No. 11-3639

In the

United States Court of Appeals

for the Seventh Circuit

GEORGE McREYNOLDS, MAROC HOWARD, LARUE GIBSON, JENNIFER MADRID, FRANKIE ROSS, MARVA YORK, LESLIE BROWNE, HENRY WILSON, LEROY BROWN, GLENN CAPEL, CHRISTINA COLEMAN, J. YVES LABORDE, MARSHELL MILLER, CARNELL MOORE, MARK JOHNSON, CATHY BENDER-JACKSON, AND STEPHEN SMARTT, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Defendant-Appellee.

Interlocutory Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 05 C 6583
The Honorable **Robert W. Gettleman**, Judge Presiding.

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

In an about-face from its arguments for the last five years in the district court, Merrill Lynch now attempts to portray this case as identical to the fact pattern in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) – apparently hoping this Court will adopt *Wal-Mart's* bottom-line result, rather than its reasoning. But Merrill Lynch's own evidence and admissions show the facts of this case bear little resemblance to *Wal-Mart.* As the Appellants pointed out in their opening brief, the homogeneity and size of their proposed class of a single job in a single business unit, as well as the uniformity of Merrill Lynch's objective national policies and the ability of a single trial to test the lawfulness of those policies, a threshold issue of the claims of all class members, make this precisely the type of case worthy of issue certification under Rule 23(c)(4). *Id.* at 2551.

As the Supreme Court held, the *Wal-Mart* plaintiffs could not show commonality for their pattern-or-practice claim because they lacked a unifying component that Merrill Lynch supplied in this case, in addition to its uniform policies:

> Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

131 S. Ct. at 2552 (emphasis in original). Thus, Merrill Lynch conspicuously omits from its brief the race-conscious class-wide defense it proffered below, knowing that the defense also provides the glue that binds the alleged reasons for its decisions.

At the outset of this litigation, before any experts were retained, Merrill Lynch volunteered the deposition testimony of its African American Chief Executive

Officer Stan O'Neal, who sought to explain why African American brokers lagged behind whites in virtually every metric Merrill Lynch recorded over at least a decade. O'Neal testified that brokers must establish a "relationship and bond of trust and confidence" with prospective clients. D356-8 at 13, 16. O'Neal stressed that "one of the seminal challenges of being an African American financial advisor" is the need "to reach across racial and cultural community boundaries" to access white wealth. *Id.* at 13. O'Neal candidly acknowledged that racial bias on the part of prospective clients is a factor that explains some of the differences in outcomes for African American brokers. *Id.* at 18.

Similarly, Merrill Lynch's Executive Vice President and Vice-Chairman and President of Global Private Client Robert McCann testified it is "a challenge" for African American brokers "to reach beyond their natural affinity group to get clients in the white market." D356-9 at 17. When asked, "what, if anything, do you know about the affinity groups, the neighborhoods, or the churches, or the family members of African-American Merrill Lynch FAs?" McCann responded only that "obviously their family members were black, and the majority of the people that they grew up with were African American." *Id.* He admitted he knew nothing about the wealth or other characteristics of the "affinity groups" of white brokers. *Id.* Likewise, Senior Vice President and Head of the Americas Client Relationship Group explained that African American brokers had "to cross into the white community against their business, and I think that's a factor of success as well." D356-11 at 9.

Merrill Lynch next paid four experts (it retained 8 in the case) more than ten million dollars in, as described below, a failed attempt to support its executives' belief that African American brokers fare poorly across-the-board, because they cannot attract wealthy white clients and African Americans lack wealth. D386 at 23-24.

Appellants' claims are equally class-wide. While Appellants do not deny that some racial discrimination exists in society, they assert that Merrill Lynch's defense rests on racial stereotypes and generalizations. Appellants established that Merrill Lynch's statistical expert, Ali Saad, did not prove that racial disparities in employment outcomes resulted from African Americans' lack of access to white wealth, instead Saad used an undisclosed racial discount to reduce predicted wages of African Americans by 48.6%. Properly interpreted, Saad's work shows that compensation disparities persist even between whites and African Americans with the same "network" and experience. Focusing on Merrill Lynch's conduct rather than its unsupported theory of alleged racial differences in access to wealth, Appellants' expert studied the data and concluded that when Merrill Lynch controls the distribution of client accounts, it steers those accounts to white brokers, beginning at the start of the training program, which causes continuing compensation disparities. Appellants contend that, because Merrill Lynch wrongly assumes that African American brokers cannot garner white wealthy clients, the firm designs and maintains policies that ensure clients accounts and books of white

brokers will transfer disproportionately to white brokers not only through the national account distribution policy but through teams.

Lastly, Appellants' expert refuted any notion that white brokers are superior to African Americans by showing that, when African Americans do receive account distributions, they do just as well as white brokers at generating production credits. D343-2 at 54-55.

