December 18, 2012

Magistrate Judge Jacqueline Scott Corley
San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Dukes v. Wal-Mart Stores, Inc.* (No. C-01-2252-CRB): Discovery Letter

Dear Magistrate Judge Corley:

Pursuant to your Standing Order, the parties seek your assistance. The parties have met and conferred but are unable to resolve two issues regarding class certification discovery: 1) the geographic scope of such discovery and 2) the reopening of pre-certification discovery. The Court had required plaintiffs to file their renewed motion for class certification by January 11, 2013, but the parties have agreed to extend that date to April 11, 2013, which Judge Breyer approved at the last CMC.

Geographic Scope: Plaintiffs' Position:

The original class action complaint in action was filed in June 2001, and a nation-wide class certified in June 2004. The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) rejected the proposed national class. Plaintiffs then filed a Fourth Amended Complaint (FAC), significantly narrowing the scope of the class. In rejecting Wal-Mart's motion to dismiss the FAC, the District Court acknowledged that the Supreme Court's decision was a "significant development in the Supreme Court's

class-action jurisprudence" which rejected the national class that had been certified because of "the inadequacy of their proof." Order Denying Motion to Dismiss (Dkt. 812, September 21, 2012) at 5, 8. Accordingly, this Court was "not prepared to deny" plaintiffs an opportunity to support their revised class allegations "so long as discovery might permit them to meet the Rule 23 obligations clarified by the Supreme Court's ruling…" *Id*. at 5.

Plaintiffs' FAC limits the class to current and former female store employees "subjected to gender discrimination as a result of specific policies and practices in Wal-Mart regions located in whole or in part in California ("California Regions") (par. 3), and alleges that the key issue of law and fact common to the class is whether "defendant, through its Region managers has engaged in a pattern or practice of discrimination in pay and management track promotions against its female employees in its California Regions…." (par. 18).[1] Thus the FAC, as the Court recognized, changes the focus of this action to the California Regions, challenging "allegedly biased decisions made by a group of Regional, District and Store Managers…perhaps four hundred or so under the corporate structure alleged." Order at 8.

Wal-Mart groups stores into regions, with 80-100 stores in each region. During the period from the opening of the class period through June 2004, Wal-Mart has adjusted regional boundaries, a number of times. During this entire period, 415 stores have been included in the affected regions at one time or another.

Plaintiffs have sought discovery concerning the regional implementation of pay and promotion policies, and accordingly seek statistical and other discovery concerning

[1] The FAC identifies 4 Regions. Plaintiffs have expressed the intention to limit the case to 3 of these regions.

every store and district that was in one of the affected regions while they were part of the affected region. Wal-Mart, however takes the position that, notwithstanding the FAC, discovery should be limited to the stores and districts in the affected regions as of June 2004, the end of the discovery period, thus excluding any store and district that had been in the region but removed from it at any point between 1998-2003.

The date Wal-Mart has selected is the date in which Wal-Mart had the fewest stores in the affected regions, excluding from discovery 152 stores (37%) of all stores that had been in the regions. Wal-Mart's proposed date also excludes from analysis data from many stores and districts during the periods, prior to the filing of the case (2001) and class certification motion (2003), where evidence of discrimination is likely to be most compelling.

Wal-Mart's limitation cannot be justified. First, the date selected is the close of the class period, and ignores the many stores and districts that had been in the regions since the opening of the class membership period (December 26, 1998). Second, Wal-Mart's proposed date would limit (and truncate) statistical analysis—excluding many stores that were subject to regional control during the relevant period.

The Wal-Mart's rationales for its regional definition do not bear scrutiny. First, it asserts the date it selects conforms the regions to California boundaries. This is not correct—even as limited by Wal-Mart, many of stores in 2004 are not in California. Moreover, Wal-Mart's regional decision-making process has never been based on state boundaries. Managers of the regions hold sway over all districts and stores in their region, whether or not the employees or stores are located solely in California.

