No. 19-

In the Supreme Court of the United States

STERLING JEWELERS INC., PETITIONER

v.

LARYSSA JOCK, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662 (2010), this Court held that an arbitrator cannot compel class arbitration if the agreement is "silent" on the question and the arbitrator relies on a policy-based rationale; what is needed is affirmative consent to resolve disputes through classwide arbitration. In *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019), this Court held that a court cannot compel class arbitration merely by finding that an agreement does not unambiguously prohibit it and should be construed against the drafter. Affirmative consent is needed.

Here, an arbitrator compelled class arbitration—and certified a class with 70,000 absent class members—without finding consent, and merely by concluding that the agreement does not unambiguously prohibit class arbitration and should be construed against the drafter. Nonetheless, the Second Circuit upheld the arbitrator's authority to bind the parties and absent class members by distinguishing *Stolt-Nielsen* on the ground that the contract is ambiguous (as in *Lamps Plus*), then distinguishing *Lamps Plus* on the ground that the decision was made by an arbitrator (as in *Stolt-Nielsen*).

The question presented is whether an arbitrator may compel class arbitration—binding the parties and absent class members—without finding actual consent, and instead based only on a finding that the agreement does not unambiguously prohibit class arbitration and should be construed against the drafter.

PARTIES TO THE PROCEEDING

Petitioner Sterling Jewelers Inc. was appellee in the court of appeals.

Respondents were appellants in the court of appeals. They are Laryssa Jock, Christy Chadwick, Maria House, Denise Maddox, Lisa McConnell, Gloria Pagan, Judy Reed, Linda Rhodes, Nina Shahmirzadi, Leighla Smith, Marie Wolf, and Dawn Souto-Coons, for themselves and on behalf of a class of similarly situated individuals.

Jacquelyn Boyle, Kelly Contreras, Lisa Follett, and Khristina Rodriguez were initially plaintiffs and counter-defendants in the district court but settled their claims. They are no longer parties and were not appellants in the court of appeals.

RULE 29.6 STATEMENT

Signet Group plc, a publicly traded company, is the parent corporation to petitioner Sterling Jewelers Inc., and owns 10% or more of its stock. No entity owns 10% or more of the stock of Signet Group plc.

RELATED PROCEEDINGS

United States District Court for the Southern District of New York:

Jock v. *Sterling Jewelers Inc.*, No. 08 Civ. 2875 (Jan. 15, 2018)

United States Court of Appeals for the Second Circuit:

Jock v. *Sterling Jewelers Inc.*, No. 18-153 (Nov. 18, 2019)

Jock v. *Sterling Jewelers Inc.*, No. 15-3947 (July 24, 2017)

Jock v. *Sterling Jewelers Inc.*, No. 16-1731 (June 1, 2017)

Jock v. *Sterling Jewelers Inc.*, No. 10-3247 (July 1, 2011)

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OPINIONS BELOW

The latest opinion of the court of appeals (App. 1a-17a) is reported at 942 F.3d 617 (*Jock IV*). A prior opinion of the court of appeals (App. 52a-92a) is reported at 646 F.3d 113 (*Jock I*). Two intervening summary orders (App. 33a-36a and 27a-32a) are not reported but available at 691 Fed. Appx. 665 (*Jock III*) and 703 Fed. Appx. 15 (*Jock II*), respectively.

The district court's opinion and order (App. 18a-26a), vacating the class certification award is reported at 284 F. Supp. 3d 566. Prior opinions of the district court (App. 37a-50a, 93a-108a and 109a-120a) are reported at 143 F. Supp. 3d 127 (order vacating the class determination award), 725 F. Supp. 2d 444 (indicative ruling that the district court would vacate the clause construction award), and 677 F. Supp. 2d 661 (initial order denying motion to vacate clause construction award).

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2019. App. 1a. The court of appeals denied a timely petition for rehearing en banc on January 15, 2020. *Id.* at 122a. On March 19, 2020, the Court issued an order extending the time for filing a petition for a writ of certiorari to 150 days from the judgment, thus to and including June 15, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, is reproduced in the appendix. App. 125a-136a.

STATEMENT

This Court has already granted certiorari twice to establish that class arbitration cannot proceed without an affirmative contractual basis that the parties agreed to it. See *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). The Second Circuit nonetheless continues to allow an arbitrator to compel class arbitration and certify a class that binds parties and absent class members without their consent. This Court accordingly needs to grant certiorari yet again to prevent evasion of its rulings and avoid serious due process problems on a vast scale.

In *Stolt-Nielsen*, this Court reversed a permissive Second Circuit decision that had allowed class arbitration to proceed without consent. This Court held that arbitrators "exceed[] their powers" under the Federal Arbitration Act (FAA), 9 U.S.C. 10(a)(4), if they compel class arbitration on the basis of contractual "silence" coupled with a policy-based rationale, requiring instead that the parties "*agreed to authorize* class arbitration." 559 U.S. at 687. In *Lamps Plus*, this Court similarly

held that a court cannot compel class arbitration on the basis that an agreement does not unambiguously prohibit it and should be construed against the drafter. The Court explained that *Stolt-Nielsen* "controls the question" because it establishes that the FAA requires actual consent, so "[n]either silence nor ambiguity" is sufficient. *Lamps Plus*, 139 S. Ct. at 1416-1417. And the *contra proferentem* canon is a policy-based rationale that "cannot substitute for the requisite affirmative 'contractual basis for concluding that the parties *agreed* to class arbitration.'" *Id.* at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684) (alterations omitted).

The law in the Second Circuit, however, remains unchanged in many (if not most) arbitration cases. The arbitral agreement here nowhere mentions class arbitration and includes many provisions indicating that the parties intended only bilateral arbitration. Nonetheless, the arbitrator compelled class arbitration—and certified a class with approximately 70,000 absent class members—by reasoning that the contract does not unambiguously prohibit class arbitration and should be construed against its drafter, petitioner Sterling Jewelers Inc. (Sterling). Notwithstanding the lack of any finding of actual consent, the Second Circuit affirmed and established a rule that renders this Court's arbitration precedents often irrelevant in one of the Nation's largest and most commercially important circuits.

In an initial appeal (*Jock I*) before *Lamps Plus*, a divided Second Circuit panel distinguished *Stolt-Nielsen* on the grounds that (1) the agreement is ambiguous, not "silent"; and (2) the arbitrator did not rely on public policy but instead relied on state law to construe ambiguity against the drafter. App. 73a-78a. *Lamps Plus*, however, squarely rejected both distinctions. Rather than correcting its error in a subsequent appeal, the Second

Circuit has now doubled down, dramatically extending its reasoning to bind 70,000 absent class members. The Second Circuit reasoned that "*Lamps Plus* does not undermine our reasoning in *Jock I*" because here an arbitrator (not a court) decided class arbitrability, so the standard of review is deferential. App. 16a. But that same deferential standard of review applied—and was overcome—in *Stolt-Nielsen* itself. See 559 U.S. at 684. After distinguishing *Stolt-Nielsen* on the ground that this case resembles *Lamps Plus*, the Second Circuit thus distinguished *Lamps Plus* on the ground that it actually resembles *Stolt-Nielsen*.

This case accordingly presents the question whether the rule of *Lamps Plus* applies where, as in *Stolt-Nielsen*, an arbitrator (not a court) decided that class arbitration was available. Can an arbitrator compel class arbitration—and certify a class with myriad absent class members who never agreed to it—merely on the basis that the contract does not unambiguously prohibit it and should be construed against the drafter? A circuit conflict has not yet developed, but the Second Circuit's decision conflicts with *Stolt-Nielsen* and *Lamps Plus* and the legal question here is at least as important as the questions in those cases. Parties frequently assign questions of arbitrability and procedure to the arbitrator—as in *Stolt-Nielsen* and under arbitral rules that most agreements incorporate. And as Judge Winter noted in dissenting from *Jock I*, ambiguity is far more common than an "idiosyncratic" stipulation that the contract is silent. See App. 83a-84a n.5 (Winter, J., dissenting). The issue accordingly will arise again and again. Indeed, it has already arisen in the Supreme Court of Alabama, which similarly disregarded this Court's reasoning and held that an arbitrator may compel class arbitration merely by finding that the agreement does not

unambiguously prohibit it and should be construed against the drafter. See *Ala. Psychiatric Servs., P.C.* v. *Lazenby*, 292 So. 3d 295, 308 (2019).

This case also exemplifies the practical problems—and due process concerns—created by forcing parties and absent class members to engage in class arbitration without their consent. This Court has emphasized that the FAA envisions bilateral arbitration, which is fast, simple, and inexpensive. See *Lamps Plus*, 139 S. Ct. at 1416; *Stolt-Nielsen*, 559 U.S. at 685-687. Yet this case has been pending since 2008, with four appeals and at immense cost. Moreover, the Second Circuit affirmed the arbitrator's authority over a class of *70,000 absent class members*—about the population of Youngstown, Ohio—without finding that any of those people actually agreed to participate in or have their own rights determined by such an action. Myriad absent class members thus could potentially "unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 575 (2013) (Alito, J., concurring) (quoting *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546–547 (1974)). To ensure the consistent, nationwide force of its arbitration precedents and to avoid serious due process problems, this Court should grant certiorari and reverse.

A. Background and the Arbitration Agreement

Petitioner operates jewelry stores in all fifty states, with about 17,000 employees. Respondents are female current and former Sterling retail sales employees. Each agreed to a contract ("Agreement") providing for resolution of claims arising out of her employment

through the RESOLVE Program, a three-step process culminating in binding arbitration. App. 298a-301a.[1]

Each agreed to use the Program to resolve "any dispute … regarding any alleged unlawful act regarding my employment." *Id.* at 298a; see *id.* at 299a ("I agree to follow the multi-step process"). In Step 1, "[a]n employee" must file a complaint specifying how "he/she has been subjected to an unlawful action." *Id.* at 308a. After an investigation, a response will be sent to "the employee." *Ibid.* If "[a]n employee" is unsatisfied, she may proceed to Step 2, in which "[a] skilled Mediator will meet with you and a Company official to attempt to resolve a claim." *Id.* at 309a, 313a. If "the employee" is still dissatisfied, Step 3 allows "the employee to file for neutral and binding arbitration." *Id.* at 310a.

Arbitration must occur "[i]n a location convenient to you," "near the site where the complaint arose." *Id.* at 316a, 310a. Ohio law governs construction of the Agreement, but "the substantive law of the jurisdiction where the complaint arose" governs any claim. *Id.* at 300a, 310a. The American Arbitration Association (AAA) National Rules for the Resolution of Employment Disputes apply in the arbitration. *Id.* at 299a. And "questions of arbitrability" and "procedural questions" "shall be decided by the arbitrator," unless a judicial proceeding is already pending in which case "a court may decide procedural questions that grow out of the dispute." *Id.* at 305a. The arbitrator may "award any types of legal or

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[1] There are several versions of the Agreement, but they are materially identical for purposes of this Court's review. See D. Ct. Docs. 58-5, 58-6 (June 30, 2009). The Program Rules and brochure, available to all employees, set forth the Program details. App. 299a; see *id.* at 302a-317a.

equitable relief that would be available in a court of competent jurisdiction." *Id.* at 299a.

The Program brochure sets forth the advantages of arbitration in a simple chart:

	Judicial System Courtroom	**ADR RESOLVE Program**
Average time to resolve the case:	Resolution can take years.	Resolution can be completed in **3-4 months or sooner**.
Typical **time spent** in case for personal testimony:	**1 to 4 weeks**	**1 to 3 days**
Location of hearing:	**Wherever court is located.**	In a **location convenient to you.**
Rules and procedures:	**Very technical and varies** between courts. Cases can be dismissed before you've had a chance to present your case.	Simple process controlled by **minimal rules**. All proceedings are clearly outlined.
Costs:	**Multiple thousands of dollars.**	**Minimal costs, if any**, dependent upon steps taken.
Selection of person judging the case:	**A judge who may not have employment law experience.** A possible jury (of unknown people) selected by the judge and lawyers.	**In Step 3 you and the Company select a skilled, experienced employment law Arbitrator.**
Decisions:	Decisions **can be appealed and overturned.**	Decision is protected if for you. **The Company cannot appeal.**

Id. at 315a-316a (emphasis in original).

B. Procedural History

1. This case has been pending since 2008 and has involved four appeals. The only claims certified as a class and collective action involve disparate-impact theories of gender discrimination in pay and promotions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and the Equal Pay Act, 29 U.S.C. 206(d). In particular, Sterling used a "Wage Rate Generator" algorithm to set starting pay using neutral criteria, and respondents contend that the use of prior management experience as a factor disproportionately benefitted men. App. 263a-264a. Respondents also contend that certain promotion practices had a disparate impact on women. See *ibid.*

Respondents instituted a putative class action in the United States District Court for the Southern District of New York, then a week later instituted a putative class arbitration before the American Arbitration Association. They moved for the district court to refer the matter to the arbitrator as a single classwide dispute, while Sterling objected and moved for a declaration that arbitration could only be bilateral. 564 F. Supp. 2d 307, 310. The court (Rakoff, J.) interpreted the Agreement to allow the court to assign questions of class arbitrability to the arbitrator and granted respondents' motion, denied Sterling's motion, and referred the class arbitration question to the arbitrator. *Id.* at 310.

On June 1, 2009, the arbitrator issued a Clause Construction Award, determining that class procedures were available over Sterling's objections to the arbitrator's decision and authority to decide the question. App. 291a-297a. The arbitrator recognized that "there is no mention of class claims in any version of the Agree-

ment." *Id.* at 294a. She also did not find implicit consent to class arbitration. Instead, she applied *contra proferentem* to decide the availability of class procedures. "Because this contract was drafted by Sterling and was not the product of negotiation," she reasoned, "it was incumbent on Sterling" to "clearly express[]" that class arbitration was barred. *Id.* at 295a-296a.

The arbitrator determined that the Agreement did not clearly prohibit class treatment and construed the ambiguity against Sterling. Although the Agreement includes "a step process for individual claims," she observed that it does not "expressly prohibit" class claims and it empowers the arbitrator "'to award any types of legal or equitable relief that would be available in a court.'" *Id.* at 294a-296a. She found that the Agreement did not "manifest an intent to waive the right to participate in a collective action" and "cannot be construed to prohibit class arbitration." *Ibid.*

Sterling moved in the district court to vacate the Award. The court denied the motion by relying on then-controlling circuit precedent in *JLM Industries, Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004), rev'd, 559 U.S. 662 (2010); see App. 109a-120a.

2. While Sterling's appeal was pending, this Court decided *Stolt-Nielsen*, reversing the Second Circuit ruling on which the district court had relied. That ruling had allowed an arbitral panel to compel class arbitration on the basis of an agreement that was "silent" on the subject. 559 U.S. at 672, 677. Like the arbitrator here, the arbitrators in *Stolt-Nielsen* had asked whether the agreement "establish[ed] that the parties … intended to *preclude* class arbitration." *Id.* at 684. This Court described that approach as "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Ibid.*

This Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Ibid.*; see *id.* at 687 ("[W]e see the question as being whether the parties *agreed to authorize* class arbitration."). And although judicial review of an arbitrator's decision under FAA § 10(a)(4) is deferential, this Court concluded that the arbitrators had exceeded their authority by compelling arbitration without consent and instead based on their "own view[s] of sound policy." *Id.* at 672 & n.3.

Following *Stolt-Nielsen*, the district court issued an indicative ruling that it would vacate the arbitrator's Clause Construction Award as being "in excess of her powers" under Section 10(a)(4). App. 101a. The district court noted that respondents "concede, as they must," that the Award "did not by its terms rest upon a finding that the parties manifested any affirmative intention to permit class arbitration." *Ibid.* The arbitrator "started from the premise that an arbitration clause silent on class arbitration may be construed to permit such arbitration." *Id.* at 102a. The district court determined that "[t]his approach is plainly incompatible" with *Stolt-Nielsen*. *Ibid.* Jurisdiction was returned to the district court and it vacated the Award. *Id.* at 61a.

A divided panel of the Second Circuit reversed, reinstating the Clause Construction Award. *Id.* at 52a-81a. Writing for the majority, Judge Hall distinguished *Stolt-Nielsen*. "[U]nlike *Stolt-Nielsen*," the majority stated, "the parties have not stipulated that the agreement is 'silent' as to class arbitration—that is, the parties here are not in agreement that the RESOLVE agreement contains no explicit or implicit intent regarding the issue of class arbitration." *Id.* at 73a. The majority also emphasized that, in *Stolt-Nielsen*, "the arbitration panel

based its holding on public policy grounds." *Id.* at 77a. The majority assumed that the arbitrator had not because, in its view, the arbitrator's ruling had a "colorable justification under Ohio law," namely, that "Ohio law does not bar class arbitration." *Id.* at 74a; see *id.* at 58a ("In other words, the arbitrator construed the absence of an express prohibition on class claims against the contract's drafter, Sterling.").

Judge Winter dissented. *Id.* at 81a-92a. Under *Stolt-Nielsen*, he wrote, an "'implicit' agreement to class arbitration cannot … be inferred from an arbitration agreement's 'silence' or 'failure to preclude' class arbitrations, much less from thin air." *Id.* at 84a; see *id.* at 85a ("Nowhere in her opinion does she purport to identify any provision of the agreement supporting the existence of an implied agreement."). He observed that the standard of review is the same as in *Stolt-Nielsen*. *Id.* at 91a-92a. And he explained that the majority's focus on the "*sui generis* and idiosyncratic stipulation" in *Stolt-Nielsen* made that case "an insignificant precedent" in the Second Circuit. *Id.* at 83a-84a n.5.

Sterling filed a petition for a writ of certiorari, which was denied. *Id.* at 51a.

3. On February 2, 2015, the arbitrator issued a Class Determination Award, certifying a mandatory nationwide class for Title VII declaratory and injunctive relief based on respondents' disparate-impact claims. App. 282a; cf. Fed. R. Civ. P. 23(b)(2).[2] The certified class consists of female current and former Sterling retail employees since July 22, 2004. App. 140a-141a, 290a. The arbitrator concluded that absent class members were bound because each had signed a RESOLVE

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[2] The arbitrator initially certified an opt-out class, but subsequently amended her order to make it mandatory. App. 137a-138a.

Agreement providing for arbitration and assigning questions of arbitrability and procedure to the arbitrator. *Id.* at 148a-149a, 289a-290a. There are now approximately 70,000 class members, only 254 of whom opted in or are named plaintiffs. *Id.* at 6a, 22a.

After two intervening appeals, see *id.* at 27a-36a, the district court vacated the Class Certification Award "in so far as that Award certifies a class that includes individuals who have not affirmatively opted in to the arbitral proceedings." *Id.* at 26a. The court determined that the FAA does not authorize arbitrators to bind individuals who have not "'submitted themselves' to the Arbitrator's authority 'in any way.'" *Id.* at 24a (quoting *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring)). "[A]n 'arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination.'" *Id.* at 24a-25a. (quoting *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring)).

While respondents' appeal was pending, this Court decided *Lamps Plus*, holding that a court cannot compel class arbitration merely by finding an agreement to be ambiguous as to class arbitration and construing it against the drafter. This Court determined that "*Stolt-Nielsen* controls the question" and reiterated that "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so.'" *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684). "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Id.* at 1417. The Court further determined that *contra proferentem* is a policy-based doctrine that does not establish consent. *Id.* at 1417-1418.