Moreover, the *Wal-Mart* plaintiffs failed to establish their employer provided any "common direction" or other incentive that would lead supervisors to exercise their discretion in a discriminatory fashion. 131 S. Ct. at 2554-55. But that is not true at Merrill Lynch, where the firm provides managers both an economic incentive and a business rationale for preferring white brokers. Managers are compensated based on the revenue their brokers produce, but African Americans are viewed at Merrill Lynch as lacking access to wealthy white prospective clients and "likely to fail." D347-1 at 3, 16, 31; D347-7 at 5, 11-12. Thus, the firm openly admitted its diversity goals "may be in conflict with a Managing Director's goal to maximize current revenue." D347-7 at 7. Merrill Lynch claims (at 5) the firm "tied local manager compensation to the hiring, retention, and success of diverse" brokers, but its managers largely ignored this minute aspect of their compensation (2%) so they could maximize their income through white brokers perceived as more profitable. D360-7 at 3; D350-6.

Merrill Lynch also acted on its generalized view that African American brokers could not serve white clients by creating segregated, separate but unequal "virtual

teams," which had none of the policy-based advantages or resources of regular teams, and through corporate marketing plans and materials disseminated to managers and brokers, which featured racial profiling of clients and sought to match African American brokers with prospective African American clients. D345-4; D357-10.

Finally, this case is unlike *Wal-Mart*, where the employer could rely upon its antidiscrimination and affirmative action efforts. Although Merrill Lynch touts its affirmative action record (at 4-5), its senior executives and the head of Human Resources testified they did not even know if an affirmative action plan existed even though Merrill Lynch represented that it would adopt the affirmative action plan to close a decades long lawsuit brought by the Equal Employment Opportunity Commission. D356-9 at 4; D356-11 at 16; D356-13 at 8-9. Significantly, Merrill Lynch is a proven discriminator. In *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* arbitrators held that Merrill Lynch engaged in a pattern-or-practice of gender discrimination in account distributions and compensation against female brokers, findings Judge Ruben Castillo held met the standards for collateral estoppel in this Circuit. 328 F. Supp. 865, 867-68 (N.D. Ill. 2004).

Most importantly for purposes of class certification, at the heart of both Appellants' claims and Merrill Lynch's defense are common questions, the answers to which will advance the discrimination claims of each class member. The issues of liability and class-wide injunctive and declaratory relief can and should be tried

with common evidence and decided in a single proceeding, and class-wide resolution is warranted under Rule 23(c)(4).

I. Merrill Lynch Ignores the Record in this Case and Its Own Admissions of Uniform National Policies.

The centerpiece of Merrill Lynch's brief is its contention that no class can be certified because the challenged teaming and account distribution policies do not apply uniformly but, instead, "delegate[] discretion to local managers." Merrill Brief at 30, *passim*. Nothing could be further from the truth.

In the district court, Merrill Lynch admitted that the African American brokers "have not argued that Merrill Lynch had a uniform policy of permitting managers to make discretionary decisions." D386 at 52 n.24.

> And as plaintiffs concede, all of the decisions about which [plaintiffs] complain were made within a framework of objective national policies...Manager discretion was exercised within these confines.

Id. Indeed, Merrill Lynch entitled one section of its district court brief "Managers' exercise of discretion in account distributions is constrained by the [account distribution policy]"*Id.* at 32.

The challenged Merrill Lynch policies apply to every branch office and broker and must be followed by every manager. Merrill Lynch policy defines and formally recognizes teams and their treatment and dictates how managers must implement the policy. The policy does not permit managers to act on their own accord using discretion or subjective criteria.[1] Likewise, under the written, mandatory National

[1] Appellants do not concede Merrill Lynch's inaccurate but irrelevant statements regarding the experiences of individual plaintiffs (at 8-10, 34, 37), facts they have repeatedly refuted in other briefs. *E.g.*, D422 at 10. For example, Merrill Lynch claims West Point graduate

Account Distribution Policy, Merrill Lynch provides detailed orders to its managers about how to assign client accounts, business leads, and referrals. Merrill Lynch requires its managers to distribute client accounts of departing brokers to remaining team members, if any, or according to a national ranking calculated centrally by the firm's corporate information systems based on objective firm-wide data and factors. *See* D353-15 to -19. The policy permits only limited exceptions in rare circumstances, delineated in the policy, and managers must report the reasons for making these exceptions in records that Merrill Lynch maintains centrally. D353-19 at 5-6

II. Undisputed Statistical Evidence Demonstrates the Disparate Impact, Admitted in Merrill Lynch Reports and Testimony, of Merrill Lynch's Uniform Teaming and Account Distribution Policies.

