Mart also conducted its own “gap”
13 analysis to determine the number of females in management it would need to match their
14 representation in the community. It concluded that Wal-Mart had a “gap” of 3324 women
15 managers. Gap Analysis, Ex. 104; Division 1 Operations Gap Analysis/Action Plan, Ex. 105 at
16 WMHO665709; Haworth Dep. at 170:1-24, Ex. 18.

17 **F. Wal-Mart Senior Management Has Been Aware of the Adverse Effects of Its
18 Personnel Policies on Female Employees for Many Years But Has Failed to
19 Take Effective Steps to Redress These Problems**

20 1. Wal-Mart Management Has Long Known of the Adverse
21 Consequences of Its Policies on Female Employees

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23
24 Coleman Peterson, the Executive Vice
25 President of the People Division, annually presents these incumbency reports company-wide and
26 by division, to the Wal-Mart Board of Directors as well as to senior management. Peterson Dep.
27 at 72:18-73:1, Ex. 16.

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As Coleman

Peterson candidly put it four years ago, “we are behind the rest of the world.”²⁷ Bentonville ‘99 People Strategic Planning Session, Ex. 111 at WMHO363415. Minutes from the Compensation and Nominating Committee of the Board of Directors for March 1999 state that “Wal-Mart’s women in field management percent of 32.4% is significantly behind several of the other retailers reporting between 43.2% and 65.3%. . . . The Wal-Mart percent of women (32.4%) trails both the retail industry of 38.6% and workforce averages of 33.9%.” 3/4/99 Minutes of Meeting of the Compensation and Nominating Committee of the Board of Directors, Ex. 112; *see also*, 6/1/00 Minutes of Meeting of the Compensation and Nominating Committee of the Board of Directors, Ex. 113 at WMHO 502683. In a February 2001 memo to the Executive Committee, Peterson compared data from the “Catalyst Census of Women Corporate Officers” to Wal-Mart’s senior corporate ranks. He noted that: “Wal-Mart is behind both the Fortune 500 and General Merchandisers in the development of women into Corporate Officers” and “Wal-Mart reported no women in the ‘clout title.’” Memo Re: Catalyst Census of Women Corporate Officers and Top Earners, Ex. 114.

Wal-Mart management has long been aware that its relocation requirement had an adverse impact on female employees seeking management promotions, and that the requirement led some managers to avoid considering women for management. Wal-Mart has a requirement that, to qualify for management positions, an employee had to be willing to move his or her residence at any time. “Traditionally, we’ve had this attitude that if you wanted to be a manager

²⁷ Coleman Peterson repeatedly and forcefully alerted the Board and Senior executives to the problem of diversity in management, in these and other memos. In a remarkable effort to avoid the consequences of these early alerts to the Board, Mr. Peterson disavowed one of these memos at his deposition, calling it “a lie” intended solely to get the attention of management. Peterson Dep. at 243:6-244:5, Ex. 16.

1 at Wal-Mart, you basically had to be willing to move on a moment's notice. . . . You just pack
2 and go, then sometime later you worry about selling your house and moving your family.” Ex.
3 87 at 217. By at least 1992, Sam Walton had recognized that the relocation requirement was no
4 longer justified by business needs and was creating a barrier to the advancement of women.

5 Maybe that was necessary back in the old days, and maybe it was more rigid than it
6 needed to be. . . . the old way really put good smart women at a disadvantage in our
7 company because at that time they weren't as free to pick up and move as many men
8 were. Now I've seen the light on the opportunities that we missed out on with women.

9 *Id.* at 217-218.²⁸ Many other internal Wal-Mart documents recognize that relocation is a barrier
10 for the advancement of women into management positions. Email re: Women in Leadership, Ex.
11 115; Diversity Ideas, Ex. 116. Many class members have been deterred from seeking promotion
12 by the relocation requirement. *See, e.g.*, Crawford Decl. at ¶ 4; Ervine Decl. at ¶ 18, 19; Gordon
13 Decl. at ¶ 10; Renati Decl. at ¶ 2; Williams, L. Decl. at ¶ 13; Tallent Decl. at ¶ 8.

14 Notwithstanding the clear evidence of an adverse impact, Wal-Mart still requires that
15 assistant management candidates be willing to relocate as a prerequisite to promotion. Coughlin
16 Dep. at 159:23-160:25, Ex. 15 ; Promotional Guidelines, Ex. 98; Relocation Agreement, Ex. 117;
17 Grimm Dep. at 142:8-143:6, Ex. 60 (same requirement at Sam's Club). As Sam's Club's former
18 president put it, relocation is necessary “in order to keep a very viral [sic], vital company
19 growing.” *Id.* Many class members have stated under oath that they were told by management
20 that relocation was required for promotion to management.²⁹

21 ²⁸ At Walton's direction, the company established the Resident Assistant Manager
22 (RAM) Program, which allowed employees (both male and female) to be promoted to the
23 management ranks without moving their residence. Schwindt Dep. at 148:13-149:12, Ex. 38.
24 There has been no publicity or posting of the policy to the hourly associates since at least 1996.
25 Curran Dep. at 55:14-20, Ex. 61. Wal-Mart has taken no steps to encourage individuals to avail
26 themselves of the RAM program. Curran Dep. at 82:25-83:10, Ex. 61. There are fewer people
27 in the program today than in the mid-90's. Harper II Dep. at 246:11-17, Ex. 1. Even today, Wal-
28 Mart leadership regard the RAM position as a dead end job. Coughlin Dep. at 157:22-158:6, Ex.
15.