4. After *Lamps Plus*, the court of appeals reinstated the arbitrator's Class Determination Award. App. 1a-17a. The court determined that "*Lamps Plus* does not undermine our reasoning in *Jock I*." *Id.* at 16a. The court distinguished *Lamps Plus* on the basis that Section 10(a)(4)'s deferential standard of review did not apply. *Id.* 16a-17a. The court did not mention, however, that Section 10(a)(4) had applied in *Stolt-Nielsen*. The court of appeals further noted that "an arbitration agreement may be interpreted to include implicit consent to class procedures." *Ibid.* Yet the court did not claim that the arbitrator had found implied consent, nor did the court address the arbitrator's reliance on *contra proferentem*, which it had recognized in *Jock I*.

The Second Circuit further extended its prior ruling, determining that, merely "by signing the RESOLVE Agreement" that assigned questions of arbitrability to the arbitrator, the absent class members had adequately expressed their intent to be bound. *Id.* at 3a. "[T]hey, no less than the parties, bargained for the arbitrator's construction of that agreement with respect to class arbitrability." *Ibid.*

The court of appeals remanded for the limited purpose of allowing the district court to consider whether the class could be certified only as a mandatory, not opt-out, class. *Id.* at 17a. The arbitrator had previously amended the award, however, to make the class mandatory rather than opt-out. *Id.* at 137a-138a.

5. On January 13, 2020, the court of appeals denied Sterling's petition for rehearing en banc. On January 22, 2020, it stayed the mandate pending the outcome of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Second Circuit's decision renders both *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019), inoperative in a wide swath of arbitration cases in one of the Nation's leading arbitration centers. Arbitrators (not courts) often decide whether class arbitration is available. Yet under the Second Circuit's decisions, so long as plaintiffs do not make the mistake of stipulating that an agreement is "silent," an arbitrator may compel class arbitration—and bind absent class members—merely on the basis that the agreement does not unambiguously prohibit class arbitration and is to be construed against the drafter. According to the Second Circuit, that is enough to distinguish both *Stolt-Nielsen* and *Lamps Plus*: The agreement is ambiguous not silent (distinguishing *Stolt-Nielsen* but not *Lamps Plus*) and the standard of review is deferential (distinguishing *Lamps Plus* but not *Stolt-Nielsen*).

This Court should not permit such circumvention of its precedents from continuing for years to come. *Stolt-Nielsen* and *Lamps Plus* together state a clear rule: Class arbitration cannot be compelled without affirmative consent, and neither ambiguity nor silence is accordingly sufficient. That rule is controlling here. There is no sound basis for an exception allowing private arbitrators (but not Article III courts) to compel class arbitration and bind absent class members without ever finding that they actually consented to class treatment. Indeed, arbitrators' power to bind derives exclusively from consent.

This case also embodies all the problems with class arbitration that this Court has been trying to prevent.

Although the Program brochure lauded arbitration as fast, convenient, and simple—all benefits of bilateral, not class arbitration—this case has been pending for 12 years, with four appeals and great complexity. The class consists of approximately 70,000 people—far larger than the classes in *Stolt-Nielsen* or *Lamps Plus*. And virtually all are absent class members over whom the arbitrator asserted authority without their consent. The Second Circuit's decision thus is wrong, causes serious due process problems, and warrants review.

I. The Decision Below Flouts *Stolt-Nielsen* And *Lamps Plus* And Gives Rise To Serious Due Process Problems

A. An Arbitrator Cannot Compel Class Arbitration Without Finding That The Parties—And Absent Class Members—Affirmatively Consented

1. "[T]he first principle that underscores all of" this Court's arbitration decisions is "that [a]rbitration is strictly a matter of consent." *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Granite Rock Co.* v. *Int'l Bros. of Teamsters*, 561 U.S. 287, 299 (2010)); see *Stolt-Nielsen*, 559 U.S. at 681 (Arbitration "is a matter of consent, not coercion.") (citation omitted). Because "arbitrators wield only the authority they are given," "[c]onsent is essential." *Lamps Plus*, 139 S. Ct. at 1416.

In light of the "[c]rucial differences between individual and class arbitration," this Court has repeatedly held that "parties cannot be compelled to submit their dispute to class arbitration" unless "the parties *agreed to authorize* class arbitration." *Stolt-Nielsen*, 559 U.S. at 687; see *Lamps Plus*, 139 S. Ct. at 1419 ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."). Parties agreeing to bilateral arbitration "forgo the procedural rigor and appellate review of the courts in order to

realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. Class arbitration "lacks those benefits," *Lamps Plus*, 139 S. Ct. at 1416, and "wind[s] up looking like the litigation it was meant to displace," *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018)—but with limited procedural protections and appellate review. See *Stolt-Nielsen*, 559 U.S. at 685-687 (emphasizing the "crucial differences" between individual and class arbitration that gave "reason to doubt the parties' mutual consent to resolve disputes through class wide arbitration"). This Court has accordingly concluded that class arbitration cannot proceed without affirmative consent.

2. In *Stolt-Nielsen*, this Court held that arbitrators exceeded their "limited powers under the FAA" by compelling class arbitration when the contract was "silent" on the issue, the arbitrators relying instead on their "own policy choice." 559 U.S. at 675-676, 687; see *id.* at 685 (it "cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator"). The Court determined that arbitrators "exceed[] their powers" under FAA § 10(a)(4) by compelling class arbitration in such circumstances. *Id.* at 671; see *id.* at 671 n.3.

In *Lamps Plus*, this Court similarly established that a court cannot compel class arbitration merely by finding that the agreement is ambiguous then construing it against the drafter. "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." 139 S. Ct. at 1417. What

is needed is "an affirmative 'contractual basis for concluding that the party *agreed*'" to class arbitration. *Id.* at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

Lamps Plus further held that the *contra proferentem* canon is a policy-based rationale that "cannot be applied to impose class arbitration in the absence of the parties' consent." 139 S. Ct. at 1418. It is "triggered only after a court determines that it *cannot* discern the intent of the parties," it "provides a default rule based on public policy considerations," and it "seeks ends other than the intent of the parties." *Id.* at 1417. *Contra proferentem* thus "cannot substitute for the requisite affirmative 'contractual basis for concluding that the parties *agreed* to class arbitration.'" *Id.* at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684). "[T]he FAA provides the default rule for resolving ambiguity," the Court explained. *Ibid.* "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration.'" *Id.* at 1416 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011)).

B. The Second Circuit Erred In Nonetheless Allowing The Arbitrator To Compel Class Arbitration Without Affirmative Consent

1. Under those principles, the arbitrator "exceeded [her] powers," *Stolt-Nielsen*, 559 U.S. at 677, as both the district court and Judge Winter in his dissent in *Jock I* correctly recognized. App. 26a, 81a, 101a.

First, the arbitrator exceeded her powers because she compelled class arbitration without finding consent and instead on the basis of ambiguity. Indeed, the arbitrator's decision is strikingly similar to the Ninth Circuit decision this Court reversed in *Lamps Plus*. After recognizing that "there is no mention of class claims in any

version of the Agreement," the arbitrator disclaimed an effort to discern the parties' intent, remarking that "the very concept of intent is problematic in the context of a contract of adhesion." App. 294a-296a. She determined merely that the contract "cannot be construed to prohibit class arbitration." *Id.* at 296a; see *ibid.* (the Agreement "does not manifest an intent to waive the right to participate in a collective action" and "cannot be construed to prohibit class arbitration"). Respondents in turn conceded that the decision "did not by its terms rest upon a finding that the parties manifested any affirmative intention to permit class arbitration." *Id.* at 101a; see *ibid.* (quoting respondents' counsel conceding "that there's nothing explicit in the [arbitrator's] clause construction that provides for a finding of assent by the parties").

That decision squarely violates this Court's rule that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 559 U.S. at 684; see *Lamps Plus*, 139 S. Ct. at 1416 (describing *Stolt-Nielsen* as requiring an "affirmative" contractual basis for consent).

Second, in contravention of *Stolt-Nielsen* and *Lamps Plus*, the arbitrator relied on a policy-based rationale to compel class arbitration, namely, she construed the Agreement against its drafter. "Because this contract was drafted by Sterling and was not the product of negotiation," the arbitrator reasoned, "it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed." *Id.* at 295a-296a. She found that "provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators" and "a step process for individual claims" were insufficient to "clearly express[]"

that class arbitration was prohibited, when the Agreement also provided for award of "any types of legal or equitable relief that would be available in a court of competent jurisdiction." *Ibid.*

The Second Circuit itself recognized that "the arbitrator construed the absence of an express prohibition on class claims against the contract's drafter, Sterling." *Id.* at 58a. Respondents recognized the same thing. See Br. in Opp. 5, No. 11-693 (Feb. 6, 2012) ("[I]nvoking Ohio law to construe any ambiguity about the parties' intentions against Sterling, the drafter of the Agreement, the Arbitrator construed the Agreement to authorize class arbitration."); *id.* at 21 ("The Arbitrator … applied the traditional principle of contract law that ambiguous terms should be construed against their drafter."). *Lamps Plus* establishes, however, that *contra proferentem* "cannot substitute for the requisite affirmative 'contractual basis for concluding that the parties *agreed* to class arbitration.'" 139 S. Ct. at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

2. The court of appeals identified no sound basis for distinguishing both *Stolt-Nielsen* and *Lamps Plus*. In *Jock I*, the Second Circuit distinguished *Stolt-Nielsen* on the grounds that the Agreement was ambiguous, not "silent," and that the arbitrator had not "relied on public policy" in compelling class arbitration based on that ambiguity. App. 72a, 77a. Those distinctions may have been debatable at the time, but this Court has now foreclosed them. *Lamps Plus* establishes that (1) neither ambiguity nor silence is sufficient because the FAA requires affirmative consent; and (2) *contra proferentem* is a policy-based rationale, not a mechanism for identifying consent. See 139 S. Ct. at 1416-1418.

Rather than correcting its error, the Second Circuit in *Jock IV* distinguished *Lamps Plus* on the ground that

a court (not an arbitrator) made the class-arbitration decision there, such that Section 10(a)(4)'s deferential standard was inapplicable. But that *very same deferential standard* applied—and was overcome—in *Stolt-Nielsen* itself. This Court held in *Stolt-Nielsen* that arbitrators had exceeded their authority under Section 10(a)(4) by compelling class arbitration without "a contractual basis for concluding that the part[ies] *agreed* to" it. 559 U.S. at 671-672, 672 n.3, 684. That is exactly what the arbitrator did here, as Judges Winter and Rakoff recognized. See App. 91a-92a (Winter, J., dissenting); *id.* at 102a.

The Court's reasoning in *Lamps Plus* applies with full force to an arbitrator's decision reviewed under Section 10(a)(4). This Court explained in *Lamps Plus* that *Stolt-Nielsen* "controls the question" of whether ambiguity is sufficient by establishing that an arbitrator exceeds her authority under the FAA if she compels class arbitration without identifying "a contractual basis for concluding that the part[ies] *agreed* to" it. *Lamps Plus*, 139 S. Ct. at 1416, 1419; *Stolt-Nielsen*, 559 U.S. at 684; see *Lamps Plus*, 139 S. Ct. at 1417 ("Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself."). The standard of review also does not impact this Court's determination that *contra proferentem* "seeks ends other than the intent of the parties." *Ibid.*

The court of appeals also noted that "an arbitration agreement may be interpreted to include implicit consent to class procedures." App. 17a. But the court of appeals in *Jock IV* did not hold that the arbitrator had, in fact, found implied consent. As discussed above, see p. 18, *supra*, the arbitrator instead described "the very concept of intent" as "problematic." App. 295a. She

found merely that the Agreement did not "clearly" prohibit class arbitration then construed it against its drafter. *Id.* at 296a. And to the extent the Second Circuit meant that *Jock I* itself was based on a finding of implied consent, in that the arbitrator had "divin[ed] the parties intent" by finding the contract ambiguous then construing it against the drafter, *id.* at 78a, that does not distinguish *Lamps Plus* either but rather falls squarely within its holding. See *id.* at 58a-59a (recognizing that the arbitrator applied *contra proferentem*); *id.* at 74a (stating that the arbitrator "had a colorable justification under Ohio law to reach the decision she did, to wit, Ohio law does not bar class arbitration"). *Lamps Plus* establishes that c*ontra proferentem* does not divine intent and "cannot substitute for the requisite finding" of affirmative consent. 139 S. Ct. at 1419. Intent implied on such basis is a fiction made up "from thin air." App. 84a (Winter, J., dissenting).

Quite simply, the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." *Lamps Plus*, 139 S. Ct. at 1415; *id.* at 1417 ("Neither silence nor ambiguity" is sufficient.). Yet ambiguity is all the arbitrator found.

C. The Second Circuit's Decision Raises Serious Due Process Problems By Binding 70,000 Absent Class Members Without Their Consent

To make matters worse, the court of appeals dramatically extended its prior decision by affirming the class-certification award and upholding the arbitrator's authority to bind absent class members—approximately 70,000 people, App. 1a-17a, 23a—even though (1) the arbitrator never found that the absent class members consented to be bound by a class arbitration; (2) the Agree-

ment nowhere mentions class arbitration and is ambiguous at best; (3) the absent class members never went through the first two steps of the dispute-resolution process, a predicate to arbitration under the RESOLVE Program; and (4) the absent class members did not opt in to the proceeding before this arbitrator or otherwise agree to her authority. Without this Court's intervention, tens of thousands of people thus will have their rights adjudicated by a private arbitrator on a classwide basis, without ever affirmatively agreeing to submit themselves to classwide arbitration, nor even to her authority. *See Oxford Health*, 569 U.S. at 574 (Alito, J., concurring).

The court of appeals' decision raises "serious due process concerns" by adjudicating "the rights of absent [class] members" with "only limited judicial review." *Lamps Plus*, 139 S. Ct. at 1416. Reflecting the "deep-rooted historic tradition that everyone should have his own day in court," *Taylor* v. *Sturgell*, 553 U.S. 880, 892-893 (2008) (quoting *Richards* v. *Jefferson Cty.*, 517 U.S. 793, 798 (1996)), class actions require additional procedural protections because they are "an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense," *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 808 (1985). A class arbitration requires "[a]t least" as much process as a corresponding class action, particularly because the FAA's limitations on judicial review "make[] it more likely that errors will go uncorrected." *Concepcion*, 563 U.S. at 349-350.

Unlike an Article III court, an arbitrator "is not a public tribunal imposed upon the parties by superior authority." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The arbitrator

"has no general charter to administer justice for a community which transcends the parties," and instead is "part of a system of self-government created by and confined to the parties." *Ibid.* It accordingly raises serious constitutional problems for courts to enforce an award binding absent class members without ensuring that those individuals agreed to "submit[] themselves to this arbitrator's authority." *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring). As Justice Alito has explained, "[i]t is true that" absent class members may have "signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought this suit. But an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Ibid*.

Class arbitration in turn creates a heads-I-win, tails-you-lose problem. A principal advantage of class actions is finality, as the entire class is bound by the judgment, win or lose. See *Cooper* v. *Fed. Reserve Bank*, 467 U.S. 867, 874 (1984). For a class arbitration, however, finality may be one-sided. Although the defendant would be bound by a class-arbitration loss, a judgment in favor of the defendant may be "vulnerable to collateral attack" by absent class members who dispute that they ever consented to the arbitrator's authority or challenge the adequacy of the process provided. *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring). Absent class members thus may "unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Ibid.* (quoting *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-547 (1974)).

The canon of constitutional avoidance therefore counsels strongly in favor of interpreting the FAA to mean,

as per *Stolt-Nielsen* and *Lamps Plus*, that arbitrators exceed their powers if they compel class arbitration merely on the basis of silence or ambiguity. *E.g.*, *Jones* v. *United States*, 529 U.S. 848, 851 (2000) ("constitutionally doubtful constructions should be avoided where possible"). The FAA requires an "affirmative 'contractual basis for concluding'" that the parties—the plaintiffs, the defendant, and the absent class members—"'*agreed* to [class arbitration].'" *Lamps Plus*, 139 S. Ct. at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684). And although courts will defer to an arbitrator's determination that a contract embodies parties' consent, see *Oxford Health*, 569 U.S. at 573, the arbitrator here made no such finding to which to accord deference. The arbitrator merely determined that the contract does not unambiguously prohibit class treatment. Under *Stolt-Nielsen* and *Lamps Plus* and as a matter of due process, that is insufficient.

The due process concerns are particularly concerning because ample evidence shows that Sterling and the absent class members intended *only* bilateral arbitration. As the arbitrator recognized, "there is no mention of class claims in any version of the Agreement." App. 294a. Instead, it "contain[s] provisions that, among other things, require claimants to complete a multi-step process before submitting their disputes to an arbitrator, require the arbitration to take place in a local venue, and require the arbitrator to apply local law." *Id.* at 106a. Those requirements are nonsensical in a class arbitration. The Agreement also speaks solely in the singular, referring repeatedly to "my employment," "my agreement," "my right," and "the employee." *Id.* at 298a-301a. And the chart in the brochure highlights the expectation that arbitration would be bilateral: It explains that arbitration is resolved in "3-4 months or sooner" not

"years"; testimony takes "1 to 3 days" not "1 to 4 weeks"; the rules are "minimal" and "clearly outlined," not "technical"; and costs are "minimal." *Id.* at 315a-316a; see p. 7, *supra*.[3] Swift, inexpensive procedures are the hallmarks of the bilateral arbitration Congress envisioned when enacting the FAA, but are inconsistent with class arbitration. And this case proves the point: It has already lasted 12 years, under complex rules, with four appeals and at great cost.

II. The Decision Below Warrants Review Now

The decision below is the first decision of a court of appeals to address a critical question at the intersection of *Stolt-Nielsen* and *Lamps Plus*: Can an arbitrator compel class arbitration—and extend her authority to bind absent class members along with the defendant—merely because an agreement does not unambiguously prohibit it and is to be construed against the drafter? Although no circuit conflict yet exists, that is an important question of federal law that warrants this Court's review now.

1. This Court has already granted certiorari twice to establish the uniform rule of federal law applicable to these kinds of cases: An arbitrator exceeds her authority under FAA § 10(a)(4) if she compels class arbitration without finding that "the parties *agreed to authorize* class arbitration." *Stolt-Nielsen*, 559 U.S. at 687. And

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[3] The provision for "any types of legal or equitable relief that would be available in a court," App. 299a, sheds little or no light on the availability of class arbitration because a class action is not a type of relief. It is a procedural device "used to pursue such relief." *Id.* at 91a (Winter, J., dissenting); see *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.); 28 U.S.C. 2072 (rules of civil procedure "shall not abridge, enlarge or modify any substantive right").

contra proferentem "cannot substitute" for that "requisite" finding, because it does not purport to identify intent. *Lamps Plus*, 139 S. Ct. at 1418-1419.

Unless the Court grants certiorari again, those precedents will be broadly inapplicable in one of the Nation's largest and most commercially important circuits. As Judge Winter noted, the Second Circuit's focus on the "*sui generis* and idiosyncratic" stipulation in *Stolt-Nielsen* renders that decision an "insignificant precedent" in the Second Circuit. App. 83a-84a n.5. Following *Stolt-Nielsen*, class-arbitration plaintiffs will rarely make the mistake of stipulating that a contract is "silent" on class arbitration. And the Second Circuit's ruling considerably narrows the reach of *Lamps Plus* as well: Absent such a stipulation, all that is needed under the Second Circuit's rule is an agreement assigning questions of arbitrability to the arbitrator. In that situation, *Stolt-Nielsen* would be inapplicable (because the contract is ambiguous, not silent) and *Lamps Plus* would be inapplicable (because an arbitrator decided the question, not a court).