After reviewing Merrill Lynch's criticisms, the district court accepted the statistical evidence of Appellants' expert, Professor Janice Madden, which it noted was "undisputed" and "compelling." A 21, 32, 53. Merrill Lynch now defends the district court's denial of class certification by attempting to re-raise several objections to the evidence the lower court accepted. These objections cannot bear scrutiny.

First, Merrill Lynch claims (at 34-37) that Madden did not connect the undisputed statistical disparities in this case to the challenged policies. In fact,

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Maroc Howard failed because he raised children and enjoyed tango dancing, but surely white brokers, too, have families and hobbies. Gibson's manager prohibited him from joining the team that had "mentored" him, for reasons he believed "racially motivated." D314-9 at 16. Teaming rates in Capel's office were the same as the rest of the country. D366-1 at 328. Madrid was in a pool whose arrangements were inequitable and degrading. D422 at 10.

Merrill Lynch has never disputed Madden's findings that 15% to 28% of the racial disparities in compensation are due to the disproportionate exclusion of African American brokers from teams and their benefits. D343-2 at 13; D364-5 at 7. Indeed, aware that team membership is a "key indicator[] of future professional success," Merrill Lynch monitored and evaluated the effect of its teaming policy and reported to senior executives that it "disadvantage[s]" African American brokers by excluding them from teams. D347-1 at 16, 32.

Nor did Merrill Lynch dispute Madden's finding that African American brokers are disproportionately excluded from favorable account distributions. D343-2 at 12-13; D364-5 at 7. Account distributions enhance broker compensation both directly, through commissions on those accounts, and indirectly, through expansion of the broker's business network. D 343-2 at 31, 34; D 368-8 at 168, 243-44. Indeed, Merrill Lynch could not dispute Madden's findings on these issues because they echo the results of the firm's own internal studies, reporting that Merrill Lynch disproportionately transferred account assets to white male brokers instead of African Americans. D360-3 at 3-4; D353-21 at 3, 5.

Second, Merrill Lynch incorrectly faults Madden (at 11, 36) for failing to "control for [broker] rankings under the [account distribution] policy" and ignoring its "best-ball" criterion.

Merrill Lynch claims the "best-ball" criterion is intended to "boost[] the rank of poorer performers" – *i.e.*, African American brokers – by rewarding revenue growth as an alternative to overall revenue. But Merrill Lynch fails to inform the Court

that the "best-ball" criterion was available only to brokers in the top three national quintiles, D386 at 34 n.17, thereby excluding 70% of African American brokers (who occupy the fourth and fifth quintiles) from scoring any points under the "best-ball" criterion. Madden tested the quintile rankings and found statistically significant differences in quintile rankings by race. Accordingly, Madden established and Merrill Lynch does not dispute that the quintile limitation on the best-ball qualifier had a disparate impact on African Americans.

Moreover, contrary to Merrill Lynch's arguments, Madden established that the vehicle driving the account distribution rankings was "tainted" by Merrill Lynch, which begins enhancing the books of white trainees to the detriment of African Americans through racially disparate account distributions and teams at the beginning of the training program. D343-2 at 50-51.[2] Madden concluded that these early account transfers affected African American brokers' books of business and resulted in skewed quintile rankings. Thus, whether the criterion used to award points under the account distribution policy was revenue quintile or recognition club memberships, which are based on cumulative production, Madden established that African American brokers' books of business were shorted from the start of their careers. As a result, the rankings drawn from those books of business measure

[2] Madden noted significantly higher attrition rates for African Americans in the training program, and the relatively small number who survived to graduation held an average of $10.6 million less in assets than whites (a difference of 5.89 standard deviations) yielding $54,125 less in production credits (5.51 standard deviations) for the 12-month period prior to graduation. *Id.* at 45-46.

not merit but merely the cumulative impact of Merrill Lynch's discrimination.[3] However, Madden tested the only ranking factor not linked to the Merrill Lynch-influenced books of business – industry certifications – and found this factor could not explain the racial disparities in account distributions and that there were no statistically significant differences in the industry certifications held by white and African American brokers. D364-5 at 20-21. Madden's study of account distributions properly tested the challenged policies and showed their disparate impact.

There is no evidence to support Merrill Lynch's representation (at 36) that "[d]isparities [in account distribution] disappear when [broker] rank is considered." Merrill Lynch's expert, Saad, never controlled for rankings in his studies; he "aggregated" the data in the same manner as Madden. Nor did he analyze account distributions under the policy's ranking factors. Instead, he studied a hypothetical scheme where accounts might be distributed based solely on overall commission production. D312-18 at 46. His only conclusion from this flawed study was that African American brokers would have fared even worse than they actually did if production were the sole criterion. *Id.* at 47. Title VII does not exonerate a policy that disproportionately disadvantages African Americans merely because it is not the most discriminatory policy imaginable.