29 *See e.g.*, Stumpf Decl. at ¶ 4; Calimee Decl. at ¶ 2; Connaker Decl. at ¶ 8; Crom Decl.
at ¶ 6, 8; Collier Decl. at ¶ 5, 7, 8, 11, 14; Dobbs Decl. at ¶ 4; Ervine Decl. at ¶ 18, 19; Gordon

1 Turning to compensation, Wal-Mart claims it has not prepared any regular analyses of
2 compensation by gender, a surprising position since the company uses its information technology
3 system to track every other aspect of its business.
4 ; Coughlin Dep. at 122:21-123:5, Ex. 15; Harris Dep. at 176:20-177:8, Ex. 62. The few
5 isolated reports that have been produced by Wal-Mart consistently show that women on average
6 are paid less than men holding the same positions. Peterson Dep. at 141:5-20, Ex. 16.

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17 If these reports were not enough to alert Wal-Mart management to these problems, many
18 individual Wal-Mart and Sam’s Club female employees have tried to raise the alarm by calling
19 and sending letters and e-mails to Wal-Mart executives. Farmer Decl. at ¶ 21 and Exs. 1 and 2

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21 Decl. at ¶ 10; Hall, T. Decl. at ¶ 6, 8, 9, 27; Johnson, J. Decl. at ¶ 8; Kellems Decl. at ¶ 6, 21;
22 Lehman Decl. at ¶ 6, 12, 14; Martin Decl. at ¶ 3, 4; Ramirez Decl. at ¶ 13, 27; Pidich Decl. at ¶
23 15, 19; Renati Decl. at ¶ 2; Rojas Decl. at ¶ 9; Bell Decl. at ¶ 4, 9; Crawford Decl. at ¶ 2, 4, 8;
24 DeWall Decl. at ¶ 6; Durfey Decl. at ¶ 3; Durfey Decl. at ¶ 8; Farmer Decl. at ¶ 9, 10; Johnson,
25 K. Decl. at ¶ 19; Jones, L. Decl. at ¶ 5b; Marshall Decl. at ¶ 4; Rojas Decl. at ¶ 9; Williams, L.
26 Decl. at ¶ 13; Zumbum Decl. at ¶ 17; Tallent Decl. at ¶ 8; Mott Decl. at 12. Since the filing of
27 this lawsuit, Wal-Mart’s official policy has shifted to treating relocatability as a “preferred” but
28 not required criteria. Emails re: Management Relocatability, Ex. 118. The change in “official”
policy appears to be a response to the lawsuit. Email re: Response to the Retreat Notes, Ex. 119.
However, senior management is apparently unaware of this post-litigation change in policy.
Coughlin Dep. at 159:23-160:11, Ex. 15. Wal-Mart’s change in policy, in the face of litigation,
demonstrates that the “requirement” was not necessary to meet business needs.

1 (declarant sent e-mails to Wal-Mart CEO Lee Scott in 2000 and 2001 chronicling the ways in
2 which she had observed a gender gap in pay within her store: “[F]emale department managers
3 [who] have been with Wal-Mart for seven years... don’t make as much as some male associates
4 [who] have only been with Wal-Mart a few years... Talk about discrimination...”); Ratliff Decl. at
5 ¶ 13 and Ex. A (declarant wrote letter to Wal-Mart CEO Lee Scott in 2002 describing concerns
6 about the gender differences in pay and treatment at her Wal-Mart Neighborhood Market);
7 Collier Decl. at ¶ 15 (declarant wrote letter to Wal-Mart CEO Lee Scott in August 2000
8 complaining about gender and racial discrimination). *See also* Hom Decl. at ¶¶ 12, 13 (female
9 assistant manager received copies of three letters in 1992 and 1993 to top executives of Wal-
10 Mart describing concerns about a pattern of discrimination and retaliation against women
11 employees at Sam’s Club).

12 Outside groups have also tried to direct Wal-Mart management’s attention to the
13 problems of discrimination against female workers. For several years, a group of nuns has
14 attended Wal-Mart’s annual shareholder meeting and asked the company to conduct a glass
15 ceiling review. Reeves II Dep. at 118:9-13, Ex. 33. Each year, the company has successfully
16 urged shareholders to reject the proposal. Notice of Annual Meeting of Shareholders, Ex. 124.

17 Notwithstanding the clear evidence that female employees have been disadvantaged by
18 pay and promotion practices, Wal-Mart has not undertaken any analysis or study of the causes of
19 these problems. Coughlin Dep. at 122:6-123:5, Ex. 15; Harris Dep. at 176:20-177:8, Ex. 62;
20 Indeed, even after this lawsuit was filed, the company took no steps to investigate the problems
21 further. Harper I. Dep. at 36:3 - 37:14, Ex. 1; Swanson Dep. at 127:15-128:13, Ex. 14.