That situation will recur with considerable frequency in the employment context and beyond. Many arbitral agreements—including here and in *Stolt-Nielsen*—expressly assign so-called "questions of arbitrability and procedure" to the arbitrator.[4] Moreover, "perhaps 90% of dispute resolution clauses incorporate rules that provide arbitrators authority to resolve issues of arbitrability." John Jay Range, Am. Bar Ass'n, *Recent Developments in Alternative Dispute Resolution, Public Utility,*

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[4] This Court "has not decided whether the availability of class arbitration is a so-called 'question of arbitrability,' which includes these gateway matters." *Lamps Plus*, 139 S. Ct. at 1417 n.4 (citation omitted).

Commc'ns & Trans. Law 2 (2016) (*Recent Developments*). The most common arbitral rules—the AAA rules and the JAMS rules—provide for the arbitrator to decide questions of arbitrability and procedure. See AAA Commercial R-7(a); JAMS R-11(b); see also *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 527-528 (2019); David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 414-415 (2018). Some rules also specifically provide for arbitrators to decide questions of class arbitrability. *E.g.*, AAA Suppl. R. for Class Arbitrations 3.

Many circuits hold that a contract's incorporation of the AAA or JAMS rules is sufficient to assign the question of class arbitrability to the arbitrator. *E.g.*, *Dish Network L.L.C.* v. *Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *JPay, Inc.* v. *Kobel*, 904 F.3d 923, 937-938 (11th Cir. 2018), cert. denied, 139 S. Ct. 1545 (2019); see *Recent Developments* 10 & n.53 (identifying "at least seven circuit courts and many district courts" adopting that rule). And the Second Circuit appeared to adopt that position, explaining that "[t]he RESOLVE Agreement's incorporation of the AAA Rules evinces agreement to have the arbitrator decide the question of class arbitrability." App. 11a.[5] Arbitrators (not courts) thus will often make the critical decision of whether to allow class arbitration.

If the Second Circuit's rule remains in place, this Court's decisions in *Stolt-Nielsen* and *Lamps Plus* thus will have little or no practical effect in the many cases in which the arbitrator decides class arbitrability. Myriad

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[5] Several respondents and many absent class members entered into a RESOLVE Agreement before the AAA enacted its Supplementary Rules for Class Arbitrations. See Pet. for Reh'g En Banc 13 n.6.

class arbitrations will violate the principle that arbitration "is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (citation omitted).

The problem extends beyond the Second Circuit. The Alabama Supreme Court has similarly held that an arbitrator may compel class arbitration without finding consent, and instead by finding that the contract does not unambiguously bar class arbitration and should be construed against its drafter. See *Ala. Psychiatric Servs., P.C.* v. *Lazenby*, 292 So. 3d 295, 307-308 (2019). Like the Second Circuit, the Alabama Supreme Court distinguished *Stolt-Nielsen* on the ground that the parties did not stipulate that the agreement was "silent," then distinguished *Lamps Plus* on the ground that Section 10(a)(4) was inapplicable. *Ibid.*

2. This case is an ideal vehicle. By arising shortly after *Lamps Plus*, it gives the Court the opportunity to prevent evasion of its decisions from occurring for years to come. This Court appears to be facing a pattern in which courts that may not agree with its interpretation of the FAA distinguish this Court's precedents *seriatim* as if each is an island unto itself, establishing a distinct legal rule applicable only in precisely the same circumstances. But this Court's decisions are not isolated rulings; they are different manifestations of a single legal rule: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Lamps Plus*, 139 S. Ct. at 1412 (quoting *Stolt-Nielsen*, 559 U.S. at 684); see *id.* at 1416 ("Our reasoning in *Stolt-Nielsen* controls the question we face today."). Under that rule, the arbitrator exceeded her authority: She never found consent. She merely found ambiguity then relied on the *contra proferentem* rule that this Court held "cannot substitute" for consent. *Id.* at 1419.

Stolt-Nielsen and *Lamps Plus* were closely decided and prompted significant dissents. But "once th[is] Court has spoken" on "what a statute means," "it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994). There is also no need for percolation to determine the best arguments against the Second Circuit's rule. This Court has already articulated those arguments with the force of law.

This case vividly illustrates the stakes. The class in *Stolt-Nielsen* consisted of "hundreds of individuals or entities," *Stolt-Nielsen*, 387 F.3d at 168, and the class in *Lamps Plus* consisted of "approximately 1,300" people, 139 S. Ct. at 1412. This class is an order of magnitude larger, binding approximately 70,000 people—virtually all of whom are absent class members. See App. 23a, 6a. Instead of arbitration taking "3-4 months" with "minimal rules" procedures and "[m]inimal" cost[s], *id.* at 315a-316a, this case has lasted 12 years—and potentially more to come—with four rounds of appeals. And critically, the arbitrator compelled class arbitration for all this time and at all this cost without ever finding that Sterling or the absent class members agreed to class treatment. Quite simply, this is a super-sized class arbitration and a poster child for the problems that this Court has been trying to prevent.

The issue is squarely presented. The arbitrator applied the same rationale as the Ninth Circuit in *Lamps Plus*. Although the contract includes many provisions inconsistent with class arbitration, she determined that the agreement did not unambiguously prohibit it and then construed the ambiguity against the drafter. App. 295a-296a. The arbitrator later extended that ruling to bind absent class members. *Id.* at 137a-138a. And the court of appeals has definitively confirmed the initial

award *and* the certification of the class, rejecting the argument that *Stolt-Nielsen* and *Lamps Plus* are to the contrary. This case thus squarely presents the question whether an arbitrator can compel class arbitration—and bind absent class members—merely by finding that the contract does not unambiguously prohibit class arbitration and is to be construed against its drafter. If the answer is yes, the class arbitration may proceed. If the answer is no, it cannot.

The case arises out of federal court and thus does not implicate Justice Thomas's view that the FAA "does not apply to proceedings in state courts." *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting). And although the court of appeals remanded in part, it did so only for the limited purpose of deciding "whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief." App. 17a. The arbitrator, however, previously amended the class to make it mandatory (not opt-out). The court of appeals' ruling is accordingly final for all practical purposes, and the limited remand has no bearing on this Court's review. *Id.* at 138a.

3. Given the clarity of the error, this Court may wish to consider summarily reversing. The Court has summarily reversed several decisions that manifestly fail to adhere to this Court's arbitration rulings. *E.g.*, *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG, LLP* v. *Cocchi*, 565 U.S. 18 (2011) (per curiam). In any event, whether by summary reversal or plenary review, the judgment below should not be permitted to stand.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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JUNE 2020

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 18, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017

Argued: May 7, 2018
Decided: November 18, 2019

Docket No. 18-153-cv

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, DAWN SOUTO-COONS,

Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,

Plaintiffs-Counter-Defendants,

v.

STERLING JEWELERS INC.,

Defendant-Counter-Claimant-Appellee.

Appendix A

Appeal from the United States District Court
for the Southern District of New York.
No. 08-cv-2875, Rakoff, *Judge*.

Before: HALL AND CARNEY, *Circuit Judges*, AND KOELTL, *District Judge*.*

The arbitrator certified a class of Sterling Jewelers Inc. employees that included employees who did not affirmatively opt in to the arbitration proceeding. The District Court held that the arbitrator exceeded her authority in purporting to bind those absent class members to class arbitration because the arbitrator erred in determining that the arbitration agreement permits class arbitration. We hold that the arbitrator was within her authority in purporting to bind the absent class members to class proceedings because, by signing the operative arbitration agreement, the absent class members, no less than the parties, bargained for the arbitrator's construction of their agreement with respect to class arbitrability. We therefore reverse the judgment of the District Court. Because the issue of whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class is not before us in this appeal, we remand the case to the District Court to reexamine that issue in the first instance.

REVERSED AND REMANDED.

JOSEPH M. SELLERS, Kalpana Kotagal, Shaylyn Cochran, Cohen Milstein Sellers & Toll PLLC, Washington, DC; Sam J. Smith, Loren B. Donnell,

* Judge John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

Burr & Smith LLP, St. Petersburgh, FL; Thomas A. Warren, Thomas A. Warren Law Offices, P.L., Tallahassee, FL; Jessica Ring Amunson, Benjamin M. Eidelson, Jenner & Block LLP, Washington, DC, for *Plaintiffs-Counter-Defendants-Appellants*. GERALD L. MAATMAN, JR., David Bennet Ross, Lorie E. Almon, Daniel B. Klein, Seyfarth Shaw LLP, New York, NY; Jeffrey S. Klein, Gregory Silbert, Weil, Gotshal & Manges LLP, New York, NY, *for DefendantCounter-Claimant-Appellee*.

HALL, *Circuit Judge*:

This is an appeal from the District Court's January 15, 2018 opinion and order vacating the arbitrator's certification of a class of Defendant-Counter-Claimant-Appellee's employees insofar as the class included employees who did not affirmatively opt in to the specific arbitration proceeding before the arbitrator. The District Court held that the arbitrator, Kathleen A. Roberts, exceeded her authority in purporting to bind those absent class members to class arbitration because the arbitrator erred in determining that the arbitration agreement permits class arbitration. We hold that the arbitrator's determination that the agreement permits class arbitration binds the absent class members because, by signing the RESOLVE Agreement, they, no less than the parties, bargained for the arbitrator's construction of that agreement with respect to class arbitrability. We therefore reverse the judgment of the District Court. The issue of whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class is not before us in this appeal, however. We therefore

remand this case to the District Court to decide that issue in the first instance after allowing the parties an opportunity to present their renewed arguments with respect to that issue.

I.

Laryssa Jock ("Jock") and her co-Plaintiffs-Counter-Defendants-Appellants (collectively, "Appellants") are a group of current and former retail sales employees of Defendant-Counter-Claimant-Appellee Sterling Jewelers Inc. ("Sterling").[1] Jock filed the instant suit in 2008, alleging that she and other female employees were paid less than their male counterparts, on account of their gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d).

All Sterling employees were required, as a condition of employment, to sign a "RESOLVE Program" agreement ("RESOLVE Agreement") mandating that they participate in arbitration. J. App. 129. Under the RESOLVE Agreement, employees "waiv[e] [their] right to obtain any legal or equitable relief . . . through any government agency or court, and . . . also waiv[e] [their] right to commence any court action. [They] may, however, seek and be awarded equal remedy through the RESOLVE Program." *Id.* The RESOLVE Agreement also provides that "[t]he Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction[,]" and

[1] The underlying facts are set forth in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), and are briefly recited here only for orientation and as relevant to the instant appeal.

that any claim arising thereunder will be arbitrated "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association." *Id.*

II.

This is the fourth time this case has come before this Court. *See Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011) ("*Jock I*"); *Jock v. Sterling Jewelers Inc.*, 703 F. App'x 15 (2d Cir. 2017) (summary order) ("*Jock II*"); *Jock v. Sterling Jewelers Inc.*, 691 F. App'x 665 (2d Cir. 2017) (summary order) ("*Jock III*").

In *Jock I*, the arbitrator issued an award in favor of the then-named plaintiffs, construing the RESOLVE Agreement to permit classwide arbitration. The District Court vacated that award, concluding that under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), "the arbitrator's construction of the RESOLVE agreements as permitting class certification was in excess of her powers." *Jock I*, 646 F.3d at 118 (quoting *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 448 (S.D.N.Y. 2010)). We reversed, holding that the District Court impermissibly substituted its own legal analysis for that of the arbitrator instead of focusing its inquiry on whether the arbitrator was permitted to reach the question of class arbitrability that had been submitted to her by the parties. *Id.* at 123-24. We explained, furthermore, that the arbitrator had a colorable justification under the law to reach the decision she did. We distinguished *Stolt-Nielsen* on the ground that the parties in *Stolt-Nielsen* stipulated that their arbitration agreement contained "no agreement" on the issue of class arbitration, whereas the plaintiffs in this case merely conceded that there was

no *explicit* agreement to permit class arbitration, thus leaving open the possibility of an "implied agreement to permit arbitration." *Id.* at 119, 124.

Following our decision in *Jock I*, the arbitrator issued a class certification determination that certified a class of approximately 44,000 women, comprising the then-254 plaintiffs as well as other individuals who had neither submitted claims nor opted in to the arbitration proceeding ("the absent class members"). The arbitrator certified the class only with respect to Appellants' Title VII disparate impact claims for declaratory and injunctive relief.[2] The District Court denied Sterling's motion to vacate the class determination award, reasoning that Sterling's argument that the arbitrator had exceeded her powers in "purporting to bind absent class members who did not express their consent to be bound" was "foreclosed" by this Court's holding in *Jock I* that "there is no question that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator." *Jock v. Sterling Jewelers, Inc.*, 143 F. Supp. 3d 127, 128-29 (S.D.N.Y. 2015) (internal quotation marks omitted).

Sterling appealed from the District Court's decision, and in *Jock II* this Court reversed and remanded,

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[2] The arbitrator denied the motion for class certification with respect to Appellants' Equal Pay Act claims, reasoning that the Equal Pay Act, unlike Title VII, provides for its own opt-in class procedures. The arbitrator also declined to certify a Title VII damages class, reasoning that monetary claims could not "be fairly adjudicated on a representative basis" because each employee's "eligibility will vary depending on their individual employment history, and the facts pertaining to similarly-situated males during their employment." J. App. at 594.

clarifying that *Jock I* "did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place." 703 F. App'x at 17. The *Jock II* panel identified the question to be considered on remand, and one not considered in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013), as "whether an arbitrator, who may decide . . . whether an arbitration agreement provides for class procedures because the parties 'squarely presented' it for decision, may thereafter purport to bind *non-parties* to class procedures on this basis." 703 F. App'x at 18.[3]

On remand, the District Court vacated the arbitrator's class determination ruling. The District Court's reasoning was twofold. First, it determined that the RESOLVE Agreement did not give the arbitrator the authority to certify the class because the District Court "considered the question of whether the RESOLVE agreement authorizes class procedures in 2010 and decided that it does not." Sp. App. 6. Second, the fact that "the named plaintiffs and the defendant submitted the question of whether the RESOLVE Agreement allowed for class procedures to the Arbitrator" also did not give the arbitrator such authority. *Id.* at 7. The District Court reasoned that, even if the arbitrator's "erroneous interpretation" of the RESOLVE Agreement could bind the 254 plaintiffs who had "authorized the arbitrator to make

[3] *Jock III* dismissed an appeal from the District Court's decision that it lacked jurisdiction to consider Sterling's motion to vacate an interim decision of the arbitrator. 691 F. App'x at 665.

that determination" by submitting the question to her or opting into the proceeding, that erroneous interpretation could not bind absent class members. *Id.* at 8 (quoting *Oxford Health*, 569 U.S. at 574 (Alito, *J.*, concurring)).

This appeal followed.

III.

"In considering a challenge to a district court's decision to vacate a portion of an arbitration award, we review its legal rulings *de novo* and its findings of fact for clear error." *ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009).

Courts are empowered to vacate arbitration awards only "where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). This is an extremely deferential standard of review. *See Stolt-Nielsen*, 559 U.S. at 671. When parties

> bargain[] for [an] arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits. Only if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract—may a court overturn his determination.

Oxford Health, 569 U.S. at 569 (internal quotation marks, citations, and alterations omitted); *accord Stolt-Nielsen*, 559 U.S. at 672. The focus of our inquiry under

Section 10(a)(4) is "'whether the arbitrator[] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrator[] correctly decided that issue*.'" *Jock I*, 646 F.3d at 122 (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997)).

IV.

The District Court's decision rests on the premise that, because the absent class members did not affirmatively opt in to the arbitration proceeding and thereby consent to the arbitrator's authority to decide whether the RESOLVE Agreement permits class procedures, our usual deferential standard of review does not apply. In other words, as Sterling argues:

> It is one thing for this Court to sustain an incorrect arbitral ruling on a question properly submitted to the Arbitrator by parties who agreed to be bound by the Arbitrator's decision. It is another thing altogether to sustain an incorrect decision granting the Arbitrator authority over absent class members who did not submit that question to her. . . . [T]he Arbitrator's decision that she had authority over absent class members cannot be upheld on the ground that, despite being wrong, it was nonetheless within her authority.

Appellee Letter Br. (May 17, 2019), at 4. The District Court concluded that the individuals who did not affirmatively opt in to the arbitration proceeding did not agree to permit class procedures by virtue of having signed RESOLVE Agreements because "[p]lainly it is

the law of the case that the Arbitrator does not have the authority, based on the agreement, to certify" a class. Sp. App. 6. The District Court thus relied on its original view that the arbitrator wrongly interpreted the RESOLVE Agreement to permit class procedures. That view is not, however, "the law of the case," because this Court vacated the District Court's earlier decision that had reached that conclusion. *Jock I*, 646 F.3d 113. In *Jock I*, we had no occasion to decide whether the arbitrator "got it right" given our conclusion that such determination was not one for the courts to make. *Id.* at 124. The District Court further determined that the fact that the named plaintiffs and Sterling had submitted the class arbitrability question to the arbitrator also did not give the arbitrator the authority to certify the class. In doing so, the District Court relied on its own prior conclusion that the arbitrator's interpretation was "wrong as a matter of law." Sp. App. 8. That logic was largely based on Justice Alito's concurrence in *Oxford Health*, which states that an arbitrator's "erroneous interpretation" of a contract that does not authorize class procedures cannot bind absent class members who have "not authorized the arbitrator to make that determination." 569 U.S. at 574.

Appellants argue that the absent class members have, in fact, authorized the arbitrator to determine whether the RESOLVE Agreement permits class procedures. They contend that because all Sterling employees signed the RESOLVE Agreement, all Sterling employees "agreed that, if any of them initiated a putative class proceeding, the arbitrator in *that* proceeding would be empowered to decide class-arbitrability—and, if he or she found it appropriate, to certify a class encompassing

other employees' claims." Appellant Br. 23. According to Appellants, the District Court erred by "never ask[ing] what authority absent class members conferred on Arbitrator Roberts by joining the RESOLVE Program," a question that is a matter of contract interpretation. *Id.* at 26

We agree with Appellants. Although the absent class members have not affirmatively opted in to this arbitration proceeding, by signing the RESOLVE Agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration. As the arbitrator reasoned, "[i]t is undisputed that each of the absent class members signed the RESOLVE arbitration agreement, which clearly provides for the application of the [American Arbitration Association ('AAA')] Rules." J. App. 603; *see id.* at 129. The AAA Supplementary Rules for Class Arbitration ("Supplementary Rules") apply to "any dispute arising out of an agreement that provides for arbitration pursuant to" the AAA rules "where a party submits a dispute to arbitration on behalf of . . . a class or purported class." *Id.* at 434 (Supplementary Rule 1(a) (2010)). The Supplementary Rules provide that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class." *Id.* at 434-35 (Supplementary Rule 3 (2010)). The RESOLVE Agreement's incorporation of the AAA Rules evinces agreement to have the arbitrator decide the question of class arbitrability. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 (2d Cir. 2018) (when parties to an agreement explicitly incorporate rules that empower an arbitrator

to decide an issue, "the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator" (internal quotation marks omitted)).[4]

Further supporting the conclusion that absent class members authorized the arbitrator to decide whether the arbitration may proceed on a class basis, the RESOLVE Agreement provides that "[q]uestions of arbitrability" and "procedural questions" "shall be decided by the arbitrator." J. App. 132.[5] The Supreme Court has suggested, and this Court has assumed without deciding, that the availability of classwide arbitration is a "question of arbitrability." *Oxford Health*, 133 S. Ct. at 2068 n.2; *Sappington*, 884 F.3d at 394. The parties in this case have at times assumed that the availability of class procedures is a "procedural question." *See* Appellant Br. 3-4; J. App. 208-210 (Sterling Mem. of Law (May 19, 2008)). Regardless of whether the availability of class procedures is a question of arbitrability or merely

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[4] It is of no moment that the Supplementary Rules also provide that "the arbitrator should not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis." J. App. 435 (Supplementary Rule 3). Here, we address whether the absent class members authorized the arbitrator to decide the threshold question of class arbitrability; we do not review the arbitrator's determination that the arbitration may proceed on a class basis.