Wal-Mart asserts its regional definition has the virtue of simplicity, and suggests complicated issues might arise if all the stores are included. This theoretical concern, best addressed by statistical experts and the Court at class certification, is not a basis to limit discovery—and the class—at the front end. Electronic data for all stores and employees is maintained by Walmart. In any event, plaintiffs have offered to limit discovery at this stage to exclude any stores that were in the regions for less than 2 years.

Defendant's Position:

On September 21, 2012, the Court gave plaintiffs less than four months to prepare their class certification arguments. Plaintiffs had previously informed the court that they were already in possession of sufficient evidence to go forward, and the Court did not contemplate or authorize an unlimited reopening of discovery.

Plaintiffs propose a class comprised of women who have worked in any store within "Wal-Mart's regions located in whole or in part in California" during the proposed class period, which begins in 1998 (subject to a pending motion for reconsideration) and ends (for present purposes) on June 1, 2004. FAC, ¶ 3. Throughout this time, however, the organizational alignment of stores changed frequently – often multiple times during a single calendar year. As a result, some line must be drawn.

Wal-Mart respectfully submits that the line delimiting the parties' discovery obligations at the Rule 23 stage should be clear and straight. Wal-Mart has defined the geographic scope of discovery using its organizational structure as of June 2004, and significant efforts are underway to produce documents and full employment history data for all employees of stores within this definition before year-end. Wal-Mart selected this date because its business rapidly expanded during the late 1990s and early 2000s. Although

plaintiffs object that this approach excludes some stores that were in the proposed class definition for less than the full period, that is true of any snapshot date. Wal-Mart's proposed date captures nearly two-thirds of the stores that fell at any time within the "California Regions" and includes every store that operated in the state of California through the period of time for which the parties have agreed to engage in discovery (while earlier dates would exclude California-based stores that opened later in the class period). The stores excluded by using the June 1, 2004 snapshot are generally those that were only briefly in the California Regions (117 of the excluded stores were within the proposed definition for less than three years) and were on the geographic fringes of the regions (in states like Washington, Idaho, Wisconsin, and Texas).

Producing employment data and searching for documents related to individuals who were employed at stores that fall outside the proposed class definition for significant periods of time would unnecessarily increase the cost and burden of discovery. Moreover, providing complete historical employment data for each such putative class member would trigger a snowball effect. In order to produce a meaningful employment history for a female employee of a given store, Wal-Mart would be required to search for and produce records on every pay decision and promotion opportunity impacting her even though the vast majority of those opportunities (or the responsible decision-makers) were outside the "California Regions." To evaluate her comparative treatment, it would have to search for and produce information about the compensation of other employees (male and female) who worked with her and other candidates who applied for the same promotion opportunities as she did, again all outside the California Regions. The cost of this additional discovery is substantial and plaintiffs are not willing to bear the burden.

The Wal-Mart proposal strikes a common-sense balance that accords with the class certification questions that will be before the Court. Wal-Mart respectfully suggests that any claims regarding the California Region as it existed in June 2004 are incapable of class certification. If Wal-Mart is correct, and plaintiffs cannot establish commonality as of June 2004, then they cannot do so for their proposed class at all. Adding or subtracting a few stores in prior years cannot make commonality any more likely, and, if anything, the introduction of these additional stores will add greater variation and difference in the proposed class. If, on the other hand, plaintiffs can show commonality using the snapshot data, and the class is certified, then plaintiffs may seek additional discovery as to all stores, district, and employees within the certified class. In either case, plaintiffs will suffer no prejudice.

For class certification purposes, some line must be drawn as to the proper scope of discovery. Plaintiffs' own proposal is no less arbitrary than Wal-Mart's, and it is not inherently more tailored toward establishing commonality and the other Rule 23 requirements than Wal-Mart's. If anything, Wal-Mart's proposed snapshot approach has the virtue of certainty, ascertainability, and precision. Faced with these two competing choices, with no clear Rule 23 advantage to either, this Court should choose Wal-Mart's proposal as it entails the least burden on the parties and the judicial system.