Moreover, controlling for rankings – which Appellants challenge – would make no sense, particularly when Madden showed they disproportionately disadvantage

[3] Nor is there is any dispute in this case that African Americans fare far worse than whites in nearly all of the interrelated ranking factors of the account distribution policy. Merrill Lynch's own studies report large racial differences between black and white brokers in revenue, production, and account assets. D347-7.

African American brokers. This would be akin to controlling for test score in a testing case.

Finally, Merrill Lynch's criticism of Madden for using what it calls "aggregated" statistics, again invoking *Wal-Mart* (at 20), lacks merit. Madden studied the data in the same manner as Merrill Lynch, in a legion of internal reports and through its expert. *E.g.,* D347-1; D347-7. The "aggregated" statistical analysis of employees holding different jobs in different stores and companies did not establish a "uniform, store-by-store disparity" in *Wal-Mart.* 131 S. Ct.at 2555. In contrast, Madden analyzed workers in a single job, segregated brokers and trainees, controlled for individual office locations, and, because Merrill Lynch employs no tenured African American brokers in a majority of states, limited her analysis to offices in which African American brokers worked. D343-2 generally and at 19 n.5. Thus, Appellants' statistics were not "aggregated" as they were in *Wal-Mart*, nor did they need to unite workers in different jobs operating under no policy.

In a recent disparate impact case, the Third Circuit explained a proper use of "aggregation," which increases the number of observances and thus improves scientific accuracy. *Stagi v. National Railroad Passenger Corp*, 391 Fed. App'x 133, 147 (3d Cir. Aug. 16, 2010) (quoting *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336 n.17 (4th Cir. 1983)).

III. The District Court Erred in Requiring Proof at the Liability Stage that Each Class Member Was Discriminated Against for Discriminatory "Reasons" or "Motives."

The district court erroneously believed that a finding that Merrill Lynch's policies had an unlawful disparate impact on African Americans or constituted a

pattern-or-practice of race discrimination requires proof that every single class member was injured by the discriminatory "reasons" or "motives" of individual managers in implementing firm-wide teaming and account distribution policies. A 4, 27, 47-49. In applying Rule 23, the district court held that no class could be certified because any "Phase I" liability proceeding would have to resolve the claims of all individual class members. A 4, 27. Merrill Lynch steadfastly defends these legal errors.

Recognizing that "reasons" and "motives" are irrelevant to a disparate impact claim, Merrill Lynch (at 41-42, 52) instead insists, incorrectly, that the district court was really holding that disparate impact liability requires a showing of "individual causation."

"Title VII prohibits 'employment practices that are facially neutral in their treatment of different *groups* but that in fact fall more harshly on one *group* than another and cannot be justified by business necessity.'" *Farrell v. Butler Univ.*, 421 F.3d 609, 616 (7th Cir. 2005).[4] Causation in a disparate impact case is proved through "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Thus, causation focuses on the policy or practice in

[4] Merrill Lynch's reliance on the individual discrimination case of *Farrell* is misplaced. The professor's sole evidence of disparate impact was her personal experience, which the Court held "hardly amounts to a disparate impact on women in general." *Id.* at 617. This Court also questioned whether Farrell had standing to challenge the award eligibility requirements because she met them and was considered for the award. *Id.*

question and its impact on the protected group, not on each individual class member.

Under Merrill Lynch's reasoning, unless its policies excluded 100% of African American brokers from 100% of client account distribution and teaming opportunities, then not "all" of the class members partake in a common case and there can be no class. But Title VII disparate impact or pattern-or-practice cases scarcely ever involve disadvantaged minorities who suffer absolute, 100% exclusion from opportunities. *See, e.g., Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1042-44 (7th Cir. 1991) (opportunities for promotion merely reduced, not eliminated); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (classes "almost inevitabl[y] will include some people who have not been injured by the defendant's conduct…this possibility does not preclude class certification."). "Title VII would have little force if an employer could defeat a claim of discrimination by treating a single member of the protected class in accordance with the law." *Diaz v. Kraft Foods Global, Inc.,* 653 F.3d 582, 587 (7th Cir. 2011).

The district court's erroneous view that individual motivations and relief issues must be part of a liability trial on the policies and practices would also subvert the settled order and allocation of proof in Title VII disparate impact and pattern-or-practice cases. "[A] plaintiff class seeking to establish a defendant's liability for discrimination under either a pattern-or-practice disparate treatment theory or a disparate impact theory must introduce evidence of discrimination against the protected group as a whole." *United States v. City of New York*, 276 F.R.D. 22, 34

(E.D.N.Y. 2011); *accord Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). "Individual issues arise in disparate impact and pattern-or-practice disparate treatment cases only if the class establishes the employer's liability and the litigation proceeds to the remedial phase." *New York*, 276 F.R.D. at 34. Upon a liability finding, the burden shifts in the remedy phase to the employer to establish that individual members of the class were not injured. *Teamsters*, 431 U.S. at 362. Only in the remedial phase does the court consider questions of liability to individual class members. *New York*, 276 F.R.D. at 34.