[5] The sole exception to that delegation of authority is the provision that if a party initiates a lawsuit, "a court may decide procedural questions that grow out of the dispute and bear on the final disposition of the matter." J. App. 132. That exception does not affect our analysis here.

a procedural question, it is a question for the arbitrator to decide under the terms of the RESOLVE Agreement.

That conclusion is consistent with Ohio law, which governs our interpretation of the RESOLVE Agreement. *See* J. App. 130. Under Ohio law, the issue of whether an arbitration agreement permits class procedures is a "question of arbitrability" that is presumptively for a court to decide. *Shakoor v. VXI Glob. Sols.*, 35 N.E.3d 539, 547 (Ohio Ct. App. 2015). But a question of arbitrability "is to be decided by the arbitrator" when the parties to an agreement "have clearly and unmistakably vested the arbitrator with the authority to decide the issue of arbitrability." *Belmont Cnty. Sheriff v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 820 N.E.2d 918, 921 (Ohio 2004); *cf. Shakoor*, 35 N.E.3d at 548-50 (agreement did not provide evidence sufficiently clear and unmistakable to overcome presumption that questions of arbitrability are for court to decide). The RESOLVE Agreement "clearly and unmistakably" provides that "[q]uestions of arbitrability . . . shall be decided by the arbitrator." *Belmont Cnty. Sheriff*, 820 N.E.2d at 921; J. App. 132.

Because the absent class members, no less than the parties, thus "bargained for the arbitrator's construction of their agreement" with respect to class arbitrability, the arbitrator acted within her authority in purporting to bind the absent class members to class procedures. *Oxford Health*, 569 U.S. at 569 (internal quotation marks omitted). By virtue of the absent class members' contractually expressed consent, they, like the parties, may be bound by the arbitrator's determination that the RESOLVE Agreement permits class procedures

regardless of whether that determination is, as the District Court believes, "wrong as a matter of law." Sp. App. 8. That is, our reasoning in *Jock I* applies with equal force to the absent class members. It is not for us, as a court, to decide whether the arbitrator's class certification decision was correct on the merits of issues such as commonality and typicality. We merely decide that the arbitrator had the authority to reach such issues even with respect to the absent class members.

The District Court's contrary conclusion is understandable in light of this Court's framing of the issue in *Jock II*. In *Jock II*, we stated that *Jock I* "did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place." 703 F. App'x at 17. That observation referred to the fact that the absent class members, unlike the 254 plaintiffs, did not affirmatively opt in to the proceeding in which the question was submitted to the arbitrator. Our use of "consent" as a shorthand for that fact may well have obscured the possibility that the absent class members consented in a different way to the arbitrator's authority to decide class arbitrability.

That those absent class members did not expressly submit themselves to this particular arbitrator's authority does not alter our analysis. Class actions that bind absent class members as part of mandatory or opt-out classes are routinely adjudicated by arbitrators and in our courts. *See* Supplementary Rule 4; Fed. R. Civ. P. 23; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361-63

(2011). Since the RESOLVE Agreement provides for "the arbitrator" to decide the question of class arbitrability, J. App. 132, it must mean, as Appellants state, that if any Sterling employee initiates a putative class proceeding, "the arbitrator in *that* proceeding [will] be empowered to decide class-arbitrability—and, if he or she [finds] it appropriate, to certify a class encompassing other employees' claims." Appellant Br. 23. To hold otherwise would be inconsistent with the nature of class litigation and would in effect negate the power of the arbitrator to decide the question of class arbitrability.[6]

Nor is our decision inconsistent with the principles affirmed in *Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133 (2d Cir. 2007). In *Porzig*, we held that an arbitration panel was without jurisdiction to order a party's lawyer to pay back to the party, Porzig, the lawyer's contingency fee, reasoning that neither Porzig nor his lawyer had agreed to arbitrate a dispute over their fee contract. We explained that "a party cannot be forced to arbitrate any dispute that it has not obligated itself, by contract, to submit to arbitration," and that an

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[6] This logic has implicitly underpinned decisions holding that because an arbitrator was within his authority in determining that class procedures were permitted under an agreement, it followed that the arbitrator was within his authority to certify a class. *See, e.g., Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 353 (4th Cir. 2008); *Jock*, 143 F. Supp. 3d at 129. In *Jock II*, we found this logic insufficient to uphold the arbitrator's class determination award because we determined, in light of the Supreme Court's decision in *Oxford Health*, that there was an unsettled question as to whether an arbitrator's authority to bind absent class members necessarily followed from her authority to determine that an agreement permitted class procedures.

arbitration panel "may not exceed the power granted to it by the parties in the contract." *Porzig*, 497 F.3d at 140 (internal quotation marks omitted). Here, the absent class members have "obligated [themselves], by contract, to submit to arbitration" the question of class arbitrability. *Id.* Indeed, our conclusion that the absent class members may be bound by the arbitrator's class arbitrability determination rests on the fact that the "self-limiting agreement between consenting parties" in this case authorizes the arbitrator to decide that question. *Id.*

Finally, because our decision rests in part on our reasoning in *Jock I*, we address Sterling's argument that *Jock I* is no longer good law in light of the Supreme Court's recent decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019).[7] In *Lamps Plus*, the Supreme Court held that "an ambiguous agreement can[not] provide the necessary 'contractual basis' for compelling class arbitration." 139 S. Ct. at 1415. *Lamps Plus* does not undermine our reasoning in *Jock I*. First, a crucial difference between the two cases is that the parties in *Lamps Plus* "agreed that a court, not an arbitrator, should resolve the question about class arbitration." *Id.* at 1417 n.4. The class arbitrability decision in *Lamps Plus* was therefore subject to *de novo* scrutiny rather than the deferential standard of review that circumscribes courts' review of arbitrators' decisions. Second, *Lamps Plus* leaves undisturbed the proposition,

[7] Because this Court was aware that the Supreme Court's decision in *Lamps Plus* would deal with class arbitrability issues similar to the ones presented in this case, we deferred issuing an opinion until *Lamps Plus* was decided.

affirmed in *Stolt-Nielsen*, that an arbitration agreement may be interpreted to include implicit consent to class procedures. Our reasoning in *Jock I* is, moreover, fully consistent with the Supreme Court's decision in the more analogous case of *Oxford Health*, 569 U.S. 564.

Having determined that the arbitrator acted within her authority in purporting to bind the absent class members to class proceedings, we note that it remains to be decided whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief. In the decision that we vacated in *Jock II*, the District Court held that in so doing the arbitrator exceeded her authority. *See Jock*, 143 F. Supp. 3d at 130-34. Applying the appropriate Section 10(a)(4) standard, the District Court concluded that under *Wal—Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the arbitrator acted "outside her authority" and "in manifest disregard of the law" by providing putative class members with the opportunity to opt out. *Id.* at 130, 133. The correctness of that conclusion is not before us in this appeal. *See* Appellant Br. 30 n.13; Appellee Br. 9 n.2. We therefore remand this case to the District Court with directions to decide that issue after allowing the parties an opportunity to present renewed argument in light of any subsequent developments in the law.

V.

We have considered all of Sterling's remaining arguments and conclude that they are without merit. The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 15, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANUARY 15, 2018, DECIDED;
JANUARY 16, 2018, FILED

08 Civ. 2875

LARYSSA JOCK, *et al.,*

Plaintiffs,

-v-

STERLING JEWELERS INC.,

Defendant.

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs, current and former female employees of defendant Sterling Jewelers Inc. ("Sterling"), filed this putative class action on March 18, 2008 alleging that Sterling discriminated against them in pay and promotion on the basis of their gender. *See* Complaint, Dkt. 1. Subsequently, plaintiffs moved to compel arbitration pursuant to a dispute resolution agreement (the "RESOLVE agreement"), *see* Dkt. 25, which motion this Court

granted by Order dated June 18, 2008, *see* Dkt. 52. There followed extensive proceedings before the Arbitrator, this Court, and the Second Circuit Court of Appeals, some of which are briefly summarized below and more specific familiarity with which is here presumed.

Now before the Court is Sterling's motion to vacate a Class Determination Award issued by the Arbitrator certifying, for plaintiffs' Title VII disparate impact claims for declaratory and injunctive relief, a class that, Sterling estimates, includes over 70,000 "absent" class members, *i.e.*, Sterling employees other than the named plaintiffs and several hundred individuals who have affirmatively opted in to the class proceedings before the Arbitrator. *See* Dkts. 137-1-3. According to Sterling, even though the Arbitrator is planning to permit members of the certified class to opt out, the Arbitrator exceeded her authority by purporting to bind this larger group in any way as they never submitted to her authority or presented to her the question of whether the RESOLVE agreement permits class action arbitration. *See* Defendant's Memorandum of Law in Support of its Renewed Motion to Vacate the Arbitrator's Class Certification Award ("Def. Mem.") at 5-7, Dkt. 163. Plaintiffs oppose Sterling's motion, arguing that the Court must defer to the Arbitrator's interpretation of the agreement and her decision to certify this larger class. *See* Opposition to Defendant's Renewed Motion to Vacate the Arbitrator's Class Certification Award ("Pl. Mem.") at 8-9, Dkt. 165.

As mentioned, this is but the latest chapter in a rather convoluted litigation. Briefly, in 2009, the Arbitrator determined that the RESOLVE agreement permitted class arbitration. Sterling moved to vacate

that determination, and by bottom-line Order dated August 31, 2009, the Court initially denied Sterling's motion. *See* Dkt. 64; Opinion and Order dated December 28, 2009, Dkt. 66. Sterling timely appealed. *See* Dkt. 68. However, while Sterling's appeal was pending, the Supreme Court issued an opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, which reversed the Second Circuit's reversal of the undersigned's decision holding that a class action proceeding is not available in arbitration unless the contracting parties so provide, *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006), *rev'd*, 548 F.3d 85 (2d Cir. 2008), *rev'd and remanded sub nom.*, 559 U.S. 662 (2010). Thereafter, Sterling moved pursuant to Federal Rules of Civil Procedure 62.1 and 60(b) for relief from the December 28, 2009 Opinion and Order (which had relied, *inter alia*, on the now reversed Second Circuit decision in *Stolt-Nielsen*), and the Second Circuit remanded the case to permit this Court to address Sterling's motion.

On August 6, 2010, this Court reversed its earlier decision and granted Sterling's motion to vacate, *see* Order dated August 6, 2010, Dkt. 87, finding in relevant part that plaintiffs had "fail[ed] to identify any concrete basis in the record for the arbitrator to conclude that the parties manifested an intent to arbitrate class claims." Memorandum Order dated July 27, 2010 at 10, Dkt. 85. Plaintiffs timely appealed, *see* Dkt. 88, and a divided panel of the Second Circuit reversed, with the majority finding that (1) the parties had squarely presented the question of whether the RESOLVE agreement allowed for class arbitration to the arbitrator and (2) "whether the arbitrator was right or wrong in her analysis, she had

the authority to make the decision, and the parties to the arbitration are bound by it." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124-127 (2d Cir. 2011) ("*Jock I*").

Several years later, on February 2, 2015, the Arbitrator issued a Class Determination Award, certifying, *inter alia*, an approximately 70,000-person class for plaintiffs' Title VII disparate impact claims. *See* Dkts. 137-1-3. On March 3, Sterling moved to vacate that Award, arguing that the Arbitrator exceeded her authority by purporting to bind employees other than the named plaintiffs and those who had affirmatively opted into the proceedings before the Arbitrator. *See* Dkts. 135, 136. On November 15, 2015, the Court denied Sterling's motion, finding that vacatur was "foreclosed by earlier rulings in this case." Opinion and Order at 4, Dkt. 144. Specifically, given *Jock I*, which affirmed the Arbitrator's prerogative to decide whether the RESOLVE agreement permitted class action procedures, the Court reasoned that there is "no basis for vacating the Class Determination Award on the ground that the Arbitrator has now exceeded her authority in purporting to bind absent class members." *Id.*

Sterling, once again, appealed. *See* Dkt. 145. On July 24, 2017, the Second Circuit vacated the November 2015 Opinion and Order, holding that the "decision in *Jock I* . . . did *not* squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they [the absent class members], unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in [the] first place." *Jock v. Sterling Jewelers, Inc.*, 703 F. App'x 15, 17 (2d Cir. 2017) ("*Jock*

II") (emphasis added). The panel further instructed the parties and this Court that the issue "pertinent" on remand is: "whether an arbitrator, who may decide . . . whether an arbitration agreement provides for class procedures because the parties 'squarely presented' it for decision, may thereafter purport to bind *non-parties* to class procedures on this basis." *Id.* at 18.

For the reasons set forth below, the Court finds that the Arbitrator may *not* so bind non-parties to class action procedures where, as here, the Court has determined that the arbitration agreement does not, in fact, permit class action procedures.

DISCUSSION

The Federal Arbitration Act provides that a district court may vacate an arbitration award where the arbitrator has exceeded her powers. *See* 9 U.S.C. § 10(a). The Court's "inquiry under § 10(a) (4) thus focuses on whether the arbitrator[] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator[] correctly decided that issue." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir. 2002) (internal quotation omitted).

Plainly it is the law of the case that the Arbitrator does not have the authority, based on the *agreement*, to certify a 70,000-person class. The Court considered the question of whether the RESOLVE agreement authorizes class procedures in 2010 and decided that it does not.[1]

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[1] The RESOLVE agreements authorize arbitration to be conducted by the American Arbitration Association ("AAA") in accordance with AAA rules, as amended or modified by certain

See Memorandum Order dated July 27, 2010, Dkt. 85. Thus, those individuals who did not affirmatively opt in to the class proceeding here did *not* agree to permit class procedures by virtue of having signed RESOLVE agreements.[2]

Thus, the remaining question here is whether the Arbitrator had the authority to certify a 70,000-person class because the named plaintiffs and the defendant submitted the question of whether the RESOLVE

RESOLVE-specific provisions, including the requirement that the arbitration agreement be construed according to Ohio law. *See* Clause Construction Award, Ex. F. to Sterling Memorandum of Law in Support of Motion to Vacate, Dkt. 58. Nowhere do the RESOLVE agreements mention class procedures. The Arbitrator, however, decided that class procedures were nonetheless available as (1) the RESOLVE agreements did not *prohibit* class arbitration; (2) under Ohio law the RESOLVE agreements were contracts of adhesion; and in a contract of adhesion, (3) unless the drafter expressly prohibits class arbitration, plaintiffs may avail themselves of that procedural right. *See id.* at 4-5. But an Ohio intermediate appellate court construing the very same agreements expressly found that they were *not* adhesive or unconscionable. *See W.K. v. Farrell*, 853 N.E.2d 728 (2006) (rejecting Sterling employee's claim that the RESOLVE agreement was adhesive or unconscionable). Moreover, the AAA Supplementary Rules for Class Arbitrations, which the Arbitrator applied here, are not, by their own terms, to be automatically incorporated. *See Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013).

[2] Note that, for the reasons stated below, the Court need not reach the question of whether, had the RESOLVE agreement, in fact, permitted class procedures, the Arbitrator would have had the authority to bind absent class members based on the fact that each absent class member agreed to such procedures by virtue of having signed the agreement.

agreement allowed for class procedures to the Arbitrator.

Whether a party has agreed to submit a dispute to an arbitrator is "typically an 'issue for judicial determination.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)). Plaintiffs here see no difference between the Arbitrator's authority to decide that the named plaintiffs' RESOLVE agreements permitted class procedures, brought by these plaintiffs on behalf of themselves and all others who opted into the class, and the Arbitrator's authority to decide that the absent class members' RESOLVE agreements permitted class procedures that would bind these individuals unless they opted out. According to plaintiffs, the named and absent class members "have all executed *the same* arbitration agreement which the Arbitrator interpreted to permit the aggregate litigation . . . as long as the due process requirements of Rule 23, tracked in AAA Supplementary Rule 4, are satisfied." Pl. Mem. at 9.

Given the seeming tension between *Jock I* and *Jock II*, plaintiffs' position has some force. But plaintiffs overlook the fact that, unlike the named plaintiffs and defendants, these "absent members of the plaintiff class [who have not chosen to opt-in to the class] have not submitted themselves" to the Arbitrator's authority "in any way." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring); *contrast Jock I*, 646 F.3d at 124 (holding that the Arbitrator had authority to decide "the issue of whether the agreement permitted class arbitration" because it "was squarely presented to the arbitrator" by the parties). Although absent class

members may have signed contracts with arbitration clauses "materially identical to those signed by the plaintiff who brought" suit, an "arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Id.*

Moreover, were the Court to permit the Arbitrator to bind absent class members with an erroneous reading of the RESOLVE agreement, then her improper assertion of authority would open the door to collateral lawsuits by absent class members. That is because, given that the Arbitrator was wrong as a matter of law about whether the RESOLVE agreement permits opt-out classes, it is hard to see how courts could bind individuals who do not opt out, but who have not otherwise opted in, to her decisions. After all, arbitrators are not judges. Nowhere in the Federal Arbitration Act does Congress confer upon these private citizens the power to bind individuals and businesses except in so far as the relevant individuals and businesses have bound themselves. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (arbitration is "simply a matter of contract between the parties"); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (arbitration "is a matter of consent, not coercion"). Nor could Congress delegate to arbitrators such authority, as Article III of the federal Constitution entrusts the judicial power to the judicial branch.[3]

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[3] Moreover, as Justices Alito and Thomas suggested in their concurring opinion in *Oxford Health*, the "distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding," because an "offeree's silence does not

Therefore the Court finds that the Arbitrator here had no authority to decide whether the RESOLVE agreement permitted class action procedures for anyone other than the named parties who chose to present her with that question and those other individuals who chose to opt in to the proceeding before her. *See Granite Rock*, 561 U.S. at 299; *see also Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 140-41 (2d Cir. 2007).

As the arbitrator exceeded her powers, *see Porzig*, 497 F.3d at 140 (an arbitrator exceeds her powers when she "goes beyond [the] self-limiting agreement between consenting parties"), the Court grants Sterling's motion to vacate the February 2, 2015 Award in so far as that Award certifies a class that includes individuals who have not affirmatively opted in to the arbitral proceedings.

The Clerk is directed to close docket entry number 162.

SO ORDERED.

Dated: New York, NY
January 15, 2018 JED S. RAKOFF, U.S.D.J.

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normally modify the terms of a contract." 569 U.S. at 574 (citing Restatement (Second) of Contracts § 69(1) (1979)). "Accordingly, at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* at 574-75.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of July, two thousand seventeen.

Present: PETER W. HALL, DEBRA ANN LIVINGSTON, *Circuit Judges*, NICHOLAS G. GARAUFIS, *District Judge*.*

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* Judge Nicholas G. Garaufis, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix C

15-3947

LARYSSA JOCK, JACQUELYN BOYLE, CHRISTY CHADWICK, LISA FOLLETT, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, KHRISTINA RODRIGUEZ, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, KELLY CONTRERAS, DAWN SOUTO-COONS,

Plaintiffs-Counter-Defendants-Appellees,

v.

STERLING JEWELERS, INC.,

Defendant-Counter-Claimant-Appellant.

For Defendant-Counter-Claimant-Appellant: GERALD L. MAATMAN JR. (David Bennet Rosse Lorie E. Almon, Daniel B. Klein, Seyfarth Shaw LLP, New York, NY; Jeffrey S. Klein, Weil, Gotshal & Manges LLP, New York, NY, *on the brief*), Seyfarth Shaw LLP, New York, NY.