22 Nor can Wal-Mart attribute the plight of its female employees to innocent causes. Wal-
23 Mart concedes that women are not less qualified as a group than men for management positions
24 nor does it contend that women are more frequently disciplined. WM Supplemental Response to
25 Interrogatories No. 11, 17, Ex. 97. Moreover, many senior managers testified that they had no
26 reason to believe that women are less interested in management than are men. Harris Dep at
27 85:7-86:5, Ex. 62; Carpenter Dep. at 141:16-19, Ex. 28. Indeed, they were at a loss to explain

1 why so few women held management positions. Kocharian Dep. at 7:18-22, Ex. 64; M. Anderson
2 Dep. at 10:25-11:2, Ex. 63; Sherman Dep. at 12:15-13:3, Ex. 43; Bishop Dep. at 21:18-20, Ex.
3 65; Harper II Dep. at 304:3-22, Ex. 11; Schwindt Dep. at 211:16-212:25, Ex. 38. This willful
4 ignorance cannot be reconciled with Wal-Mart’s claim to be committed to diversity and respect
5 for the individual.

6 2. The Numerical Goals for Women in Management Are Arbitrarily Set and
7 Lack Any Mechanism for Holding Managers Accountable

8 Wal-Mart sets numerical goals for the overall percentage of women in management.
9 Harper II Dep. at 292:25-293:4, Ex. 11. The goals are set at the district level and then aggregated
10 into regional and divisional goals. *Id* at 294:7-14. Store managers are largely unaware of the
11 diversity goals. Mireles Dep. at 219:20-23, Ex. 26; Raps Dep. at 222:9-223:15, Ex. 48; Bosler
12 Dep. at 85:6-13, Ex. 57; Oshier Dep. at 69:16-24, Ex. District managers are not given any
13 direction about how to set goals for their district and they can do so however they wish. Harper
14 II Dep. at 297:22-298:5, Ex. 11; Butler Dep. at 203:11-21, Ex. 4. The goals are not tied to any
15 analysis of the number of women who are available and qualified for promotion to the next
16 level. Harper II Dep. at 302:7-21, Ex. 11. Typically, managers set modest goals that only
17 slightly exceed the levels of women currently holding management positions. Bielby Decl. at ¶
18 55. As District Manager Danny Carter put it, he did not want to set a goal that was “unrealistic
19 or I knew wouldn’t happen immediately.” D. Carter Dep. at 220:3-24, Ex. 23. RPM Sandy
20 Ellison testified that she reviewed the district manager goals simply to see if they “weren’t worse
21 than the year before.” Ellison Dep. at 187:12-23, Ex. 66.

22 Failure to meet even these modest goals has no real consequence on the district manager.
23 Jarrells Porter Dep. at 149:17-150:1, Ex. 67. Meeting diversity goals is just one of four elements
24 of a performance dimension that makes up 5% of a district manager’s evaluation. Reeves II Dep.
25 at 44:5-7, Ex. 33. Even worse, it is not necessary to actually meet the goal to get a positive
26 diversity score. A manager only needs to “show progress” in meeting these goals. In fact, where
27 a senior manager’s figures showed that the percentage has actually declined, he still received a

1 positive score. Haworth Dep. at 153:3-20, Ex. 18. Not surprisingly, the goals have had little
2 impact on the percentage of women in field management. Drogin Decl. at ¶¶ 21, 77.

3 It is well understood that, unless there is meaningful accountability for meeting diversity
4 goals, they will not accomplish their purpose. Bielby Decl. at ¶¶ 56-57. When asked how the
5 female representation in field management could be increased, former Sam’s Club Vice President
6 of Human Resources, Jeffrey Reeves, explained:

7 I think what you do is to get people's attention you tie expectations and the number to
8 people's incentive, whether it's their base or it's their bonus, but I think that's the first and
foremost and most important piece. Until you do that, it will continue to be lip service.

9 Reeves II Dep. at 281:19-282:4, Ex. 33. *See also* Bilgischer Dep. at 184:25-185:19, Ex. 45.

10 Accordingly, the record assembled in this action readily demonstrates that Wal-Mart has
11 pursued a common set of compensation and promotion policies and practices which have
12 disadvantaged female employees and which, notwithstanding knowledge of the shortcomings of
13 these practices and policies by senior management, have been left unremedied for the entire
14 period covered by the proposed class. The claims of the Named Plaintiffs and of the thousands
15 of women associates who are similarly situated are susceptible of class treatment.

16 **III. ARGUMENT**

17 Plaintiffs ask this Court to certify a class consisting of:

18 All women employed at any Wal-Mart domestic retail store at any time since December
19 26, 1998 who have been or may be subjected to Wal-Mart’s challenged pay and
management track promotions policies and practices.³⁰

20 A motion for class certification is not an occasion for examination of the merits of the
21 case. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir. 1999); *see also*
22 *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 745, 480 (9th Cir. 1983). “There is nothing in
23 either the language or history of Rule 23 that gives a court any authority to conduct a preliminary
24 inquiry into the merits of a suit in order to determine whether it may be maintained as a class
25

26 ³⁰ The class definition excludes decisions on promotions into, or compensation for, store
27 pharmacists, who are subject to specialized educational and state licensing requirements. *See*
n.14.

1 action. . .” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Instead, the Court must
2 determine if the plaintiffs have proffered evidence to meet each of the requirements of Rule 23.
3 No weighing of competing evidence is appropriate at this stage of the litigation. *Caridad*, 191
4 F.3d at 293.