Merrill Lynch and the district court would import the burden of proving individual liability and injury straight to the class certification and class liability stage, and place it on the wrong party: for commonality, Appellants would have to show (even before merits discovery) that every single class member was injured in some degree. This Court rejected a similar argument in *Rosario v. Livaditis*, a suit alleging deceptive practices by a beautician's school, where the school argued that commonality was lacking because "the class consists of students with varying lengths of exposure to the D'or program, some class members were satisfied with their teachers, and at least two class members graduated from D'or schools and passed the state licensing exam." 963 F.2d 1013, 1017-18 (7th Cir. 1992). Although the defendant could point to class members who were not harmed,

> the common question which is at the heart of this case does not change: were the D'or schools operated pursuant to an ongoing scheme to defraud and deceive prospective students?

Id at 1018.[5]

The Third Circuit's recent *en banc* decision in *Sullivan v. DB Investments, Inc.*, emphasizes that *Wal-Mart* does not disturb this settled law. 2011 U.S. App. LEXIS 25185 *49 (Dec. 20, 2011). A Third Circuit panel reversed on predominance grounds the certification of a settlement class alleging anti-competitive conduct in the diamond trade, because many class members "lacked a substantive right to recover damages" due to various state laws on antitrust standing. *Id.* at *31. The *en banc* court reversed, because – as *Wal-Mart* confirms – "the focus" at the class certification stage "is on whether the defendant's conduct was common as to all of the class members, not on whether each plaintiff has a 'colorable' claim." *Id.* at *49. The court rejected the dissenting opinion that *Wal-Mart* requires "an inquiry into the existence or validity of each class member's claim …at the class certification stage." *Id.*

Moreover, although unnecessary for certification, given the structure of Merrill Lynch's employment policies, all class members were in fact harmed by its discriminatory teaming and account distribution policies. Merrill Lynch employs a national stack ranking system that orders and ranks brokers in national quintiles, which are in turn used to determine rankings under the national account distribution policy and to distribute in local offices various resources and business opportunities. Under the challenged policies, whites receive disproportionately more client accounts than African Americans through distributions and teams, and so

[5] The district court also erroneously believed that plaintiffs must have identical experiences to meet commonality. *See Rosario*, 963 F.2d at 1017 ("factual variation among the class grievances will not defeat a class action").

receive additional client assets, production and other benefits. As a result, they score higher on the account distribution ranking, entitling them to even more client accounts and other lucrative opportunities. Thus, white brokers anywhere in the country who improve their rankings by receiving client accounts and other benefits due to discriminatory teams and account distributions not only push down the rankings of African American brokers everywhere but also augment the rankings of whites. All African American brokers, regardless of location or "success," are harmed by this unfair competition.

IV. The District Court Erred in Denying Certification of the Issues of Liability and Injunctive and Declaratory Relief.

The text and commentary of Rule 23(c)(4), abundant caselaw from this and other courts, and noted treatises all support issue certification in this case. This Court has consistently held that the prospect of follow-on hearings to determine individual issues of damages or causation does not detract from the efficiency of conducting a class trial on common issues key to resolving the case. *E.g., Pella*, 606 F.3d at 394; *Arreola v. Godinez*, 546 F.3d 788, 800-01 (7th Cir. 2008); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661, 663 (7th Cir. 2004); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004).

Merrill Lynch's brief ignores the text and commentary of Rule 23(c)(4), as well as the Wright & Miller and Conte & Newberg treatises. "[E]ven where class plaintiffs file a complaint seeking non-incidental individual monetary relief, the classwide liability questions raised by their disparate impact and pattern-or-practice

disparate treatment claims are properly certified under Rule 23(b)(2) and (c)(4)." *New York*, 276 F.R.D. at 35.

Merrill Lynch's argument against issue certification rests almost entirely on the flawed premise that liability "turns on highly-individualized inquiries into the exercise of discretion by thousands of managers and FAs." Merrill Brief at 45. As discussed above, this premise is wrong as a matter of law.