For Plaintiffs-Counter-Defendants- Appellees: JOSEPH M. SELLERS (Kaplana Kotagal, Shaylyn Cochran, Cohen Milstein Sellers & Toll, PLLC, Washington, D.C.; Sam J. Smith, Loren B. Donnell, Burr & Smith LLP, St. Petersburg, FL; Thomas A. Warren, Thomas A. Warren Law Offices, P.L., Tallahassee, FL, *on the brief*), Cohen Milstein Sellers & Toll, PLLC, Washington, D.C.

Appendix C

Appeal from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED**, and that the case is **REMANDED** for further proceedings.

Defendant-Counter-Claimant-Appellant Sterling Jewelers Inc. ("Sterling") appeals the order of the district court confirming in part the arbitrator's class certification award. "We review a district court's decision to confirm an arbitration award *de novo* to the extent it turns on legal questions, and we review any findings of fact for clear error." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003) (quoting *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002)). As is relevant here, we may vacate an arbitration award "where the arbitrator[] exceeded [her] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). Our focus in such cases is on "whether the arbitrator[] had the power, based on the parties' submission or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 824 (2d Cir. 1997). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

The narrow question presented here is whether the arbitrator had the authority to certify a class that included absent class members, *i.e.*, employees other than the named plaintiffs and those who have opted into the

class. As the district court explained, it is law of the case that "the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011) ("*Jock I*"). Our decision in *Jock I*, however, did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in first place. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them."); *accord Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 681-82 (2010); *cf. Oxford*, 133 S. Ct. at 2068 n.2 (indicating that the availability of class arbitration may be a "question of arbitrability" that is "presumptively for courts to decide"); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003) ("An arbitration panel may not determine the rights or obligations of non-parties to the arbitration."). The district court accordingly erred in finding that law of the case conclusively resolved this question. *See Jock v. Sterling Jewelers, Inc.*, 143 F. Supp. 3d 127, 129 (S.D.N.Y. 2015).

The Supreme Court's decision in *Oxford Health Plans* does not suggest otherwise. In that case, the Court wrestled solely with the question of whether an arbitrator to whom the parties had submitted the issue acted within his authority in finding that a contract provided for class arbitration. *See* 133 S. Ct. at 2066. This issue is analogous to that addressed by this Court in *Jock I*.

Oxford Health Plans does not speak, however, to whether an arbitrator in that scenario *also* has the authority to certify a class containing absent class members.

The district court suggested that Justice Alito's concurrence in *Oxford Health Plans* (joined by Justice Thomas) provides additional support for its conclusion here, which is based principally (but erroneously) on law of the case. *See Jock*, 143 F. Supp. 3d at 129 n.2. Justice Alito did indeed join the majority opinion in *Oxford Health Plans*, despite his doubt as to whether absent class members would—or should—ultimately be bound by the results of arbitration. *See id.* at 2071-72 (Alito, *J.*, concurring). Again, however, he joined an opinion addressing only whether, given Oxford Health Plans' concession that it had consented to the arbitrator deciding whether the parties' agreement authorized class arbitration, "the availability of class arbitration [was] a question the arbitrator should decide." *Id.* at 2072. In doing so, moreover, he indicated that "it is difficult to see how an arbitrator's decision to conduct class proceedings *could* bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* (emphasis added). Thus, Justice Alito did not directly address the issue that is pertinent here: whether an arbitrator, who may decide the question whether an arbitration agreement provides for class procedures because the parties "squarely presented" it for decision, may thereafter purport to bind *non-parties* to class procedures on this basis.

We therefore vacate and remand for further consideration of whether the arbitrator exceeded her authority in certifying a class that contained absent class members who have not opted in.

Appendix C

* * *

For the foregoing reasons, we **VACATE** the district court's judgment, and we **REMAND** the case for further proceedings consistent with this order.

FOR THE COURT

CATHERINE O'HAGAN WOLFE,
CLERK

APPENDIX D — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 1, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 1st day of June, two thousand seventeen.

Present: JON O. NEWMAN,
ROSEMARY S. POOLER,
PETER W. HALL,
Circuit Judges.

Appendix D

16-1731-cv

LARYSSA JOCK, JACQUELYN BOYLE, CHRISTY CHADWICK, LISA FOLLETT, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, KHRISTINA RODRIGUEZ, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, KELLY CONTRERAS, DAWN SOUTO-COONS,

Plaintiffs-Counter-Defendants-Appellees,

v.

STERLING JEWELERS INC.,

Defendant-Counter-Claimant-Appellant.

Appearing for Appellant: Gerald L. Maatman, Jr., Seyfarth Shaw LLP (David Bennet Ross, Lorie E. Almon, Daniel B. Klein, *on the brief*), New York, NY. Jeffrey S. Klein, Weil, Gotshal & Manges LLP, New York, NY.

Appearing for Appellees: Joseph M. Sellers, Cohen Milstein Sellers & Toll, PLLC (Kalpana Kotagal, Shaylyn Cochran, *on the brief*), Washington, DC.

Sam J. Smith, Loren B. Donnell, Burr & Smith LLP, St. Petersburg, FL.

Thomas A. Warren, Tallahassee, FL.

Appendix D

Appeal from the United States District Court for the Southern District of New York (Rakoff, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal be and it hereby is **DISMISSED** for lack of appellate jurisdiction.

Defendant-Counter-Claimant-Appellant Sterling Jewelers Inc. ("Sterling") appeals the May 22, 2016 opinion and order of the United States District Court for the Southern District of New York (Rakoff, *J.*) holding that the district court lacked jurisdiction to consider Sterling's motion to vacate the arbitrator's Equal Pay Act Collective Action Conditional Certification Award and the arbitrator's Order Re Claimants' Motion for Tolling of EPA Limitations Period. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even [if] the parties are prepared to concede it." *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 150 n.10 (2d Cir. 2016) (internal quotation marks and brackets omitted). Section 16 of the Federal Arbitration Act provides that an appeal may be taken only in limited circumstances, including from "an order" "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D). The district court's order from which Sterling appeals neither confirmed nor denied confirmation of an award or partial award, but instead held that the district court lacked jurisdiction to consider an interim decision of the arbitrator. *See Accenture LLP v.*

Spreng, 647 F.3d 72, 77 (2d Cir. 2011) (explaining Section 16(a)(1)(D) confers jurisdiction only over appeals of arbitration awards that "finally and definitively dispose of a separate independent claim").

Accordingly, the instant appeal hereby is DISMISSED for lack of appellate jurisdiction.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED NOVEMBER 15, 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 2875 (JSR)

LARYSSA JOCK, *et al.*,

Plaintiffs,

-v-

STERLING JEWELERS, INC.,

Defendant.

JED S. RAKOFF, UNITED
STATES DISTRICT JUDGE.

November 15, 2015, Decided

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

On March 18, 2008, plaintiffs Laryssa Jock et al. filed suit in this Court on behalf of themselves and all persons similarly situated, alleging sex discrimination in the promotion and compensation policies and practices of defendant Sterling Jewelers, Inc. ("Sterling"). *See* Complaint, Dkt. 1. On May 5, 2008, plaintiffs

moved to refer the matter to arbitration, pursuant to the "RESOLVE" dispute resolution agreement signed by Sterling's employees. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Refer to Arbitration and Stay the Litigation, Dkt. 26. The Court granted this motion in an order dated June 18, 2008. Dkt. 52. Since then, however, the matter has been the subject of interminable litigation (familiarity with which is here presumed) before the Arbitrator, this Court, and the Second Circuit Court of Appeals. Regretfully, the matter is still not at an end.

Most recently, following over three years of discovery and other proceedings before the Arbitrator, the Arbitrator, on February 2, 2015, issued a Class Determination Award that, in relevant part, certified a class for the adjudication of plaintiffs' Title VII disparate impact claims with respect to declaratory and injunctive relief, but declined to certify plaintiffs' Title VII disparate impact claims with respect to monetary damages or plaintiffs' Title VII disparate treatment claims. *See* Declaration of Gerald L. Maatman, Jr., Exhibit 1 ("Class Determination Award") at 118. As discussed below, this much was unassailable. But the Arbitrator went further and permitted members of the class to opt out from the putative declaratory and injunctive relief. This, regretfully, exceeded her authority, as well as manifestly disregarding settled law.

Pending at present before this Court is the motion of defendant Sterling to vacate the Arbitrator's Class Determination Award on the grounds that the Arbitrator exceeded her authority by, first, "purporting to bind absent class members who did not express their consent

to be bound" and, second, "permitting opt-out rights in a mandatory Rule 23(b)(2) class." *See* Defendant's Memorandum of Law in Support of Its Motion to Vacate the Arbitrator's Class Determination Award ("Defs. Br.") at i. The Federal Arbitration Act provides that a district court may vacate an arbitration award "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . .; (3) where the arbitrators were guilty of misconduct . . . or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a). Courts read 9 U.S.C. § 10(a)(4) very narrowly. *See. e.g., ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) ("If the parties agreed to submit an issue for arbitration, we will uphold a challenged award as long as the arbitrator offers a barely colorable justification for the outcome reached." (internal quotation marks omitted)). In addition, however, the Second Circuit has recognized "a judicially-created ground [for vacatur], namely that an arbitral decision may be vacated when an arbitrator has exhibited a manifest disregard of law." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011).[1]

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[1] Despite some uncertainty regarding the vitality of the "manifest disregard" doctrine, the Court has no reason to conclude that it has been eliminated in this Circuit. *See, e.g., United Broth. of Carpenters & Joiners of America v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 275 (2d Cir. 2015); *Landmark Ventures, Inc. v. InSightec, Ltd.*, No. 14-cv-4599, 2015 WL 6603900, at *l (2d Cir. Oct. 30, 2015) (summary order); *see also*

With respect to its first ground for vacatur, Sterling contends that the Arbitrator lacked authority to certify a class that included approximately 44,000 alleged class members (who were current and former female employees of defendant Sterling), beyond the 254 plaintiffs who filed opt-in notices to join the proceeding or were represented by Cohen Milstein Sellers & Toll, PLLC and its co-counsel in the arbitration proceeding. *See* Defs. Br. at 4-6 & 4 n.9. According to Sterling, individuals other than these 254 plaintiffs have not consented to join the class arbitration, and an opt-out notice to those individuals would not create consent. Defs. Br. at 5. Defendant further argues that absent class members may then seek to collaterally attack the arbitration, forcing Sterling to face numerous individual claims. Defs. Br. at 7-8.

The Court finds, however, that defendant's argument on this point is foreclosed by earlier rulings in this case. The Second Circuit stated in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011) that "there is no question that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator." *Jock*, 646 F.3d at 124. "Agreement" here refers to the RESOLVE agreements between Sterling and its employees, *id.*, assent to which was a mandatory condition of employment. *Id.* at 116. All members of the class certified by the Arbitrator signed the RESOLVE agreements; the Arbitrator interpreted these agreements to permit class arbitration; and the Second Circuit upheld the Arbitrator's authority to do so. Given that holding, this Court sees no basis for vacating the Class

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Incredible Foods Group, LLC v. Unifoods, S.A. de C.V., No. 14-cv-5207, 2015 U.S. Dist. LEXIS 131130, 2015 WL 5719733, at *4 n.15 (E.D.N.Y. Sept. 29, 2015).

Determination Award on the ground that the Arbitrator has now exceeded her authority in purporting to bind absent class members.[2]

As to defendant's second challenge to the arbitration award, however, the Court agrees that the Arbitrator acted outside her authority in certifying an opt-out class for injunctive and declaratory relief in the Class Determination Award.[3] As detailed below, the Arbitrator

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[2] In raising this challenge to the Arbitrator's Class Determination Award, Sterling relies heavily on Justice Alito's concurrence in *Oxford Health Plans v. Sutter*, in which a unanimous Supreme Court held that an arbitrator did not exceed his powers in finding that the parties' contract authorized class arbitration. *Oxford Health Plans*, 133 S. Ct. at 2067. In his concurrence, Justice Alito, who was joined by Justice Thomas, expressed concern that "absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration" and that "it is far from clear that [the absent class members] will be bound by the arbitrator's ultimate resolution of this dispute." *Id.* at 2071 (Alito, J., concurring). However, Justice Alito indicated that he joined the Court's opinion because of Oxford Health Plans's "concession below," namely, the fact that "petitioner consented to the arbitrator's authority by conceding that he should decide in the first instance whether the contract authorizes class arbitration." *Id.* at 2071-72. While the Court finds ample support for rejecting defendant Sterling's first ground for vacatur in the prior history of this case, the Court also notes that the parties in the instant case appear to be covered by Justice Alito's explanation for his agreement to join the majority opinion in *Oxford Health Plans*, since the Second Circuit held that "there is no question that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator." *Jock*, 646 F.3d at 124.

[3] Plaintiffs suggest that Sterling waived this argument by not raising the challenge before the Arbitrator, *see* Pl. Opp. Br. at 10 n.11. However, Sterling stated in a footnote to its

purported to certify the class under Rule 23(b)(2). But it is settled law that, as the Supreme Court most recently stated in *Wal-Mart Stores. Inc. v. Dukes*, 564 U.S. 338 (2011), "Rule [23] provides no opportunity for (b)(1) or (b)(2) class members to opt out." But even if one were to accept plaintiffs' dubious claim that the Arbitrator could be said to have certified the class on grounds other than Rule 23(b)(2), *see* Opposition to Defendant's Motion to Vacate the Arbitrator's Class Determination Award ("Pl. Opp. Br.") at 11, the Court would still hold that the Arbitrator exceeded her authority in permitting class members to opt out of injunctive and declaratory relief that necessarily affects all class members.

To elaborate, Rule 23(b)(2) describes a type of class action in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In *Wal-Mart v. Dukes*, the Supreme Court stated that "[c]lasses certified under (b)(1) and (b)(2)" are "mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Wal-Mart*, 131 S. Ct. at 2558. The Supreme Court reasoned that in the case of 23(b)(2) classes, "the relief sought must perforce affect the entire class at once." *Id.*

Memorandum of Law submitted to the Arbitrator that "23(b)(2) actions are not opt-out classes . . ." *See* Defs. Reply Brief in Further Support of Its Motion to Vacate the Arbitrator's Class Determination Award ("Defs. Reply Br.") at 6; Supplemental Declaration of Gerald L. Maatman, Jr., Exhibit 1.

Appendix E

It is clear from the Arbitrator's award that her purported basis for permitting opt-outs was pursuant to Rule 23(b)(2). Although she also mentioned AAA Supplementary Rule 4, she stated that "AAA Supplementary Rule 4 essentially tracks the requirements of Fed. R. Civ. P. 23" and that "[i]n this case Claimants seek certification of their claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and certification of their claims for monetary damages pursuant to Rule 23(b)(3)." Class Determination Award at 6. The Arbitrator then granted class certification for plaintiffs' Title VII disparate impact claims with respect to declaratory and injunctive relief and denied class certification with respect to plaintiffs' claims for monetary damages. *See id.* at 8; *see also id.* at 118. The clear inference is that the 23(b)(2) class was the one certified.

Confirming this point, the Arbitrator, in summarizing her award, stated: "I find that the adjudication of Claimants' Title VII disparate impact claims with respect to declaratory and injunctive relief may be maintained as a class arbitration pursuant to AAA Supplementary Rule 4 and Rule 23(b)(2) and Rule 23(c)(4). Claimants' motion for class certification of their Title VII disparate impact claims with respect to monetary damages pursuant to AAA Supplementary Rule 4 and Rule 23(b)(3) is denied." *id.* at 8, *see also id.* at 118. Further, the Arbitrator indicated that "I have determined that this case may proceed as a class action solely with respect to Claimants' disparate impact claims for declaratory and injunctive relief, based upon Rule 23(b)(2) and Rule 23(c)(4)." *Id.* at 103.

Having thus certified only a 23(b)(2) class, the Arbitrator then went on to write that, even though "[t]

he members of the proposed class are unlikely to have any interest in individually controlling the prosecution of Claimants' claims for declaratory and injunctive relief," "to the extent a putative class member wishes to do so, she will be afforded an opportunity to opt out of the class arbitration." Class Determination Award at 109-10. The Arbitrator also directed counsel to submit a proposed form of opt-out notice, *id.* at 118. It is clear, therefore, that the Arbitrator purported to permit opt-outs from a Rule 23(b)(2) class. But she had no power to do so, as the relief sought in the certification of a Rule 23(b)(2) class "must perforce affect the entire class at once." *Wal-Mart*, 131 S. Ct. at 2558.

Plaintiffs urge, however, that since the Arbitrator elsewhere found that the claimants satisfied the requirements of AAA Supplementary Rule 4(a) and 4(b), and these rules track the language of Fed. R. Civ. P. 23(a) and 23(b)(3), respectively, "the invocation of Rule 23(b)(2) is not necessary to sustain the Class Determination Award." Pl. Opp. Br. at 10. The Arbitrator did indeed state that the claimants "have satisfied the requirements of Supplementary Rules 4(a) and 4(b) with respect to their Title VII claims based upon a disparate impact theory of liability for purposes of declaratory and injunctive relief . . ." Class Determination Award at 112. But as the foregoing discussion indicates, the Arbitrator found AAA Supplementary Rules 4(a) and 4(b) were satisfied *because* she determined that Rule 23(b)(2) - that is, "one of the provisions of Rule 23(b)," *id.* at 6 - was satisfied.[4]

[4] The fact that some of the Arbitrator's inquiries, such as her analyses of "predominance" and "superiority," *see* Class Determination Award at 108-09, are part of AAA Supplementary

Thus, these determinations do not vitiate the Arbitrator's clear statements that she was permitting individuals to opt out of a class certified under Rule 23(b)(2).

The Court's task is to determine whether the Arbitrator has "*offer[ed]* a barely colorable justification for the outcome reached," *ReliaStar*, 564 F.3d at 86 (emphasis added), not whether the party satisfied by the Arbitrator's decision can devise a post hoc justification for her ruling. To ignore the Arbitrator's stated account in the Class Determination Award of what she was doing in certifying the class would not be to grant substantial deference.

Moreover, even if plaintiffs' argument that the Arbitrator certified an opt-out class under provisions other than Rule 23(b)(2) were somehow to be accepted, the Court would still hold that the Arbitrator failed to present a "barely colorable justification" for her ruling. The Arbitrator both (1) certified a class for the purpose of seeking class-wide injunctive relief and (2) permitted some putative class members to opt out. As the Arbitrator states, the answers to questions regarding an adverse effect on female employees at Sterling "will determine whether Claimants are entitled to class-wide declaratory and injunctive relief 'in one stroke' . . ." Class Determination Award at 98. Plaintiffs indicate that "as

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Rule 4 and Fed. R. Civ. P. 23(b)(3), and not Fed. R. Civ. P. 23(b)(2), does not prove that the Arbitrator certified the class under Rule 23(b)(3), since the Arbitrator also noted that "[a]lthough under Rule 23, the predominance and superiority requirements apply only to claims certified under Rule 23(b)(3), the predominance and superiority requirements of AAA Supplementary Rule 4(b) must be met in all cases." *Id.* at 6 n.4.

members of a certified class they seek injunctive relief to redress the policies and practices that they intend to show at trial had an impermissible adverse impact on women sales associates at Sterling Jewelers." Pl. Opp. Br. at 11-12.[5] Specifically, "the class would seek to ensure the criteria for making pay and promotions have been validated and to modify the criteria, used in making those personnel decisions." Pl. Opp. Br. at 12-13. These remedies are plainly types of relief that "must perforce affect the entire class at once." *Wal-Mart*, 131 S. Ct. at 2558.