5 Plaintiffs state claims under both the disparate treatment and disparate impact analyses of
6 Title VII. As discussed below, this class meets all the requirements of Rule 23(a): numerosity,
7 commonality, typicality and adequacy of representation. In addition, this class meets the
8 requirements of Rule 23(b)(2) in that final injunctive relief is appropriate.

9 **A. All Requirements of Rule 23(a) Are Met**

10 1. The Proposed Class is Sufficiently Numerous

11 The class proposed here is plainly so numerous that “joinder of all members is
12 impracticable.” Fed. R. Civ. P. 23(a)(1). Classes of fewer than 100 persons are sufficiently
13 numerous to render joinder impracticable. *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319
14 n.10 (9th Cir. 1982) *judgment vacated on other grounds* at 459 U.S. 810 (1982). Wal-Mart
15 employs over 930,770 hourly employees, Drogin Decl. at ¶ 31, Table 14 and almost two-thirds
16 are women. *Id.* There should be no dispute that this satisfies the numerosity requirement.

17 2. The Claims of the Named Plaintiffs Are Typical of the Class They Seek to
18 Represent

19 Typicality is satisfied where the named plaintiffs have suffered from defendant’s general
20 policy of discrimination in compensation and promotions. *Gen. Tel. Co. of Southwest v. Falcon*,
21 457 U.S. 147, 159 n.15 (1982); *Piva v. Xerox Corp.*, 70 F.R.D. 378, 387-88 (N.D. Cal. 1975).³¹
22 Under the rule’s “permissive standards,” representative claims are “(typical) if they are
23 reasonably co-extensive with those of absent class members; they need not be substantially

24 ³¹ Moreover, the “commonality and typicality requirements of Rule 23(a) tend to merge.”
25 *Falcon*, 457 U.S. at 157 n.13. A finding of commonality will ordinarily satisfy the requirement
26 of typicality as well. *Barefield v. Chevron U.S.A., Inc.*, No. C-86-2427 TEH, 1987 WL 65054, at
27 *5 (N.D. Cal. 1987); *Piva v. Xerox Corp.*, 70 F.R.D. 378, 385 (N.D. Cal. 1975). Thus, the
28 typicality requirement is also satisfied for the reasons set forth in the discussion of commonality,
in subsection 3 below.

1 identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Here, named
2 plaintiffs Betty Dukes, Cleo Page and Patricia Surgeson have each suffered from Wal-Mart’s
3 general policy of discrimination in compensation, and each of the plaintiffs – Betty Dukes,
4 Patricia Surgeson, Cleo Page, Debra Gunter, Edith Arana and Christine Kwapnoski – have
5 suffered from Wal-Mart’s general policy of denying women promotions to management
6 positions. *See* nn.12 and 16. It is not necessary for every named plaintiff to have been affected
7 by every type of discrimination challenged in plaintiffs’ class claims. It is sufficient that, taken
8 as a whole, the named plaintiffs have been subject to each of the challenged practices. *Staton v.*
9 *Boeing* 313 F.3d 447, 466 (9th Cir. 2002). Plaintiffs need not have a class representative for
10 each job category and for each type of claim alleged. *Taylor v. Union Carbide Corp.*, 93 F.R.D.
11 1, 6 (S.D. W. Va. 1980) ³²

12 Any minor factual variations arising from the individual details of each plaintiff’s
13 employment are irrelevant since all proceed under the same legal theory: that Wal-Mart’s
14 centrally controlled personnel system systemically disadvantages women employees in
15 compensation and promotion decisions. *Wofford v. Safeway Stores Inc.*, 78 F.R.D. 460, 488
16 (N.D. Cal. 1978); *Adams v. Pinole Point Steel Co.*, 1994 WL 515347, 65 F.E.P. 774 (N.D. Cal.
17 1994). Thus, the named plaintiffs may properly represent a nationwide class, although they all
18 reside in California. The class representatives have been subjected to the same policies and
19 practices that have adversely affected members of the class that they seek to represent. The same
20 compensation and promotion practices in effect in the California stores apply throughout Wal-
21 Mart’s other domestic facilities. *See* Sections II C, D *supra*. Accordingly, the claims of the

23 ³² Further, it does not matter that some women have been denied promotion to assistant
24 manager positions and others have been denied promotion to store manager positions. As a court
25 in this district found in certifying an employment discrimination class action, “the Court
26 perceives no significant difference in interest . . . among those employees denied opportunity for
27 advancement, at whatever level that denial occurred.” *Wofford v. Safeway Stores, Inc.*, 78 F.R.D.
28 460, 491 (N.D. Cal. 1978). *See Stender v. Lucky Stores, Inc.*, 1990 U.S. Dist. Lexis 19985 (N.D.
Cal. June 8, 1990) (named plaintiffs allowed to represent claims of initial assignment, although
they only had claims for lack of promotion).

1 named plaintiffs are typical of the claims advanced by members of the class they seek to
2 represent.

3 Plaintiffs have submitted the declarations of over 110 current and former female
4 employees who explain how they each have been subjected to the discriminatory pay and
5 promotion practices at issue in this case. The Supreme Court has recognized that such anecdotal
6 evidence is particularly valuable to “bring the cold numbers convincingly to light.” *Teamsters v.*
7 *United States*, 431 U.S. 324, 339 (1977). These declarants have worked in Wal-Mart and Sam’s
8 Club stores all over the country. Ex. 125 (map of locations of discriminatory events described by
9 declarations). What is striking about their stories is that, even though they worked in different
10 stores, in different states and in different divisions, they experienced the same discriminatory
11 policies and suffered the same adverse consequences.