Pre-Certification Discovery: Plaintiffs' Position:

Prior to the initial certification of the class in 2004, discovery was limited to national policies and practices and to the policies and practices at "the stores at which the named plaintiffs worked . . . and higher level management into which whom those stores report." Case Management Order (Jan. 3, 2002, Dkt. 41) at 7. This limitation to the

plaintiffs' stores and districts made sense based on the national allegations, the theory of the case and the standards for satisfying commonality in effect at the time. Under the new rules established by the Supreme Court, and the allegations of the FAC, plaintiffs seek discovery of the relevant decision-makers—store, district and regional management. Wal-Mart refuses to provide any discovery for the prior certification period beyond that produced prior to 2003 under the national discovery regime. Plaintiffs have limited current discovery requests for this period to 1) the stores and districts other than those in which the named plaintiffs worked, and 2) new discovery requests not duplicative of earlier requests.

Plaintiffs contend this discovery is necessary given the burden of showing a "common mode of decision-making" by Wal-Mart Managers, a burden newly imposed by the Supreme Court. Moreover, the FAC, unlike the national class complaint, focuses its allegations on these local decision-makers. Thus the discovery plan in place in the national class case, which limited discovery to the stores, districts and regions in which the named plaintiffs worked, left unexplored the decisions and personnel policies and practices used in stores in these regions at which the named plaintiffs never worked, which comprise the overwhelming majority of stores and districts in these regions. The new class certification standards and the FAC allegations made pursuant to those standards make such additional discovery necessary. Contrary to Walmart's assertion, Plaintiffs have consistently maintained the need for additional discovery for this period.

Wal-Mart infers from the Court's class certification deadline, since modified, set in the Order Denying Motion to Dismiss, that the Court intends limited discovery. Yet its Order recognized that plaintiffs are entitled to seek discovery to prove their new allega-

tions. *See* Order at 5 (FAC allowed "so long as discovery might permit them to meet the Rule 23 obligations clarified by the Supreme Court's ruling. . . ."). Plaintiffs should be afforded discovery necessary to establish class action pre-requisites.

Defendant's Position:

In setting an expedited schedule for class-certification briefing (Dkt. 812, Sept. 21, 2012), the Court neither contemplated nor permitted a wholesale reopening of discovery reaching all the way back to December 1998. Plaintiffs themselves have acknowledged that the previous discovery was sufficient through the date of the initial certification motion. (Dkt. 790, Mar. 30, 2012) at 13 & n.10. Wal-Mart has agreed to supplement that discovery through the parties' agreed-upon date of June 2004. Yet, notwithstanding that they have *narrowed* their proposed class, plaintiffs seek to *broaden* the previous discovery.

The Court long ago entered a Case Management Order permitting discovery as to facts "that are relevant to . . . plaintiffs' claim that this case should be certified as a class action," subject to various practical limits. Case Management Order (Dkt. 41, Jan. 3, 2002) ¶¶ 11(a), (f) ("CMO"). The discovery previously provided by Wal-Mart complied with that Order. Since plaintiffs have not sought modification of the CMO, there is no basis for them to seek additional discovery.

Although the Supreme Court clarified the standard for proving commonality, the requirement that plaintiffs must establish a "general policy of discrimination" is nothing new. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158 n.15 (1982). Plaintiffs survived a motion to dismiss based on their representation that "[t]o establish a 'general policy of discrimination' plaintiffs have included substantial factual allegations of overt

discriminatory conduct and statements by senior managers throughout the California Regions, in addition to relying on statistical analyses reflecting a consistent pattern of disparities adverse to women." Presumably, plaintiffs have sufficient evidence to support those allegations, and their request to expand the scope of discovery is simply an unnecessary and expensive fishing expedition.

If the Court ultimately certifies a class, plaintiffs may of course seek additional discovery necessary to prove their merits case. However, it remains Wal-Mart's position that no such certification order should enter, and neither of the current discovery disputes would, even if resolved in plaintiffs' favor, make certification any more (or less) likely. These requests should therefore be denied without prejudice to revisiting the issues if a class is certified by the district court.

Sincerely,

/s/ Brad Seligman
Brad Seligman

/s/ Catherine Conway
Catherine Conway