Plaintiffs attempt to draw a distinction between the types of equitable relief that would be pursued by class members, on the one hand, and individuals who opt out, on the other. *See* Pl. Br. at 12-13. Plaintiffs argue that while the *class* would seek to validate and modify criteria used in making pay and promotion decisions, "individuals who opt out would be eligible to seek a promotion they would have received in the absence of discrimination or an adjustment to their pay rate to eliminate a disparity

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[5] At oral argument in front of the Arbitrator, plaintiffs expanded on the forms of relief they were seeking, such as "injunctive relief directing that Sterling conduct a proper job analysis of the positions at issue here and determine the particular kinds of knowledge, skills, and abilities" and injunctive relief enjoining "Sterling . . . from using any factors setting starting pay rates not shown to be job-related . . ."; and relief directing Sterling "to create a process for identifying and selecting candidates for promotion that afford employees full and fair notice of vacancies . . ." Pl. Opp. Br. Exhibit 2 (Transcript of Arbitration Proceedings on Feb. 26, 2014), 223:6-224:13. These remedies would necessarily affect all class members by virtue of their membership in their class.

with a similarly-situated male that cannot be justified." *Id.* At oral argument on the instant motion, plaintiffs suggested that "the remainder of the class can seek the broad injunctive relief, but those who remain in the class would not be eligible to seek the kind of individualized injunctive relief that those who opt out could." Transcript of Proceedings dated May 4, 2015 at 11:18-21. Plaintiffs fail to explain, however, how individuals who opt out would not be bound by the "broad injunctive relief" sought by "the remainder of the class." If the Arbitrator decides that Sterling must change its criteria for making promotion decisions, for example, it is unclear how some Sterling employees would not be subject to such a determination - even if certain employees who opt out are also able to pursue individualized equitable remedies.

Plaintiffs' briefing does suggest that courts have certified both (1) a Rule 23(b)(2) class for the purposes of pursuing classwide declaratory and injunctive relief and (2) a Rule 23(b)(3) class for the pursuit of individualized equitable and monetary relief. *See* Notice of Supplemental Authority in Support of Plaintiff's Opposition to Sterling's Motion to Vacate, Dkt. 143, enclosing *Chi. Teachers Union, Local No. 1, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the City of Chicago*, 14-2843, slip op. at 27 (7th Cir. Aug. 7, 2015); *see also, e.g., Easterling v. Conn. Dep't of Correction*, 278 F.R.D. 41, 51 (D. Conn. 2011). However, plaintiffs cite no cases in which a court permitted individuals to *opt out* of a class certified to seek injunctive or declaratory relief that would necessarily affect the class as a whole. Changes to Sterling's criteria for making pay and promotion decisions, among other forms of relief that plaintiffs

seek, would do precisely that. Therefore, in finding that some Sterling employees could opt out of a class certified to seek class-wide injunctive or declaratory relief, the Arbitrator failed to present a "barely colorable justification for the outcome reached." *ReliaStar*, 564 F.3d at 86.[6]

The Court additionally notes that the Arbitrator's decision to certify an opt-out class for classwide injunctive relief was made in "manifest disregard of law." *Jock*, 646 F.3d at 121. In order to find that an arbitrator has acted in manifest disregard of the law, first, "the governing law alleged to have been ignored by the arbitrators" must have been "well defined, explicit, and clearly applicable," and second, "[t]he arbitrator must appreciate[] the existence of a clearly governing legal principle but decide[]to ignore or pay no attention to it." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 209 (2d Cir. 2002)(alterations in the original; internal quotation marks omitted).

Here, the governing law that the Arbitrator chose to disregard - the principle that opt-out classes may

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[6] Further, AAA Supplementary Rule 5(c) indicates that "[t]he Class Determination Award shall state when and how members of the class may be excluded from the class arbitration. If an arbitrator concludes that some exceptional circumstance, such as the need to resolve claims seeking injunctive relief . . . makes it inappropriate to allow class members to request exclusion, the Class Determination Award shall explain the reasons for that conclusion." AAA Supplemental Rules for Class Arbitrations 5(c). This statement suggests that the AAA Supplementary Rules themselves contemplate a potential conflict between class-wide injunctive relief and opt-outs, although it does not provide conclusive proof and is not the provision upon which the Court's decision to vacate the arbitration award relies.

not be certified for the purposes of seeking classwide injunctive relief - was clearly mandated by the United States Supreme Court in *Wal-Mart v. Dukes*. As to the Arbitrator's appreciation of this principle, the Arbitrator cited *Wal-Mart* at length and drew significantly on *Wal-Mart*'s similarities and distinctions from the instant case in making her class determination decision. *See, e.g.*, Class Determination Award at 86-93. Given the Arbitrator's extensive familiarity with *Wal-Mart*, the Court declines to find that the Arbitrator somehow remained unaware of its statement that Rule 23(b)(2) classes do not permit opt-outs or of the reasoning that with Rule 23(b)(2) classes, "the relief sought must perforce affect the entire class at once" - reasoning that applies to any attempted certification of an opt-out class seeking classwide injunctive relief. Therefore, though the Court's ruling is sustained by the absence of a "barely colorable justification" for the Arbitrator's ruling, the Court also finds that the Arbitrator acted in "manifest disregard of law."

To conclude, the Court is not unmindful of the high standard for vacating an arbitration award. But deference to arbitrators is not without its limits; and the Court declines to hold that a ruling lacking "barely colorable justification" in black-letter law or common sense must be upheld purely because it issued from an arbitrator's pen. The Court therefore grants Sterling's motion to vacate the Arbitrator's class determination award to the extent that it permits individuals to opt out of a class certified for the purposes of seeking classwide injunctive and declaratory relief. In all other respects, the award is confirmed.

Appendix E

The Clerk of Court is directed to close docket number 136.

SO ORDERED.

Dated: New York, NY
November 15, 2015

JED S. RAKOFF, U.S.D.J.

APPENDIX F — ORDER DENYING CERTIORARI OF THE SUPREME COURT OF THE UNITED STATES, DATED MARCH 22, 2012

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 19, 2012

Clerk
United States Court of Appeals for the Second Circuit
702 US Courthouse, Foley Sq.
New York, NY 10007

Re: Sterling Jewelers Inc.
v. Laryssa Jock, *et al.*
No. 11-693
(Your No. 10-3247)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

WILLIAM K. SUTER, CLERK

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 1, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 10-3247-cv

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, DAWN SOUTO-COONS, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,

Plaintiffs-Counter-Defendants,

— v.—

STERLING JEWELERS INC.,

Defendant-Counter-Claimant-Appellee.

February 9, 2011, Argued
July 1, 2011, Decided

Before: WINTER, POOLER, and HALL, Circuit Judges.

Appendix G

Plaintiffs, a group of retail sales employees of defendant Sterling Jewelers, Inc.'s national jewelry chain stores, appeal from an order of the United States District Court for the Southern District of New York (*Rakoff, J.*) vacating an arbitration award on the ground that the arbitrator had exceeded her authority in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010). We hold that the district court, rather than examining whether the arbitrator had exceeded her authority under the precedent of this circuit, improperly substituted its own interpretation of the parties' arbitration agreement for that of the arbitrator's to conclude that the arbitrator had reached an incorrect determination that the parties' arbitration agreement did not prohibit class arbitration. We, therefore, reverse the judgment of the district court vacating the arbitration award and remand with instructions to confirm the award.

REVERSED AND REMANDED.

Judge Winter dissents in a separate opinion.

JOSEPH M. SELLERS, Cohen, Milstein, Sellers & Toll PLLC, Washington, DC, (Jenny R. Yang and Kalpana Kotagal, Cohen, Milstein, Sellers & Toll PLLC, Thomas Warren, Thomas A. Warren Law Offices, P.L., and Sam Smith, Burr & Smith, LLP *on the brief*) for *Plaintiffs-Counter-Defendants-Appellants.*

GERALD L.MAATMAN, JR., Seyfarth Shaw LLP, New York, NY, (David Bennet Ross and Daniel B. Klein, Seyfarth Shaw LLP, and Stephen S.

Zashin, Zashin & Rich Co., L.P.A., *on the brief*) for *Defendant-Counter-Claimant-Appellee.*

HALL, *Circuit Judge*:

Plaintiffs, a group of retail sales employees of defendant Sterling Jewelers, Inc.'s national jewelry chain stores, appeal from an order of the United States District Court for the Southern District of New York (*Rakoff, J.*) vacating an arbitration award on the ground that the arbitrator had exceeded her authority in light of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010). The issue presented by this appeal is whether a district court has the authority to vacate an arbitration award where it believes that the arbitrator improperly interpreted the terms of an arbitration agreement. Because the district court did not undertake the appropriate inquiry—whether, based on the parties' submissions or the arbitration agreement, the arbitrator had the authority to reach an issue, not whether the arbitrator decided the issue correctly—and instead substituted its own legal analysis for that of the arbitrator's, we reverse the judgment of the district court. Because we find that the arbitrator acted within her authority to reach an issue properly submitted to her by the parties and reached her decision by analyzing the terms of the agreement in light of applicable law, the award should not have been vacated. We remand with instructions to confirm the award.

Appendix G

I. Background

In May 2005, plaintiff Laryssa Jock filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") against her employer Sterling Jewelers, Inc. ("Sterling"), alleging that she and other female workers were being paid less because of their gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d). Eighteen other female employees filed charges against Sterling before the EEOC. Jock and the other employees simultaneously initiated dispute resolution procedures pursuant to their employment contract, which mandated a three-step alternative dispute resolution program, known as RESOLVE. Step One of the RESOLVE program requires the employee to notify Sterling of her complaint in writing, and include references to any supporting evidence. Sterling then makes a determination with respect to the merits of the complaint. If the employee is dissatisfied with Sterling's determination, she may then initiate Step Two, which calls for referring the claim to a mediator or a panel of employees, both of which are determined by Sterling. If the employee remains dissatisfied, in Step Three she may request arbitration, which is to be conducted in accordance with the rules of the American Arbitration Association ("AAA"). Agreeing to the RESOLVE dispute resolution process is a mandatory condition of employment.

In January 2008, the EEOC issued its letter of determination, finding reasonable cause to believe that Sterling had violated Title VII and the Equal Pay Act. According to its letter, the EEOC's "investigation

determined that [Sterling] subjected [plaintiffs-appellants] and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation." The letter goes on to state that "[s]tatistical analysis of pay and promotion data . . . reveals that [Sterling] promoted male employees at a statistically significant, higher rate than similarly situated female employees and that [Sterling] compensated male employees at a statistically significant, higher rate than similarly situated female employees."

Following the EEOC's determination, in March 2008, Jock and the other plaintiffs-appellants (collectively, the "plaintiffs") filed a class action suit in the United States District Court for the Southern District of New York on behalf of themselves and others similarly situated, and asserting claims under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act, alleging that Sterling's discriminatory promotion and compensation policies denied promotional opportunities to qualified female employees and paid female employees less than male employees performing the same work. That same month, the plaintiffs filed a class arbitration complaint with the AAA, making the same allegations and challenging the same practices. After Sterling addressed several of the plaintiffs' concerns, they moved to stay their federal court litigation in favor of the arbitration. In September 2008, the EEOC filed a parallel action against Sterling in the United States District Court for the Western District of New York.

II. Procedural History

On June 18, 2008, over Sterling's objection, the district court granted the plaintiffs' motion to refer the matter to arbitration and stay the litigation. The parties submitted to the arbitrator the question whether the RESOLVE agreement permitted or prohibited class arbitration. In its clause construction brief, Sterling asked the arbitrator to "find . . . [t]hat RESOLVE does not allow for class arbitration." The plaintiffs conversely asked the arbitrator to "find that the RESOLVE Arbitration Agreements at issue permit class arbitration." On June 1, 2009, the arbitrator found in favor of the plaintiffs, issuing a "Clause Construction Award" (the "award") holding that the RESOLVE arbitration agreements "cannot be construed to prohibit class arbitration." In undertaking her analysis, the arbitrator began by quoting the language of the arbitration provision at issue:

> I hereby utilize the Sterling RESOLVE program to pursue any dispute, claim, or controversy ("claim") against Sterling . . . regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a [sic] appropriate court, including but not limited to, claims under . . . Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991, . . . the Fair Labor Standards Act . . .. I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government

> agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program.
>
> ***
>
> The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

The arbitrator noted that there was no express prohibition on the pursuit of class claims and that "indeed, there is no mention of class claims." The arbitrator stated that "[u]nder Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." Construing the agreement in accordance with Ohio law, as required by the terms of the agreement, the arbitrator determined she would not read into the agreement an intent to prohibit class claims because "'[t]he law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract.'" (quoting *Montgomery v. Bd. of Educ. of Liberty Township, Union Cty.*, 102 Ohio St. 189, 193, 131 N.E. 497, 19 Ohio L. Rep. 14 (1921)).

In other words, the arbitrator construed the absence of an express prohibition on class claims against the contract's drafter, Sterling. Noting that the issue of intent

was "problematic in the context of a contract of adhesion," the arbitrator held that "[b]ecause this contract was drafted by Sterling and was not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed." In her analysis of the agreement, the arbitrator noted that Sterling acknowledged it had deliberately chosen not to revise the RESOLVE contract despite several arbitral decisions permitting class claims in the absence of an express prohibition. She reasoned that to read a prohibition on class arbitration into the terms of the agreement "would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract." (citing *Montgomery*, 102 Ohio St. at 193). Noting that the agreement expressly gave the arbitrator the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction," the arbitrator determined that merely agreeing to the RESOLVE step process could not constitute a waiver of the employee's right to participate in a collective action. Finally, she concluded that "[t]he RESOLVE arbitration agreements cannot be construed to prohibit class arbitration," which thus permitted the plaintiffs to proceed with an effort to pursue their claims on a class-wide basis. The arbitrator allowed the parties to move in the district court to confirm or vacate that determination.

On June 30, 2009, Sterling moved in the district court case to vacate the arbitration award. On August 31, 2009, the district court denied the motion to vacate the award, laying out its reasoning in an opinion dated December 28, 2009. In that opinion, the district court

decided as a preliminary matter that the motion was ripe for consideration despite the fact that the arbitrator had not yet certified a class. It went on to hold that the arbitrator had not exceeded her powers by reaching the issue whether the arbitration agreements prohibited class certification and that the decision was not made in manifest disregard of the law, citing the Second Circuit's decision in *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 548 F.3d 85, 99 (2d Cir. 2008). The court declined to stay its order pending the outcome of the Supreme Court's decision in *Stolt-Nielsen*.

On January 26, 2010, Sterling appealed the district court's order denying its motion to vacate the award or, in the alternative, stay the arbitration. Three months later, the Supreme Court issued its decision in *Stolt-Nielsen*, and on May 13, 2010, Sterling moved pursuant to Federal Rules of Civil Procedure 62.1 and 60(b) in the district court for relief from its December 28, 2009 order. The appeal to this court was held in abeyance pending the outcome of the district court's decision on that motion.

On July 27, 2010, the district court issued a ruling holding that, if jurisdiction was restored to it, it would reconsider its December 28, 2009 order and vacate the arbitrator's award that permitted the plaintiffs to pursue class certification. *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010). The district court concluded that in light of the Supreme Court's decision in *Stolt-Nielsen v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), "the arbitrator's construction of the RESOLVE agreements as permitting class certification was in excess of her powers and therefore cannot be upheld." *Jock*, 725 F. Supp. 2d at 448. The district court

first held that the arbitrator's approach—determining whether there was any indication of an intent to preclude class arbitration—"was plainly incompatible with the Supreme Court's subsequent pronouncements in *Stolt-Nielsen*." *Id.* Then, addressing the issue whether the record "evince[d] the parties' shared intent to permit class arbitration," the court found the record devoid of any indication that the parties intended to permit arbitration of class claims. *Id.* Although the district court conceded that *Stolt-Nielsen* "does not foreclose the possibility that parties may reach an 'implicit'—rather than express—'agreement to authorize class-action arbitration,'" it held that "the record here provides no support for such an implied agreement." *Id.* at 449 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775). In so ruling, the district court determined that *Stolt-Nielsen* was not distinguishable on the facts. *Id.* at 449-50.

On August 3, 2010, this court issued a limited remand of the appeal to permit the district court to rule on the pending Rule 60(b) motion. Six days later, the district court officially granted Sterling's motion to vacate the arbitrator's award permitting class arbitration to proceed. Plaintiffs timely appealed that ruling.

III. Discussion

Appellate jurisdiction is based on the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(E) ("An appeal may be taken from . . . an order . . . vacating an award."). "In considering a challenge to a district court's decision to vacate a portion of an arbitration award, we review its legal rulings *de novo* and its findings of fact for clear error." *ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009).

Appendix G

A. Supreme Court's Decision in *Stolt-Nielsen*

The dispute in *Stolt-Nielsen* arose out of a Department of Justice investigation that revealed the petitioner, a shipping company, was engaging in an illegal price-fixing conspiracy. *Stolt-Nielsen*, 130 S. Ct. at 1765. The respondent, a shipping customer, brought a putative class action asserting antitrust claims for supracompetitive prices that the shipping company had been charging its customers over the course of several years. *Id.* The Multidistrict Litigation Panel eventually consolidated that case with other similar cases; the parties agreed that, as a consequence of judgments and orders arising out of that MDL case, they had to arbitrate their antitrust dispute. *Id.* The respondent subsequently served the petitioner with a demand for class arbitration. *Id.*

The parties then entered into a supplemental agreement that the question of class arbitration was to be submitted to a panel of three arbitrators. *Id.* The parties stipulated that the arbitration clause was "silent" with respect to class arbitration. *Id.* at 1766. After hearing argument and taking evidence from the parties, including expert testimony on the customs and usage in the maritime trade, the arbitration panel concluded that the arbitration clause allowed for class arbitration. *Id.* The arbitration panel stayed its decision to permit the parties to seek judicial review. The petitioners filed an application to vacate the award in the United States District Court for the Southern District of New York. *Id.*

The district court vacated the award on the ground that the arbitrators had acted in manifest disregard of the law because they failed to conduct a choice-of-law analysis. *Id.* This court reversed, concluding that the

decision was not in manifest disregard of the law because the petitioner had not cited any authority applying a federal maritime rule of custom and usage against class arbitration and because there was nothing in New York law that established a rule against class arbitration. *Id.* at 1766-67.

The Supreme Court granted *certiorari* to decide the question "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]." *Id.* at 1764. The five-member majority first noted that "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded his powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.* at 1767. Of significance to the majority was that the arbitration panel "appears to have rested its decision on [a] public policy argument." *Id.* at 1768. *See also AT&T Mobility LLC v. Concepcion*, __U.S. __, 131 S. Ct. 1740 (2011) (noting that in *Stolt-Nielsen* "we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation"). The *Stolt-Nielsen* Court admonished that "[b]ecause the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation," hypothesizing that the FAA, federal maritime law, or New York would provide the governing rule. 130 S. Ct. at 1768. The Court reiterated that, in light of the parties' stipulation

that they were "in complete agreement regarding their intent," i.e., that their arbitration agreement contained "no agreement" on the issue of class arbitration, "the only task left for the panel . . . was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration." *Id.* at 1768, 1770. Because the arbitration panel failed to follow this approach, the Supreme Court concluded that it had "exceeded its powers" when it "imposed its own policy choice" rather than engaging in its required "task" of "interpret[ing] and enforc[ing] a contract," "identifying and applying a rule of decision derived from the FAA or either maritime or New York law," and "giv[ing] effect to the intent of the parties." *Id.* at 1767-68, 1770, 1774-75.