12 3. There Are Questions of Law and Fact Common to the Class

13 Rule 23(a)(2) requires that there be questions of law or fact common to the class. It does
14 not require that all questions of law or fact be common to every single member of the class;
15 rather, at least one issue must be common to the claims of all the class members. *Hanlon*, 150
16 F.3d at 1019; 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §3.10 at 154 (3d
17 ed. 1992); 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, §1763, at 198
18 (1986). Courts have not considered commonality a difficult hurdle; the requirement should be
19 “construed permissively.” *Hanlon*, 150 F.3d at 1019.

20 For example, there is sufficient commonality where “the named plaintiffs’ claims . . .
21 charge discrimination based on patterns and practices not special or unique to themselves, and
22 the members of the putative class . . . have been similarly victimized by the same patterns or
23 practices.” *Wofford*, 78 F.R.D. at 478; *see also Bouman v. Block*, 940 F.2d 1211, 1232 (9th Cir.
24 1991). Plaintiffs here have alleged the existence of common discriminatory practices in
25 compensation and promotion which affect putative class members in a like manner as the named
26 plaintiffs.

27 Moreover, differences in the ways in which these practices affected individual members

1 of the class do not undermine the finding of commonality. *Staton*, 313 F.3d at 447, 464 (where
2 plaintiffs have alleged a “complex of discriminatory practices,” individual class members need
3 not have been affected by every practice); *Wofford*, 78 F.R.D. at 473 (“a class action may be
4 maintainable to challenge a general course of discrimination, even though different members of
5 the class may have been affected in different ways and at different times.”) For example,
6 different class members may have been under-compensated in different amounts; some
7 employees may have been denied promotion to Assistant Manager while others may have been
8 denied promotion to Store Manager. Nonetheless, all harm for which relief is sought is the result
9 of the same general course of conduct.

10 The class is challenging discrete policies and practices that have adversely affected the
11 female employees within Wal-Mart’s domestic retail facilities. The challenged policies have as a
12 common feature that they have entrusted to managers very broad discretion to make promotion
13 and compensation decisions with little or no oversight.³³ As the Supreme Court recognized, the
14 “problem of subconscious stereotypes and prejudices” when combined with an “undisciplined
15 system of subjective decisionmaking has precisely the same effect as a system pervaded by
16 impermissible intentional discrimination.” *Watson v. Fort Worth Bank of Trust Co.*, 487 U.S.
17 977, 990-91 (1988). The common policies and practices that the class challenges include:

18 (a) Wal-Mart’s decision not to issue criteria for making promotion selections from
19 among minimally qualified candidates, thereby permitting the managers to use subjective and
20 idiosyncratic factors in making such selections that may be based on stereotypes, rather than job-
21 related factors. Bielby Decl. at ¶¶ 38-39; *supra* at Section II D;

22 (b) Wal-Mart’s decision to entrust managers with the discretion to forego posting job
23 vacancies, its refusal, until January 2003, to post vacancies for its Management Training

24
25 ³³ An employer’s decision to permit subjective decision making has been recognized as
26 presenting common questions appropriate for class certification. *Wofford*, 78 F.R.D. at 479;
27 *Caridad*, 191 F.3d at 286; *Wagner v. The NutraSweet Co.*, 170 F.R.D. 448, 450-51 (N.D. Ill.
28 1997); *Morgan v. UPS*, 169 F.R.D. at 349; *Shores v. Publix Super Mkts., Inc.*, No. 95-1162-
CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. March 12, 1996).

1 Program, thereby denying many women the chance to even apply for promotions, and its refusal
2 generally to post assistant manager and co-manager positions. Bielby Decl. at ¶ 44, *supra* at
3 Section II D;

4 (c) Wal-Mart’s decision not to exercise oversight or conduct any systematic review of the
5 grounds on which candidates are selected for promotion, ensuring that whatever bias may infect
6 promotion decisions goes undetected and unremedied; Bielby Decl. at ¶¶ 21- 44; *supra* at
7 Section II D ;

8 (d) Wal-Mart’s decision to authorize managers to depart from the starting pay rates for
9 hourly employees without offering any guidance or training on the particular factors that may be
10 considered or limits on the pay rates that may be offered, permitting managers to make decisions
11 based on gender rather than merit; Bielby Decl. at ¶ 40; *supra* at Section II C;

12 (e) Wal-Mart’s decision to authorize managers to award pay raises for “exceptional
13 performance,” without offering any guidance as to the factors that may be considered, allowing
14 bias to infect decisions on pay; Bielby Decl. at ¶¶ 21- 41; *supra* at Section II C;

15 (f) Wal-Mart’s decision not to conduct any systematic review of compensation decisions
16 by gender, thereby allowing bias that has entered compensation decisions to go undetected and
17 unremedied. Bielby Decl. at ¶ 37; *supra* at Section II F;

18 (g) Wal-Mart’s decision to require that candidates for management promotions be
19 willing and able to relocate, despite the concession that such a requirement lacks any business
20 justification and its operation has disadvantaged female employees. Bielby Decl. at ¶¶ 21- 45;
21 *supra* at 32-33.