Merrill Lynch attempts to limit this Court's clear teachings on the value of issue certification. For example, Merrill Lynch distinguishes *Allen* (at 49) as a single-plant case, but does not explain how that is different from this single-job, single-business-unit case. Merrill Lynch distinguishes *Carnegie* (at 50) because the defendants in that case were judicially estopped from contesting manageability for purposes of a settlement class – but the Court permitted the defendants to argue that a litigation class of millions would be unmanageable. 376 F.3d at 660-61. The Court rejected this argument for lack of merit, not on estoppel grounds. *Id.*

Merrill Lynch contends (at 45-46) that even if issues common to all class members predominate, certification of any issue under Rule 23(c)(4) is improper unless the entire case as a whole, including all individual relief and damages issues, satisfies Rule 23(b). But if the district court were required to find the action as a whole meets the requirements of Rule 23(b) before considering issue certification, then the district court would have no need to certify particular issues under Rule 23(c)(4). *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006). Such an interpretation would render Rule 23(c)(4) superfluous, thereby violating a

basic rule of statutory construction: statutes and rules should be interpreted to give effect to each of their provisions. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 439 (4th Cir. 2003); *Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 2009). Rule 23(c)(4) is intended to make class actions more manageable, but Merrill Lynch's interpretation would frustrate that purpose.

Merrill Lynch relies on cases that either do not address issue certification at all,[6] reject it because class members' claims varied according to differing state laws,[7] or reflect the minority, and not this Circuit's, view.[8] Nothing in these cases undermines this Court's consistent view that issues common to the claims of all class members should be certified for resolution in a single proceeding. In *Easterling v. State of Connecticut*, 2011 U.S. Dist. LEXIS 134524 (D. Conn. Nov. 22, 2011), a disparate impact case decided after *Wal-Mart*, the court applied Rule 23(c)(4) to certify a Rule 23(b)(2) liability and class-wide injunctive relief class and a Rule 23(b)(3) class for determining monetary damages and individualized injunctive relief.

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[6] *Wal-Mart*, 131 S. Ct. 2541; *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011); *Andrews v. Chevy Chase Bank*, 545 F.3d 570 (7th Cir. 2008); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002).

[7] *E.g., In re GM Corp. Prods. Dex-Cool Liab. Litig.*, 241 F.R.D. 305, 318 (S.D. Ill. 2007) (laws of 47 states regarding 31 difference vehicle models). *McLaughlin v. Am. Tobacco*, 522 F.3d 215, 233-34 (2d Cir. 2008), rejected issue certification because of the need for individualized determinations on when each plaintiff discovered light cigarettes are not appreciably safer, as well as individual reliance, injury, and damages.

[8] *Castano v. Am. Tobacco*, 84 F.3d 734 (5th Cir. 1996), a nationwide class of all smokers, reflects the minority view that Rule 23(c)(4) certification should be limited to cases in which the action as a whole satisfies the requirements of Rule 23(b) (not shown because of different state laws.) *Id.* at 743, 745 n.21; *see Gates v. Rohm & Haas*, 655 F.3d 255, 272-73 (3d Cir. 2011) (noting circuit split).

Merrill Lynch argues that issue certification in this case would trample on its constitutional rights to due process and a jury trial. But contrary to Merrill Lynch's assertion (at 48), remedial phase juries would not "unconstitutionally reexamine" a class jury's findings of a pattern-or-practice of discrimination or other issues. As this Court held in rejecting this argument: "[c]ertifying a class for injunctive purposes, while handling damages claims individually, does not transgress the seventh amendment." *Allen*, 358 F.3d at 472; *see also Teamsters*, 431 U.S. at 362 (employer found to have engaged in a pattern-or-practice of discrimination may not relitigate that finding in phase two proceedings).[9] As this Court explained:

> Just as in a single-person (or 27-person) suit, a jury will resolve common factual disputes, and its resolution will control when the judge takes up the request for an injunction. ... [Defendant] will enjoy its jury-trial right either way; and once *one* jury (in individual or class litigation) has resolved a factual dispute, principles of issue preclusion can bind the defendant to that outcome in future litigation consistently with the seventh amendment. The other 323 employees' right to jury trial can be protected in either or both of two ways: By offering them the opportunity to opt out, or by denying them (in any later damages proceedings) both the benefits and the detriments of issue and claim preclusion. Thus a class proceeding for equitable relief vindicates the seventh amendment as fully as do individual trials, is no more complex than individual trials, yet produces benefits compared with the one-person-at-a-time paradigm.

Allen, 358 F.3d at 471.

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[9] Merrill Lynch also relies on *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), a mass tort case in which the district court certified particular questions for the jury to answer in a special verdict. The Court expressed "[t]hree concerns, none of them necessarily sufficient in itself but cumulatively compelling:" undue pressure on the defendants to settle despite a 92% win rate in individual cases; instructing the jury on an amalgam of 50 states' laws; and the fact that the first jury would not determine comparative negligence. *Id.* at 1299-1303. None of these concerns apply here. Under *Teamsters*, phase two juries do not decide issues (like comparative negligence in *Rhone-Poulenc*) that overlap with a pattern-or-practice finding. 431 U.S. at 362.