The Court's interpretation of the parties' "silence" is key. Our dissenting colleague states that he believes the "silence" in *Stolt-Nielsen* was interpreted as "simply reflect[ing] the fact each party recognized the arbitration clause neither specifically authorized nor specifically prohibited class arbitration." Dissenting Op. at 1-2 (citing Brief for Respondent at 26, *Stolt-Nielsen*, 2009 WL 3404244, at *26). The dissent, however, fails to acknowledge that although that is the interpretation that the Respondent in *Stolt-Nielsen* wished the Court to adopt, that is not the interpretation that the Court *did* adopt. To the contrary, the Court interpreted the stipulated silence to mean that "the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1768. *See also id.* at 1766 ("The

parties . . . stipulated that the arbitration clause was 'silent' with respect to class arbitration. Counsel for [the Respondent] explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, '[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on the issue.'"). The Court further noted that "parties were in complete agreement regarding their intent." *Id.* at 1770. That is to say, according to the majority in *Stolt-Nielsen*, there was no express or implicit intent to submit to class arbitration. Indeed, the dissent in Stolt-Nielsen pointed out that the majority's interpretation of "silence" was incongruous with the Respondent's interpretation. *Id.* at 1781 (Ginsburg, *J., dissenting*) (noting the majority's failure to acknowledge that counsel for the Respondent clarified his quoted statement to say that "[i]t's also undisputed that the arbitration clause here contains broad language and this language should be interpreted to permit class arbitration"). Although the dissent here appears to agree with Justice Ginsburg's interpretation of the parties' stipulated "silence" in *Stolt-Nielsen*, significantly for purposes of this case, that was not the interpretation adopted by the majority.

Turning back to *Stolt-Nielsen*, the Court then took on the task of answering the question left open by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003): "establish[ing] the rule to be applied in deciding whether class arbitration is permitted." *Stolt-Nielsen*, 130 S. Ct. at 1772. Acknowledging that although "interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental

importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* at 1773 (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Court emphasized the "consensual nature of private dispute resolution," noting that "parties are generally free to structure their arbitration agreements as they see fit" and that "parties may specify *with whom* they choose to arbitrate their disputes." *Id.* at 1774 (internal quotation marks omitted) (emphasis in original). Accordingly, because the primary purpose when enforcing arbitration agreements is "to give effect to the intent of the parties," the Court concluded that "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Significantly, the *Stolt-Nielsen* Court was concerned that the arbitration panel had imposed class arbitration despite the parties' explicit stipulation that "they had reached 'no agreement' on that issue," i.e., that they had stipulated that the arbitration agreement contained neither an explicit nor implicit intent regarding class arbitration. *Id.*

It is equally important to note that the Court declined to hold that an arbitration agreement must expressly state that the parties agree to class arbitration—"[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class arbitration"—because in the case before them, "the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 1776 n.10. The Court contemplated that an arbitration agreement may contain an implicit agreement to authorize class

arbitration, but an "implicit" agreement to authorize class arbitration may not be "infer[red] solely from the fact of the parties' agreement to arbitrate." *Id.* at 1775. In other words, simply agreeing to submit the dispute to an arbitrator does not equal an agreement to class-action arbitration. "[M]ere silence" on the issue of class arbitration, therefore, cannot give rise to "consent to resolve . . . disputes in class proceedings." *Id.* at 1776. Thus, the Court saw "the question as being whether the parties *agreed to authorize* class arbitration" and held that "where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.* (emphasis in original).

B. District Court's Authority to Vacate Award

The Federal Arbitration Act ("FAA") sets forth specific grounds for vacating arbitration awards. 9 U.S.C. § 10(a). Grounds for vacating an award under section 10(a) are: "corruption, fraud, or undue means in procurement of the award, evident partiality or corruption in the arbitrators, specified misconduct on the arbitrators' part, or 'where the arbitrators exceeded their powers.'" *Wall Street Assocs., L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 848 (2d Cir. 1994) (quoting 9 U.S.C. § 10(a)). Because the FAA supports a "strong presumption in favor of enforcing arbitration awards . . . the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist." *Id.* at 849. In addition to the section 10(a) grounds for vacatur, we have recognized a judicially-created ground, namely that "an arbitral decision may be vacated when an arbitrator

has exhibited a manifest disregard of law."[1] *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir.

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[1] To vacate an award on the basis of a manifest disregard of the law, the court must find "something beyond and different from mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Westerbeke*, 304 F.3d at 208. (internal quotation marks omitted). The two part showing requires the court to consider, first, "whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable," and, second, whether the arbitrator knew about "the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it." *Id.* at 209 (internal quotations and alterations omitted). *See also STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, No. 10-3847-cv, slip op. at 18 (2d Cir. June 2, 2011) ("We therefore will not vacate an award because of 'a simple error in law or a failure by the arbitrators to understand or apply it' but only when a party clearly demonstrates 'that the panel intentionally defied the law.'") (quoting *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)). Here, the district court did not base its vacatur order on the manifest disregard of law doctrine, *Jock*, 725 F. Supp. 2d at 448 n.4, and, at any rate, it is clearly not applicable to this case where this circuit's decision in *Stolt-Nielsen* was controlling at the time and the Supreme Court's decision in that case was issued a year after the arbitrator's award. On page 10 of the dissent, our colleague states that the arbitrator "exceeded her authority by manifestly disregarding explicit provisions of the agreement inconsistent with class arbitration." Respectfully, the dissent has conflated two separate grounds for vacatur, which are independent of each other and do not overlap. As we have already pointed out, whether an arbitrator exceeds her authority or manifestly disregards the law requires a reviewing court to undertake two different inquiries for determining whether vacatur is appropriate.

2002) (internal quotation marks omitted); *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133,139 (2d Cir. 2007).

"We have . . . 'consistently accorded the narrowest of readings'" to section 10(a)(4) permitting vacatur where the arbitrator has exceeded her powers. *Reliastar*, 564 F.3d at 85 (quoting *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003)); *Westerbeke*, 304 F.3d at 220. This is "especially" true when section 10(a)(4) is invoked to challenge an award deciding "a question which all concede to have been properly submitted in the first instance." *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997) (quoting *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991)). The focus of our inquiry in challenges to an arbitration award under section 10(a)(4) is "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrators correctly decided that issue*." *Id.* (emphasis added); *Westerbeke*, 304 F.3d at 220. Put simply, "[s]ection 10(a)(4) does not permit vacatur for legal errors." *Westerbeke*, 304 F.3d at 220. If the "arbitrator's award draws its essence from the agreement to arbitrate," then "the scope of the court's review of the award itself is limited. Notably, *we do not consider whether the arbitrators correctly decided the issue*." *Reliastar*, 564 F.3d at 86 (internal quotation marks and alterations omitted) (emphasis added). We will uphold an award so long as the arbitrator "offers a barely colorable justification for the outcome reached." *Id.* (internal quotation marks omitted). As the Supreme Court emphasized in *Stolt-Nielsen*, vacating an arbitration award

requires the moving party to "clear a high hurdle," and "[i]t is not enough . . . to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." 130 S. Ct. at 1767 (internal quotation marks, citations, and alterations omitted). "In other words, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision." *Reliastar*, 564 F.3d at 86 (internal quotation marks omitted).

Accordingly, an arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement. For example, in *Westerbeke*, 304 F.3d at 220, we drew a distinction between two situations. One is where the law or the parties' agreement categorically prohibits the arbitrator from reaching an issue so that, in reaching that issue, the arbitrator exceeds her authority. *Id.* (citing *Fahnestock*, 935 F.2d at 519 (vacating an arbitration award imposing punitive damages where New York law expressly prohibited arbitrators from imposing punitive damages) and *Katz v. Feinberg*, 290 F.3d 95, 97-98 (2d Cir. 2002) (holding that the arbitrators had exceeded their authority by reaching an issue that the agreement exclusively committed to independent accountants, not the arbitrators)). The other is a situation where the parties grant the arbitrator

the authority to determine an issue, but the arbitrator makes an error of law in deciding that issue. *Id.* (citing *DiRussa*, 121 F.3d at 824 (confirming an award denying attorneys' fees for a party that successfully established a violation of the Age Discrimination in Employment Act, which required a statutory award of attorneys' fees). Concluding that the parties were contesting whether the arbitrator properly interpreted New York law regarding the award of expectancy damages, not whether the arbitrator had the authority to award such damages generally, the court in *Westerbeke* held that the award could not be vacated under section 10(a)(4) despite the fact that such damages might be precluded by New York law. 304 F.3d at 220. In other words, the arbitrator may well have committed an error of law, but in doing so she was rendering a decision the parties authorized her to make and thus did not exceed her authority in making the determination.

The threshold issues for the district court to consider in this case when deciding whether it was appropriate to vacate the award pursuant to section 10(a)(4) was, first, whether the parties had submitted to the arbitrator the question of whether their arbitration agreement permitted class arbitration and, second, whether the agreement or the law categorically prohibited the arbitrator from reaching that issue. The district court, however, appears not to have considered the "high hurdle" that vacating an award under section 10(a)(4) requires but to have proceeded instead to engage in a substantive review of the arbitrator's decision, holding that "in light of *Stolt-Nielsen*, . . . the arbitrator's construction of the RESOLVE agreements as permitting class arbitration

was in excess of her powers and therefore cannot be upheld." In substance, while articulating a rationale that purported to examine whether the arbitrator exceeded her authority, the district court's analysis focused in fact on whether the arbitrator had correctly interpreted the arbitration agreement itself. This was error.

The district court seems to have taken the plaintiffs' concession that the agreement lacked an explicit authorization permitting class arbitration as a concession that the agreement did not manifest even an implicit intent to permit class arbitration. *Jock*, 725 F. Supp. 2d at 448. The plaintiffs' concession that there was no explicit agreement to permit class arbitration, however, is not the same thing as stipulating that the parties had reached no agreement on the issue. Nor is it the same as stipulating that the agreement is "silent" on the issue of class arbitration in the sense that "silent" was used by the *Stolt-Nielsen* majority. As the district court correctly acknowledged, "*Stolt-Nielsen* does not foreclose the possibility that parties may reach an 'implicit'—rather than express—'agreement to authorize class-action arbitration.'" *Id.* at 449 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1775). Where the district court strayed was in substituting its interpretation of the agreement for that already undertaken by the arbitrator when she performed the legal analysis she was asked by the parties to undertake. When the district court did so, it determined that nothing in the record supported any implied agreement to permit arbitration, but this was an issue the arbitrator had already considered and decided differently. *Id.*

Under our precedent it is not for the district court to decide whether the arbitrator "got it right" when the

question has been properly submitted to the arbitrator and neither the law nor the agreement categorically bar her from deciding that issue. *Reliastar*, 564 F.3d at 85-86;*Westerbeke*, 304 F.3d at 220. In that regard, there is no question that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator. In its brief submitted to the arbitrator on the issue, Sterling expressly asked the arbitrator to "find . . . [t]hat RESOLVE does not allow for class arbitration." Similarly, in the converse, the plaintiffs asked the arbitrator to "find that the RESOLVE Arbitration Agreements at issue permit class arbitration." In sum, the parties agree that they disagree about whether the arbitration agreement permits class arbitration. Put another way, unlike *Stolt-Nielsen*, the parties have not stipulated that the agreement is "silent" as to class arbitration—that is, the parties here are not in agreement that the RESOLVE agreement contains no explicit or implicit intent regarding the issue of class arbitration—and there is no escaping the fact that the parties submitted that question to the arbitrator for a decision.

Nor did the arbitrator exceed her authority under the agreement or the law by deciding the issue and ruling that the arbitration agreement allowed the plaintiffs to pursue class arbitration even though the agreement lacked an express provision permitting class arbitration. *Stolt-Nielsen*, on which the district court relied, did not create a bright-line rule requiring that arbitration agreements can only be construed to permit class arbitration where they contain express provisions permitting class arbitration. 130 S. Ct. at 1776 n.10. There is nothing in the agreement itself, moreover, that prohibits an

arbitrator from determining whether the agreement contemplates class arbitration. In other words, the arbitrator was acting within her authority when she concluded that the arbitration agreement between Sterling and the plaintiffs manifested an intent to allow for class arbitration because the issue was properly before her having been placed there by the parties. In addition, she had a colorable justification under Ohio law to reach the decision she did, to wit, Ohio law does not bar class arbitration.

By re-examining the record to determine the question that the arbitrator had already decided—whether the parties intended to permit arbitration of class claims—the district court substituted its legal reasoning for the arbitrator's. Yet the only question before it, both preceding and following the issuance of *Stolt-Nielsen*, was whether the arbitrator was authorized by the parties, the agreement, and applicable law to render the decision she did. The record demonstrates unequivocally that the arbitrator operated within the bounds of her authority in reaching her decision. Sterling has not argued, nor would we find, that the decision manifestly disregarded the law. The decision of the arbitrator should thus be confirmed.

It is worth reemphasizing that the primary thrust of our decision is whether the district court applied the appropriate level of deference when reviewing the arbitration award. With all due respect, our dissenting colleague appears to have fallen into the same trap as did the district court by focusing, to the point of disposition, on what the "correct" interpretation of *Stolt-Nielsen* should be. Like the district court, the dissent fails to

identify how the arbitrator exceeded her authority, which, if true, would be a valid basis for vacating the award. Indeed, the dissent explicitly acknowledges that the arbitrator faithfully followed the law as it existed at the time of her decision. (Dissenting Op. p. 6). Our Circuit has never held that an intervening change of law, standing alone, provides grounds for vacating an otherwise proper arbitral award.

Instead, the dissent, like the district court, focuses impermissibly on substituting its interpretation of what the arbitration agreement does or does not allow—a function explicitly submitted by the parties to the sound judgment of the arbitrator. To achieve the result that both the dissent and the district court would impose in this case would require that we forsake the "substantial deference" we have for decades accorded to an arbitrator's decision that is rendered within the authority given her by the parties and under law. *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). There is simply no basis for abandoning that principle in this case and toppling the pedestal on which our federal jurisprudence has repeatedly placed a properly authorized arbitrator's determination of the facts and analysis of the law. To do so here in order to strike down the arbitral determination allowing class arbitration requires throwing the baby out with the bathwater.

C. Sterling's interpretation of *Stolt-Nielsen* is not persuasive

In support of the district court's determination, Sterling argues that the agreement is "silent" on the issue of class arbitration because it does not contain an

express provision permitting class arbitration and that the arbitrator found that the arbitration agreement did not *prohibit* class arbitration, rather than finding that it *permitted* class arbitration. Sterling's arguments are unpersuasive.

To begin with, in fairness to the arbitrator, the legal standard she was operating under at the time framed the issue as whether the applicable law *prohibited* class arbitrations. J.A. 703 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 100-01 (2d Cir. 2008) *overruled by Stolt-Nielsen*, 130 S. Ct. 1758 (2010) (reversing vacatur award where party had not cited any "federal maritime law or New York State law establishing a rule of construction prohibiting class arbitration where the arbitration clause is silent on that issue")). Nonetheless, it was Sterling that framed the issue and asked the arbitrator to find that the agreement did not allow for—i.e., prohibited—class arbitration, and it was the plaintiffs who asked the arbitrator to find that the agreement permitted class arbitration. A determination that class arbitration is not prohibited under the agreement clearly answers both parties' question. The arbitrator's analysis, using principles of contract interpretation under Ohio law, included an examination of the language of the contract to determine the parties' implicit intent to permit class arbitration. That she phrased her conclusion in the negative is of no moment and certainly does not indicate she improperly reached an issue that was not before her.

Sterling's attempt to equate the lack of an express agreement with a lack of intent to agree to class arbitration also misses the mark because it relies on a rationale

that *Stolt-Nielsen* did not advance. *Stolt-Nielsen* did not hold that the intent to agree to arbitration must be stated expressly in an arbitration agreement. 130 S. Ct. at 1776 n. 10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration."). Moreover, the negative inferences from the *Stolt-Nielsen* opinion supports the approach taken by the arbitrator. A primary basis for the Supreme Court's decision to vacate the arbitration award in *Stolt-Nielsen* was that the arbitration award went beyond the terms of the agreement and governing law, and the panel relied on public policy grounds to support its finding that the arbitration agreement permitted class arbitration. 130 S. Ct. at 1767-68. None of those factors obtains here.

The dissent states that the FAA, not state law, establishes the primary principle that the parties must consent to arbitration. Dissenting Op. at 6-7. We do not disagree. We disagree, however, that state law is "irrelevant" for the issues presented here. We note that in *Stolt-Nielsen*, a primary concern for the Court was that the arbitration panel based its holding on public policy grounds, rather than looking to the FAA, maritime, or state law. 130 S. Ct. at 1768-69. Indeed, although the FAA absolutely requires that the parties "not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so," where that agreement contains what is argued to be an implicit agreement to submit to class arbitration, the arbitrator must necessarily look to state law

principles of contract interpretation in order to divine whether such intent exists. *Id.* at 1773, 75 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.") (internal quotation marks and citations omitted).

In divining the parties' intent on the issue of class arbitration, the arbitrator relied solely on the terms of the agreement and Ohio law: "[u]nder Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." J.A. 703 (citing *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 247 (1974)). Based on the language of the agreement, to deny the plaintiffs the right to seek classwide relief would deny them access to at least one type of legal or equitable relief available to them in court—namely, certification to pursue classwide relief. That result would be contrary to the promise of the RESOLVE arbitration agreement, which states that by signing the agreement the employee is waiving any right to seek relief through any government agency or court, but that she "may, however, seek and be awarded equal remedy through the RESOLVE program" and that the arbitrator has the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction."

Sterling also argues unpersuasively that this language is similar to the language of the arbitration clause in *Stolt-Nielsen*. The arbitration clause in *Stolt-Nielsen*, however, was not as broadly worded as the RESOLVE agreement. It merely stated that the arbitration clause would be applicable to "[a]ny dispute arising from the

making, performance or termination of this Charter Party." *Stolt-Nielsen*, 130 S. Ct at 1765. That is not the same as saying that the employee "may, however, seek and be awarded equal remedy through the RESOLVE program" and that the arbitrator has the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction."

Stolt-Nielsen has reaffirmed the basic precept of the FAA, that "arbitration is a matter of consent, not coercion." *Id.* at 1773 (quoting *Volt*, 489 U.S. at 479). "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Id.* at 1773-74 (quoting *Volt*, 489 U.S. at 479). The intent of the parties, therefore, is controlling. *Id.* at 1774. "Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit." *Id.* (internal quotation marks omitted). It is clear from the terms of the arbitration agreement that Sterling required its employees to sign that the parties intended to make available in arbitration all remedies and rights that would otherwise be available in court or before a government agency. It was not unreasonable, and clearly not manifestly wrong, for the arbitrator to construe this to mean that the parties also intended to include the right to proceed as a class and seek class remedies. To read that right out of the arbitration agreement would fail to give effect to the employees' contractual rights and expectations of what the arbitration agreement provides.[2]

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[2] As an aside, it is a bit disingenuous for Sterling to argue that permitting class arbitration to proceed would lose sight of the

Regardless, whether the arbitrator was right or wrong in her analysis, she had the authority to make the decision, and the parties to the arbitration are bound by it.[3] In sum, we hold that the arbitrator did not exceed her authority in determining that the agreement permitted the plaintiffs to proceed with their effort to certify a class in the arbitration proceedings.