22 Common questions of law and fact are presented with respect to each of Wal-Mart’s
23 policies and practices set forth above. Specifically, two factual questions arise (i) are these
24 practices common throughout Wal-Mart?; and (ii) do these practices cause women at Wal-Mart
25 to be paid less and promoted less often than similarly situated male employees? There are also
26 three common legal questions: (i) does Wal-Mart’s conduct violate Title VII, 42 U.S.C. § 2000e-
27 5, by causing a pattern or practice of discrimination against women employees?; (ii) does Wal-

1 Mart’s conduct violate Title VII because it has a disparate impact on women employees that is
2 not justified by business necessity?; and (iii) did Wal-Mart act with reckless indifference to the
3 federally-protected rights of its female employees, making it liable for punitive damages?

4 4. The Named Plaintiffs and Their Counsel Are Adequate Representatives

5 Rule 23(a)(4) requires that the named representatives “will fairly and adequately protect
6 the interests of the class.” The rule is satisfied where, as here: (1) the representatives’ claims are
7 sufficiently interrelated to and not antagonistic with the class’ claims; and (2) counsel for the
8 representatives are qualified, experienced and generally able to conduct the litigation. *Hanlon*,
9 150 F.3d at 1020; *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 42 (N.D. Cal.
10 1977); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Here, the
11 interests of the class and the interests of the named plaintiffs are the same. Both seek to prove
12 the existence of Wal-Mart’s general practice of gender discrimination in compensation and
13 promotion. There is no antagonism between the named plaintiffs’ claims and those of the class
14 they seek to represent.

15 The named plaintiffs have retained counsel who have the resources and expertise to
16 prosecute this action vigorously on behalf of the class. Plaintiffs retained a coalition of three not-
17 for-profit organizations and three private law firms each of which, standing on its own, possesses
18 substantial experience in litigating employment discrimination cases; collectively they are more
19 than qualified to serve as class counsel. *See* Declaration of Brad Seligman, *passim*. Plaintiffs
20 have retained counsel who are among the most experienced in the country in representing
21 plaintiffs in employment discrimination class actions. *Id.*

22 **B. The Proposed Class Satisfies the Requirements of Rule 23(b)(2)**

23 Certification under Rule 23(b)(2) is appropriate when the defendant “has acted or refused
24 to act on grounds generally applicable to the class,” thereby making appropriate final injunctive
25 relief or corresponding declaratory relief with respect to the class as a whole. Fed. R. Civ. P.
26 23(b)(2). “Civil rights cases against parties charged with unlawful, class-based discrimination
27 are prime examples” of Rule 23(b)(2) classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,

1 117 S. Ct. 2231, 2245 (1997). Indeed, it is “often acknowledged, (b)(2) was deliberately drafted
2 to facilitate the vindication of civil rights through the class action device.” *Barefield v. Chevron*
3 *U.S.A., Inc.*, 48 F.E.P. Cases 907, 910 1988 WL 188433 (N.D. Cal. 1988).

4 1. The Court Should Certify a Class for Liability, Injunctive and Equitable
5 Relief Under Rule 23(b)(2)

6 Certification of a class under Rule 23(b)(2) is appropriate here because Wal-Mart has
7 acted and refused to act on grounds generally applicable to the entire class. *See* section III A.3,
8 *supra*. Here, plaintiffs have alleged that Wal-Mart has acted in a discriminatory manner
9 generally applicable to the class, and plaintiffs have sought declaratory and injunctive relief with
10 respect to the class as a whole. Third Amended Complaint at ¶¶ 19, 114, Prayer for Relief.
11 Moreover, plaintiffs have presented evidence that these general practices have adversely affected
12 many members of the class. *See* Drogin Decl., *passim*.

13 In addition to substantial injunctive relief, plaintiffs seek back pay for the class as a
14 whole. Back pay awarded under Title VII, while monetary in nature, is a form of equitable relief.
15 *Gotthardt v. Nat’l R.R. Passenger Corp.*, 191 F.3d 1148, 1152-55 (9th Cir. 1999). Plaintiffs
16 seeking back pay have long secured certification under Rule 23(b)(2). *See, e.g., Probe v. State*
17 *Teachers’ Ret. Sys.*, 780 F.2d 776 (9th Cir. 1986); *Salinas v. Roadway Express*, 735 F.2d 1574,
18 1576 (5th Cir. 1984); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see*
19 *also*, 42 U.S.C. § 2000e-5(g) (1994).

20 2. The Court Should Certify Plaintiffs’ Claims for Punitive Damages Under
21 Rule 23(b)(2) With Notice and Right to Opt Out

22 Plaintiffs also seek a class-wide award of punitive damages to punish Wal-Mart for its
23 reckless disregard of the rights of its women employees to equal employment opportunity, and to
24 deter similar misconduct by Wal-Mart and other large retailers in the future. *See* Third Amended
25 Complaint , Prayer for Relief. An award of punitive damages to the class as a whole is
26 appropriate here because the misconduct warranting punitive damages was perpetrated by senior
27 Wal-Mart management and has adversely affected women employees in a similar fashion.
28 *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 536 (1991); *Barefield*, 1988 WL 188433, at *3;

1 *Beck v. The Boeing Co.*, 203 F.R.D. 459 (W.D. Wa. 2001), *modified by slip op.* Dec. 27, 2001,
2 *affirmed in part, vacated in part by unpublished decision*, 2003 WL 683797, 83 Empl. Prac. Dec.
3 ¶ 41, 313 (9th Cir. Feb. 25, 2003); *EEOC v. Dial Corp.*, Civ. Action No. 99-C-3356, *slip op*
4 (N.D. Ill. Feb. 14, 2003), *See* Declaration of Julie Goldsmith, hereinafter referred to as
5 “Goldsmith Decl.”