The district court was curiously troubled by Merrill Lynch's constitutional arguments, even though Appellants' post-*Wal-Mart* class certification motion sought certification (in whole or in part) only of the disparate impact claim. Appellants explained that the district court could preside over the liability trial and assign a special master to handle the follow-on individual relief proceedings. Merrill Lynch incorrectly claims (at 48-49) to be entitled to jury trials on backpay under any legal theory, and that Article III does not permit a special master to resolve individual relief issues even in a disparate impact case. Not so. Disparate impact plaintiffs are limited to equitable remedies, including backpay; there is no right to jury trial on disparate impact claims. 42 U.S.C. §§1981a(a)(1), 2000e-5(g)(1).[10] Title VII expressly authorizes the appointment of special masters. 42 U.S.C. §2000e-5(f)(5); Fed. R. Civ. P. 53(a)(1). "Where Congress creates a statutory right, its discretion includes . . . providing that aggrieved persons must proceed before certain adjudicative officers," who need not be Article III judges. *Baer v. First Options of Chicago, Inc.*, 1994 U.S. Dist. LEXIS 1792, *3 (N.D. Ill. Feb. 18, 1994) (distinguishing *Stauble v. Warrob*, 977 F.2d 690 (1st Cir. 1992), because no statute authorized referral to master); *accord Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81 (1982).

[10] The very cases Merrill Lynch cites refute the claim that backpay is a legal remedy. *E.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002); *Randall*, 637 F.3d at 825.

V. There is No Conflict Between Appellants and the Class of African American Brokers.

Merrill Lynch argues (at 38) that Appellants cannot adequately represent the class because they compete with other African American brokers for limited teaming opportunities and account distributions. Such "competition" is inherent in virtually every employment discrimination class but is not the sort of conflict of interest that precludes class certification. This Court has never barred certification of an applicant or promotion class merely because the number of available positions could not accommodate 100% of the class members. On the contrary, such classes are routinely certified and granted relief for the lost opportunities caused by the employer's discriminatory conduct. *E.g.*, *Lewis v. City of Chicago*, 643 F.3d 201, 202-03 (7th Cir. 2011) (African American applicant class awarded "damages based on the loss-of-a-chance approach"); *Biondo v. City of Chicago*, 382 F.3d 680, 688 (7th Cir. 2004) (same for firefighters promotion were case).

Moreover, the notion that the class representatives compete with other African American brokers for teaming opportunities and account distributions is largely untrue. Despite the 6.5% hiring goal that Merrill Lynch consented to in settling an EEOC lawsuit, only 2.1% of Merrill Lynch's brokers were African American during the class period. D365-6 at 16; D364-15 at 3. African Americans also had racially disproportionate attrition rates near 80%. D343-2 at 49. As a result, few African Americans worked in an office that employed another African American broker. A 9. African American brokers, including the Appellants, competed with white brokers, not other African Americans, for specific teaming opportunities and account

distributions. The real "zero-sum" game in this case is that every time Merrill Lynch favors white brokers over African Americans, it reduces compensation and opportunities for African American brokers and depresses their rankings in the firm's national quintile system.

The fact that some African Americans have achieved some measure of success despite the headwinds created by Merrill Lynch's policies neither validates those policies as nondiscriminatory nor defeats the cohesiveness of the class. *See Rosario*, 963 F.2d at 1018-19 (rejecting argument that representatives were inadequate because some class members were successful and would be harmed by maintenance of class action).

Merrill Lynch relies on cases in which the proposed class representatives asserted unique claims or were subject to unique defenses, circumstances not presented here. Indeed, those cases make clear that the adequacy requirement is met in a case like this one, a "Title VII class action involving a challenge to employment policies of general application." *Patterson v. General Motors Corp.*, 631 F.2d 476, 481-82 (7th Cir. 1980).[11]

VI. This Court's Standard of Review Is *De Novo*.

Merrill Lynch's brief lacks a Standard of Review section, *but see* Fed. R. App. P. 28(b), but contends that this Court should review the district court's decisions under

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[11] *Patterson* rejected a class representative because his claims were limited to personal grievances not shared by the putative class. *Id.* at 481-82. In *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011), the plaintiffs challenged the employer's treatment of two of eleven investment funds in an ERISA plan, but the class was defined to include *all* past, present, and future participants in the plan as a whole, regardless of whether the participants had invested in the two funds at issue. *Id.* at 586-87.

an abuse of discretion standard because the district court made extensive findings of fact. On the contrary, the district court made clear that it accepted the Appellants' undisputed statistical evidence but made no other factual findings. A 52; *see also* A 9-10.

In response to Appellants' reconsideration motion, the district court stated that it had not made any factual findings but had accepted the parties' evidence "holistically." A 52. Accordingly, this Court should review the district court's legal errors and applications of law to fact *de novo. Arreola,* 546 F. 3d at 794.