6 Claims for punitive damages, awarded to the class as a whole, may properly be certified
7 under Rule 23(b)(2).³⁴ Out of an abundance of caution, however, plaintiffs ask that the Court
8 direct that class members be provided notice and an opportunity to opt out, akin to that provided
9 by Rule 23(b)(3). The Court may do so pursuant to Rule 23(d), which permits it to issue such
10 orders as are necessary. *See Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003). In *Molski*, the
11 Ninth Circuit adopted an *ad hoc* approach similar to the Second Circuit in *Robinson v. Metro-*
12 *North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) to determine whether certification under
13 Rule 23(b)(2) was appropriate in cases seeking monetary in addition to injunctive relief, and
14 encouraged the use of notice under Rule 23(d) to address concerns about the interests of absent
15 class members. *Molski*, 318 F.3d at 947, 949-50.

16 This hybrid approach has also been endorsed by other circuits called upon to address
17 precisely employment discrimination classes seeking punitive damages. *Robinson v. Metro-*
18 *North Commuter R.R. Co.*, 267 F.3d 147, 166-67 (2d Cir. 2001) (“any due process risk posed by
19 (b) (2) class certification of a claim for non-incident damages can be eliminated by the district

20
21 ³⁴ It has long been recognized in this circuit that classes could be certified under Rule
22 23(b)(2) even when such actions involve damages. *Probe*, 780 F.2d at 780 (“Class actions
23 certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory
24 relief, but may include cases that also seek monetary damages.” affirming Rule 23(b)(2) class
25 certification of claims under the Equal Pay Act seeking monetary damages); *Molski v. Gleich*,
26 318 F.3d 937, 947 (9th Cir. 2003). Courts have specifically included punitive damages in classes
27 certified under Rule 23(b)(2); *Barefield*, 1988 WL 188433, at *3; *Butler v. Home Depot*, No. C-
28 94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996). *See also Arnold v. United Artists*
Theatre Circuit, Inc., 158 F.R.D. 439, 450, 461 (N.D. Cal. 1994) (certifying entire case under
Rule 23(b)(2) because the statutory damages available in that case were more akin to back pay
claims in the ease of their calculation); *Rodriguez v. Carlson*, 943 F. Supp. 1263, 1275-77 (E.D.
Wash. 1996) (same).

1 court simply affording notice and opt out rights to absent class members for those portions of the
2 proceedings where the presumption of class cohesion falters – *i.e.*, the damages phase of the
3 proceedings.”); *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999) (endorsing
4 certification under Rule 23(b)(2) with notice and opt-out provided for damage claims); *see also*
5 *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997) (finding Rule 23(d)(5) “broad enough to
6 permit the court to allow individual class members to opt out of a (b) (1) or (b) (2) class when
7 necessary to facilitate the fair and efficient conduct of the litigation.”) (citation omitted).

8 In awarding punitive damages, defendant’s conduct, not the individual circumstances of
9 class members, is at issue. *Kolstad*, 527 U.S. at 536; *see also, Cooper Indus. v. Leatherman Tool*
10 *Group*, 532 U.S. 424, 432 (2001). The circumstances of individual class members, therefore, do
11 not preclude the class from seeking a collective award of punitive damages. In *Barefield*, Judge
12 Henderson applied this same analysis in an employment discrimination class action:

13 A class claim for punitive damages does not detract from the homogeneity or
14 cohesiveness of the class. Rather, it is consistent with the notion that the focus of a [Rule
15 23](b)(2) action is the defendant’s conduct towards persons sharing a common
16 characteristic. Because the purpose of punitive damages is not to compensate the victim,
17 but to punish and deter the defendant, any claim for such damages hinges, not on facts
18 unique to each class member, but on the defendants’ conduct toward the class as a whole.

19 *Barefield*, 1988 WL 188433 at *3. Thus, the court held punitive damages could be determined
20 on an aggregate basis. *Id.* at *4-5.³⁵

21 3. The Court Could Also Certify the Case Pursuant to Rule 23(b)(3)

22 In the alternative, Plaintiffs’ claims are also suitable for certification under Rule 23(b)(3).
23 In order to obtain certification under Rule 23(b)(3), plaintiffs must show that they meet the
24 requirements of Rule 23(a), and that “questions of law or fact common to the class members of

25 ³⁵ *See also, Hilao v. Estate of Marcos*, 103 F.3d 767, 780-81 (9th Cir. 1996) (human
26 rights abuses); *Butler v. Home Depot*, No. C-94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25,
27 1996) (employment discrimination); *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000), and 270
28 F.3d 1215 (9th Cir. 2001) (oil spill); *EEOC v. Dial Corp.*, Civ. Action No. 99-C-3356 *slip op*
(N.D. Ill. Feb. 14, 2003) (pattern and practice sexual harassment case), *see* Goldsmith Decl.; *Day*
v. NLO, 851 F. Supp. 869, 884-85, 887 (S.D. Ohio 1994) (radiation exposure).

1 the predominate,” and “a class action is superior to other available methods.”

2 There are numerous common issues in this case, as discussed above. The common
3 questions relate to whether Wal-Mart is liable for a pattern or practice of discrimination against
4 female employees and whether its policies and practices have had a disparate effect on female
5 employees. Here, resolving the common question of Wal-Mart’s liability for a pattern or practice
6 of discrimination is the dominant issue in the case. Moreover, the issue of whether Wal-Mart is
7 liable for punitive damages, and the amount of punitive damages to which the class is entitled,
8 are also significant issues which can be resolved on a class-wide basis. Thus, the most
9 substantial questions would be decided at the class-wide liability trial, leaving only discrete
10 questions relating to allocation of damages to be determined on an individual basis.

11 Class treatment is, moreover, superior to other available methods of litigation. It would
12 be far more costly for each individual female employee of Wal-Mart separately to seek discovery
13 of Wal-Mart’s policies, obtain data concerning personnel decisions, and have a multitude of
14 different experts analyze such data for each individual case. Moreover, separate lawsuits would
15 require analysis of the same evidence by a multitude of courts and juries. Finally, the disparity in
16 resources between individual women employed by Wal-Mart, most of them making less than
17 \$25,000, and the world’s largest private employer, could easily intimidate potential plaintiffs
18 from proceeding individually.

19 **C. Proposed Trial Plan**

20 Plaintiffs propose the following trial plan.

21 **STAGE 1:** The jury decides:

- 22 1) Whether Wal-Mart has engaged in a pattern and practice of discrimination (liability
23 for class-wide disparate treatment);
- 24 2) Whether Wal-Mart’s conduct meets the standard for an award of punitive damages;
- 25 3) If liable, the aggregate amount of lost earnings owed to the class and a measurement
26 of front pay;
- 27 4) If liable for punitive damages, the aggregate amount of punitive damages owed to the

1 class;

2 5) Whether Wal-Mart is liable to the named plaintiffs for gender discrimination, and if
3 so, in what amount.³⁶

4 The Court decides:

5 1) Whether Wal-Mart's employment practices have had an adverse impact on women
6 (liability for disparate impact claim), subject to jury findings.

7 **STAGE 2:** The Court would decide:

8 1) Whether Wal-Mart's employment practice was justified by business necessity
9 (defense to the disparate impact claim), and if so, whether there was a less discriminatory
10 alternative;

11 2) Appropriate injunctive relief; and

12 3) The process for allocating damages and other individualized relief based upon the
13 issues.³⁷

14 *See, e.g., EEOC v. Dial Corp.*, Civ. Action No. 99-C-3356, *slip op* (N.D. Ill. Feb. 14, 2003), *see*
15 *Goldsmith Decl.; Beck v. The Boeing Co.*, 203 F.R.D. 459 (W.D. Wa. 2001), *modified by slip op.*
16 *Dec. 27 2001, affirmed in part, vacated in part by unpublished decision; Barefield*, 1988 WL
17 188433 at *3.

18 A finding of liability to the class *mandates* an award of lost wages to the class, with no
19 separate individual liability determinations required. The Fifth Circuit, for example, has stated:

20 Once a court has determined that a plaintiff or a complaining class has sustained
21 economic loss from a discriminatory employment practice, back pay should normally be
22 awarded . . . Under Title VII *the plaintiff class is entitled to compensation* for that loss. . .

23 *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 252-53 (5th Cir. 1974) (emphasis added).

24 The lost wages due to the class can be determined by formula; the correct formula
25 presents another class-wide issue for determination. Such formulaic distributions of back pay

26 ³⁶ Plaintiffs propose to sever the race claims of Plaintiffs Page and Dukes.

27 ³⁷ A special master can be appointed to handle these individualized issues.

1 have been found particularly useful where, as here, defendant's lack of objective standards or
2 adequate records would make any attempt at reconstructing the career paths of affected
3 employees in order to quantify lost earnings individually a "quagmire of hypothetical
4 judgments." *Pettway*, 494 F.2d at 261; *see also, Domingo v. New England Fish Co.*, 727 F.2d
5 1429, 1444-45 (9th Cir. 1984); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir.
6 1976); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984); *EEOC v. O & G Spring & Wire*
7 *Forms Spec. Co.*, 38 F.3d 872, 876 (7th Cir. 1994). Such an approach is similar to that accepted
8 by the Ninth Circuit in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996).

9 Punitive damages may be allocated to individual members of the class proportionate to
10 the amount of lost earnings each woman would receive or by any other rationale means that the
11 Court or jury determines. *EEOC v. Dial Corp.*, Civ. Action No. 99-C-3356 *slip op* (N.D. Ill.
12 Feb. 14, 2003) *see* Goldsmith Decl.; *Hilao*, 103 F.3d at 782-87.

13 **CONCLUSION**

14 Plaintiffs have established all the requirements for certification of this case as a class
15 action. The proposed trial plan provides an efficient and effective means for bringing justice to
16 thousands of women who daily suffer the indignities of pervasive gender discrimination. This
17 Court should, therefore, order certification of this case under Rule 23(b)(2).

18 Dated: April 28, 2003

19 Respectfully submitted,

20
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