When, as here, the district court applies an incorrect legal rule as part of its class certification decision, the decision must be set aside as an abuse of discretion. *Ervin v. OS Restaurant Servs., Inc.,* 632 F.3d 971, 976 (7th Cir. 2011). Alternatively, to the extent the district court did make factual findings, those findings were not made as part of the court's consideration of Appellants' request for Rule 23(c)(4) issue certification but pertained to a Rule 23(b)(3) predominance test to the case as a whole. Thus, the findings do not govern this appeal.

VII. This Court Correctly Accepted the Appeal.

On November 16, 2011, a panel of this Court granted the petition for leave to appeal under Federal Rule of Civil Procedure 23(f) and 28 U.S.C. §1292(b). As Merrill Lynch told the Supreme Court in this case, there is no "rigid rule" for accepting Rule 23(f) appeals; the Court has "broad discretion" that "will always be exercised in light of the particular facts" of each case. Merrill Brief in Opp. to Cert., No. 10-1534 (Aug. 2011). This Court has made clear that mere technical deficiencies

do not defeat §1292(b) review. *Hewitt v. Joyce Beverages of Wis., Inc.*, 721 F.2d 625, 627 n.1 (7th Cir. 1983) (noting two §1292(b) appeals accepted without any certification by district court); *see also Gamboa v. Velez*, 457 F.3d 703, 709-10 n.5 (7th Cir. 2006) (discussing district judge's oral statements regarding §1292(b) appeal). Indeed, the Court has remanded cases so that the district court could correct technically deficient §1292(b) orders. *See Rumpke of Indiana, Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1238-39 (7th Cir. 1997).

Merrill Lynch nonetheless claims (at 24) Appellants were "too late" in seeking interlocutory review of the denial of class certification. The opposite is true. Unlike the appellants in the cases Merrill Lynch cites, Appellants have timely pursued each avenue of appellate review to correct the district court's legal errors. *See Asher v. Baxter*, 505 F.3d 736 (7th Cir. 2007) (plaintiffs proposed same class three times, with different representatives, only seeking Rule 23(f) review third time); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999) (Rule 23(f) review first sought after reconsideration ruling 14 months after initial denial of class); *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (missed deadline for appeal as of right and then sought §1292(b) certification). Merrill Lynch misreads the *Asher* case as limiting §1292(b) review to "'antecedent' determinations" of the adequacy of the class representatives, but *Asher* plainly holds that §1292(b) provides an avenue for interlocutory review of the class certification decision itself. 505 F.3d at 740.

Merrill Lynch likewise ignores the district court judge's uncertainty about the class certification ruling and repeated calls for appellate review. The district court

found the legal issues in the case "difficult," "challenging," and "important," in part because *Wal-Mart* changed "the landscape under Rule 23." A 35-37. Openly admitting it may have erred, the district court stayed the individual claims and urged Appellants to seek appeal. *Id.* The district judge repeatedly said this case "cries out" for appellate review and he "want[s] the folks upstairs to also weigh in on this, because… it's that important." *Id.*[12]

Now that the appeal has been accepted and the parties have briefed its merits, dismissing the appeal would mean "this Court would have wasted substantial resources in administering and hearing a full-blown appeal on the merits," and the parties would "have suffered significant delay in the district court." *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir. 1996). "As such, the purpose of Section 1292(b) to speed litigation and conserve judicial resources [would be] utterly thwarted." *Healthcare*, 75 F.3d at 280.

This appeal presents precisely the situation envisioned by Rule 23(f). This Court's review of the district court's orders will provide courts in this Circuit with crucial guidance on the proper interpretation of *Wal-Mart*. Other Courts of Appeals have already interpreted *Wal-Mart* in different ways. *Compare Bennett v. Nucor Corp.*, 656 F.3d 802 (2011), with *Sullivan,* 2011 U.S. App. LEXIS 25185 at *49. These issues and the seminal Rule 23(c)(4) issue are proper and timely subjects for interlocutory review.

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[12] Merrill Lynch faults plaintiffs for not filing a formal §1292(b) on September 27, 2011. But instead of waiting for a formal motion, the district court issued its ruling and §1292(b) certification on September 19. Plaintiffs could not have obtained a corrected §1292(b) certification before September 29, and if they had tried, Merrill Lynch would no doubt be arguing now that plaintiffs had missed the 10-day deadline under §1292(b).

CONCLUSION

Appellants respectfully request that this Court reverse the district court's denial of class certification as to liability and injunctive relief, and remand the case for the district court to consider whether some individual relief issues should be accorded class treatment.

Respectfully submitted:

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), as modified by Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2000, with text in 12-point Century font and footnotes in 11-point Century font.

January 5, 2012

/s/ Linda D. Friedman
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

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Plaintiffs-Appellants,	)	
v.	)	
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,	)	
Defendant-Appellee.	)	

I hereby certify that on January 5, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. The following counsel will be served via email on today's date:

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