IV. Conclusion

For the reasons stated, we REVERSE the judgment of the district court vacating the arbitration award and

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requirement that "parties may specify with whom they choose to arbitrate their disputes," *Stolt-Nielsen*, 130 S. Ct. at 1774, because the putative class in this case would presumably include only employees who signed the RESOLVE agreement. Accordingly, because Sterling and each potential member of the putative class agreed to arbitrate their disputes, they implicitly agreed that they may seek to do so as a class, and Sterling is certainly not being forced to arbitrate with anyone whom it did not require to arbitrate with it.

[3] We further note that the arbitrator's decision merely permits the plaintiffs to seek class certification; it does not make it a foregone conclusion that a class will be certified. The arbitrator must still consider the propriety of class certification in this case if and when an application to certify a class is advanced. That consideration will no doubt include examination of the problems identified in the dissent regarding the feasibility of class certification in the circumstances presented here. The articulation of the principles set forth in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 2011 WL 2437013 (June 20, 2011), may well be principles for the arbitrator to consider when she is presented with the employees' motion actually to certify a class. However, in no way do they inform or detract from the question presented by the parties to the arbitrator for decision—to wit, whether the agreement permits class arbitration at all.

REMAND with instructions to confirm the arbitration award.

WINTER, Circuit Judge dissenting:

I respectfully dissent.

This case is the arbitration counterpart to *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. __, 2011 WL 2437013 (June 20, 2011). As in *Wal-Mart*, the class action complaint filed by appellants in the Southern District, followed by their request for class arbitration, the subject of this proceeding, asserted a company-wide gender discrimination claim against a national employer based on a statistical study finding disparities in pay and promotions between male and female employees where the company has delegated relevant decision-making power to local executives. *Wal-Mart*, 2011 WL 2437013, at *9-10. I need not pause to consider the *Wal-Mart* decision's effect on the present matter because *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), is a binding precedent on all fours.

The issue in *Stolt-Nielsen*, which reversed a decision of this court, was, in the Supreme Court's words, "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)." *Id.* at 1764. The Court answered that question in the negative. *Id.* at 1775.

My colleagues attempt to distinguish *Stolt-Nielsen* on several grounds. First, they note the stipulation in *Stolt-Nielsen* that the arbitration agreement there was "silent" as to class arbitration. Maj. Op. at 11-12, 18. Second, they rely on *Stolt-Nielsen*'s recognition of the possibility of implied agreements to class arbitration. Maj. Op. at

13-14, 18. Third, they make reference to the arbitrator's reliance on Ohio law in this case. Maj. Op. at 19, 21-23. Fourth, they rely on provisions of the various arbitration agreements at issue here empowering arbitrators to award generally available types of legal and equitable relief. Maj. Op. at 23-24. Fifth, and finally, they invoke the limited scope of judicial review of arbitration agreements. Maj. Op. at 19-21. None of these grounds, which I address seriatim, suffices to distinguish *Stolt-Nielsen*.

I.

My colleagues emphasize the existence of a stipulation between the parties in *Stolt-Nielsen* that the pertinent arbitration clause was "silent" as to class arbitration. Maj. Op. at 11-12, 18. This stipulation simply reflected the fact that each party recognized that the arbitration clause neither specifically authorized nor specifically prohibited class arbitration. Brief for Respondent at 26, *Stolt-Nielsen*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 3404244 at *26. The disputed issue was, as it was in the Second Circuit, the effect of that silence. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 86 (2d Cir. 2008) ("The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award construing that silence to permit class arbitration, acted in manifest disregard of the law."). That is precisely the issue in this matter.

Neither party here claims that any of the various arbitration clauses at issue[4] either specifically autho-

[4] Many arbitration agreements, with significantly different provisions, were signed by the individual Sterling employees, *see infra*, p.4.

rizes or specifically precludes class arbitration, the same facts that constituted the "silence" that existed in *Stolt-Nielsen*. Indeed, that is the reason my colleagues seek refuge in a non-existent finding of the arbitrator, discussed *infra* Part II, that an agreement to class arbitration was implied.

If the parties' arguments here and the face of the agreements are insufficient to establish their "silence," then the arbitrator's decision certainly was when she explicitly found "there is no mention of class claims." Clause Construction Award (Ex. F to Sterling Mem. of Law in Support of Mot. to Vacate) at 3, *Jock v. Sterling Jewelers, Inc.*, 677 F. Supp. 2d 661 (2009) (No. 08 Civ. 2875). That being the case, and not having the benefit of the Supreme Court's views in *Stolt-Nielsen*, the arbitrator framed the issue before her by specifically relying on the Second Circuit's decision in *Stolt-Nielsen*. Following our now-reversed decision, she found only that the arbitration clauses here did not "prohibit class arbitrations," and therefore that they allowed class arbitrations. Clause Construction Award, *supra*, at 4. In short, the arbitrator viewed the arbitration clause here as, in all pertinent respects, identical to that in *Stolt-Nielsen*.[5]

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[5] Moreover, my colleagues' narrow reading of *Stolt-Nielsen* -- limiting it to cases with supposed formal stipulations as to contractual silence -- casts grave doubt over the reasons for the Court's even granting a writ of certiorari in that case. Under Supreme Court Rule 10, "a writ of certiorari will be granted only for compelling reasons." The Supreme Court grants such writs only where "a state court or a United States court of appeals has decided an important question of federal law that has

II.

My colleagues also seek to distinguish *Stolt-Nielsen* on the ground that the decision recognized the possibility of implied agreements to class arbitration. Maj. Op. at 13-14, 18. True. However, the Supreme Court explicitly held that, in an FAA proceeding, an implied agreement could not be inferred from an arbitration clause's failure to "preclude class arbitrations." 130 S. Ct. at 1775 (emphasis omitted). Had it not decided that question, the Court would have had either to address whether such an agreement might be implied from the arbitration clause in that case or to remand for such a determination. Instead, it held that "imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is [in]consistent with the Federal Arbitration Act." *Id.* at 1764, 1775-76.

An "implicit" agreement to class arbitration cannot, therefore, be inferred from an arbitration agreement's "silence" or "failure to preclude" class arbitrations, much less from thin air. Indeed, the arbitrator in this case did not purport to find an implied agreement. Following our decision in *Stolt-Nielsen*, where we speculated that "the arbitration panel may have concluded that even though

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not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). If *Stolt-Nielsen* resolves only the effect of a *sui generis* and idiosyncratic stipulation of the parties, the case hardly meets those criteria. Given my colleagues' narrow reading of the decision and their reliance on an analysis indistinguishable from the decision of the Second Circuit reversed by the Supreme Court, *Stolt-Nielsen* has been rendered an insignificant precedent in this circuit.

the arbitration clauses are silent . . . their silence bespeaks an intent not to preclude class arbitration," 548 F.3d at 99, she inferred the class arbitration agreement entirely from the failure of the various agreements to "prohibit class arbitration," precisely what the Supreme Court said cannot be legitimately done. 130 S. Ct. at 1775.

Nowhere in her opinion does she purport to identify any provision of the agreement supporting the existence of an implied agreement. Far from it. Some of the agreement's provisions are in fact inconsistent with class arbitration, and the arbitrator had to manifestly disregard key provisions of the arbitration clauses in order to hold that class arbitration was authorized.

The members of the purported class each signed a provision that was often different from that signed by other members of the purported class. The arbitration clauses contain significant differences as to: (i) waiver of rights to seek relief in other tribunals; (ii) the kinds of disputes subject to the RESOLVE program; (iii) the particular laws under which claims may arise; (iv) contribution amounts by employees to the costs of arbitration; (v) descriptions of the relief available; (vi) limitations periods; (vii) the role of a court before which litigation has already begun; (viii) where the arbitration is to take place; and (ix) the source of the law under which the arbitrable claim is to be decided. *See* Spagnola Affidavit (Ex. C to Sterling's Mem. of Law in Support of Mot. to Vacate) at Tab 2, *Jock*, 677 F. Supp. 2d 661 (No. 08 Civ. 2875).

When the various agreements are read in the aggregate, or even separately, the differences preclude class

arbitrations. The arbitrator herself acknowledged that many of the arbitration agreements contained "unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators," Clause Construction Award, *supra*, at 4, all of which are inconsistent with class arbitration. Pertinent *common* themes in the arbitration clauses are (i) the need to follow Steps 1 and 2 of the RESOLVE program -- Step (1): a complaint with reference to supporting evidence; and Step (2): resort to mediation if Sterling does not remedy the complaint -- and (ii) the failure to mention class arbitration -- silence. These common provisions are inconsistent with an implied agreement to class arbitration. As a result, the arbitrator found it necessary to hold that Steps 1 and 2 of the RESOLVE program were to be ignored in class arbitrations. Then, having framed the issue according to this court's *Stolt-Nielsen* decision, she went on to find that the failure to "prohibit class arbitrations" prevailed. Clause Construction Award, *supra*, at 5.

My colleagues dismiss as "disingenuous" Sterling's argument "that permitting class arbitration to proceed would lose sight of the requirement that 'parties may specify with whom they choose to arbitrate their disputes,' *Stolt-Nielsen*, 130 S. Ct. at 1774, because the putative class in this case would presumably include only employees who signed the RESOLVE agreement." Maj. Op. at 24 n.3. However, Sterling agreed to arbitrate only with employees who complete steps 1 and 2 of the RESOLVE procedures; it has not agreed to arbitrate with each and every employee that signed the RESOLVE program agreement, whether or not they assert a claim pursuant to its provisions.

Far from implying class arbitration from the agreement, therefore, the arbitrator manifestly disregarded both unique and common features of all the agreements based on the view of silence as to class arbitration upheld by the Second Circuit in *Stolt-Nielsen* but thereafter rejected by the Supreme Court. Having now been enlightened by the Supreme Court's views, we do not have the arbitrator's excuse.

III.

My colleagues also believe that the arbitrator purported to be acting under Ohio law. Maj. Op. at 19, 21-23. That is not the case. All she stated about Ohio law was that "the question of whether class claims are permitted or prohibited by an agreement that does not expressly address the issue . . . has apparently not been addressed in any reported decision by an Ohio court." Clause Construction Award, *supra*, at 4.

Moreover, Ohio law does not govern the issue before us. *Stolt-Nielsen* held that consent to class arbitration cannot be inferred from an agreement's failure to preclude it. The Supreme Court did not base its decision on the law of a particular state or federal maritime law. Rather, it relied on principles of law derived solely from the Federal Arbitration Act. *Stolt-Nielsen*, 130 S. Ct. at 1773 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'") (internal citations omitted); *id.* at 1775 ("The [arbitration] panel's conclusion is fundamentally at war with the *foundational FAA principle* that arbitration

is a matter of consent.") (emphasis added). The Court's exclusive reliance on the FAA as a source of governing law was in contrast to the Second Circuit's extensive discussion of New York and federal maritime law in its *Stolt-Nielsen* decision, 548 F.3d at 96-101, and to the arguments before the Supreme Court that there were considerable precedents in New York and maritime law authorizing class arbitration in the face of contractual silence. Brief for Respondent at 31-33 & 38, *Stolt-Nielsen*, 130 S. Ct. 1758 (No. 08-1198).

The Supreme Court treated New York and federal maritime law as irrelevant. Rather, it framed the question as "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act," and answered that question in the negative. *Stolt-Nielsen*, 130 S. Ct. at 1764. The exclusive role of the FAA in providing substantive law to determine the requisite consent to class arbitration was recently confirmed by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). That case held that the FAA substantive law "preempted" state contract law rendering unenforceable as unconscionable an explicit contractual preclusion of class arbitration. *Id.* at 1753.

The Supreme Court's concerns under the FAA with inferring consent to class arbitration are based on the fundamental differences between bilateral arbitration and class arbitration. As *Stolt-Nielsen* stated:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so

> because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. . . . Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, *consistent with their limited powers under the FAA*, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

130 S. Ct. at 1775-76 (internal citations omitted) (emphasis added).

Moreover, as the Supreme Court has recently noted at some length, even where a designated arbitration organization has established rules for class arbitration, as has the American Arbitration Association ("AAA") in the present case, the shortcomings of class arbitration are substantial. *Concepcion*, 131 S. Ct. at 1750-52 ("[W]hile it is theoretically possible to select an arbitrator

with some expertise relevant to class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties . . . . The absence of multilayered review makes it more likely that errors will go uncorrected."). Class proceedings carry significant risks for plaintiffs as well as defendants. A class proceeding may well be driven by a quest for a substantial award of counsel fees alone, but the award will bind the members of the class who may pay little attention to the proceedings and are generally unaware of the consequences. Even where, as under the AAA rules, any settlement must be approved by the arbitrator, the critical safeguard of fairness review by an independent Article III judge, present in judicial class actions, is lacking. *See id.* at 1752; Fed. R. Civ. P. 23. While approval of a settlement by the arbitrator may sometimes be required, counsel will have an influence on both the selection of an arbitrator and even his or her fees. *See* Hans Smit, *Contractual Modification of the Arbitral Process*, 113 Penn. St. L. Rev. 995, 1009 (2009) (noting that because the tribunal is normally composed of arbitrators designated by the parties, it will normally agree with the parties once they have agreed upon a proper class and settlement). An arbitrator who disapproves a settlement may do so only at a risk of not being selected in future cases.

IV.

My colleagues also rely upon the provision in the present agreement that the arbitrators may award any legal or equitable relief generally available in courts.

Maj. Op. at 23-24. Clearly, this provision refers only to relief in the form of an award based on a violation of law or contract -- damages, injunctions, etc. -- and not to the availability of procedures used to pursue such relief. A class can be certified and yet not get "relief," i.e. it may lose. Significantly, one form of this provision found in some of the arbitration agreements here states that "the Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law." Spagnola Affidavit at Tab 2, *supra*, at 1. Applying the canon "ejusdem generis" -- a general item in a list of specific items of a particular genre must be construed to be limited to that genre, *see Rajah v. Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008) -- the word "relief" is a reference to remedies compensating or punishing for harm done.

V.

Finally, my colleagues note the limited review of arbitration awards exercised by federal courts. Maj. Op. at 19-21. While that is surely a relevant point, this concern was not only as fully applicable to the award in *Stolt-Nielsen* as it is here but was also discussed extensively by the Supreme Court in that case. 130 S. Ct. at 1767-68. I will rely on the Supreme Court's discussion.

Moreover, my colleagues' deference here is not to the arbitrator's actual decision, which framed the issue under the Second Circuit's decision in *Stolt-Nielsen*, found that the agreement made "no mention of class"

arbitration, allowed class arbitration because the agreement did not "prohibit" it, and exceeded her authority by manifestly disregarding explicit provisions of the agreement inconsistent with class arbitration. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("[Arbitral] awards may be vacated . . . where the arbitrator's award is in manifest disregard of the terms of the agreement."). Rather their deference is to a decision that was, in fact, never made by the arbitrator -- namely that the arbitration agreement implied an agreement to class arbitration.

I therefore respectfully dissent.

APPENDIX H — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 26, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 2875 (JSR)

LARYSSA JOCK, *et al.*,

Plaintiffs,

-v-

STERLING JEWELERS, INC.,

Defendant.

July 26, 2010, Decided

JED S. RAKOFF, U.S.D.J.

MEMORANDUM ORDER

By an Opinion and Order dated December 28, 2009 (the "December 28 Order," reported at 677 F. Supp. 2d 661), the Court denied the motion of defendant Sterling Jewelers, Inc. ("Sterling") to vacate the arbitrator's determination that the arbitration agreements between Sterling and its employees, including the plaintiffs in the above-captioned class action lawsuit, permitted class arbitration of plaintiffs' employment discrimination

claims. On January 26, 2010, Sterling filed a notice of appeal of the December 28 Order. That appeal is presently pending before the Second Circuit. Thereafter, Sterling, pursuant to Federal Rule of Civil Procedure 62.1, filed a motion in this Court seeking an "indicative ruling" as to whether the Court would reconsider its December 28 Order in light of the Supreme Court's recent decision in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). The Court received full briefing on this motion and held oral argument on June 30, 2010. For the following reasons, the Court hereby indicates that if jurisdiction were restored, it would reconsider its December 28 Order and vacate the arbitrator's ruling permitting class arbitration.

By way of background, in June 1998 Sterling put in place a three-step program called "RESOLVE," which provides an alternative dispute resolution mechanism for employment disputes and which requires arbitration of such disputes after the employee in question exhausts certain preliminary "steps." *See* December 28 Order, 677 F. Supp. 2d at 663. Thereafter, the plaintiffs in this action, who are current and former female Sterling employees, brought this class action lawsuit alleging that Sterling discriminated against them in pay and promotion on the basis of their gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d), and then moved to refer this dispute to arbitration. Sterling objected to that motion on the ground that the Court, rather than the arbitrator, should resolve certain preliminary issues, including whether the arbitration clauses permit class arbitration. The Court nonetheless referred these matters to the arbitrator

(former Magistrate Judge Kathleen A. Roberts), finding that the parties' contract granted the Court discretion to refer such issues to the arbitrator and that it made good sense for the arbitrator to decide these issues in the first instance. *Jock v. Sterling Jewelers, Inc.*, 564 F. Supp. 2d 307, 311 (S.D.N.Y. 2008).

The parties then briefed the issue of class arbitrability to the arbitrator. Sterling argued, among other things, that certain provisions of the RESOLVE agreements, including requirements that each arbitration be held near where the employee worked and that the arbitrator apply local law, were incompatible with class arbitration. The plaintiffs responded chiefly by arguing that under then-applicable Second Circuit precedent, where, as in the RESOLVE agreements, the arbitration clauses do not expressly preclude class arbitration, class arbitration may be permitted. *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 101 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1758 (2010).

On June 1, 2009, the arbitrator ruled that the RESOLVE agreements did not prohibit class arbitration, and for that reason allowed class arbitration to proceed. Pursuant to the choice-of-law clause contained in the agreements, this ruling (as amended, the "June 1 Award") applied Ohio law to the issue of whether class claims were authorized under the arbitration contract, and noted that the question of whether class arbitration is permitted by an agreement that does not expressly so provide had not been addressed by the Ohio courts. The arbitrator then reasoned:

> Under Ohio law, contracts are to be interpreted so as to carry out the intent of the parties,

as that intent is evidenced by the contractual language. *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 247 (1974). "The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract." *Montgomery v. Bd. of Educ. of Liberty Township, Union Cty.*, 102 Ohio St. 189, 193 (1921).

Applying these principles, I find that the RESOLVE Arbitration Agreements do not prohibit class claims.

Sterling argues that RESOLVE's unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators establish that the parties never intended class arbitration of employee claims. Sterling further argues that ignoring the terms of RESOLVE that are inconsistent with class arbitration would "rewrite" the parties' Agreement.

I note at the outset that the very concept of intent is problematic in the context of a contract of adhesion. Because this contract was drafted by Sterling and was not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed. Notably, Sterling acknowledges . . . that it has deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition, despite numerous

> arbitral decisions that class claims are permitted in the absence of an express prohibition. Under these circumstances, construing the Agreement to contain a waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract. *Montgomery*, 102 Ohio St. at 193; *cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995).[1]
>
> I further find that agreeing to a step process for individual claims does not manifest an intent to waive the right to participate in a collective action, where, as here, the Agreement expressly gives the Arbitrator the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction."

Sterling Rule 62.1 Mem., 5/13/10, Ex. A (June 1 Award), at 4-5. Accordingly, the arbitrator concluded that the RESOLVE agreements could not be construed to prohibit class arbitration.

On June 30, 2009, Sterling filed a motion before this Court to vacate the June 1 Award. Sterling also moved to stay arbitration proceedings pending the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, which presented the question of

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[1] In a footnote, the arbitrator added: "Arbitrators faced with agreements containing similar provisions have found them insufficient to reflect any mutual intent to preclude arbitration of class claims." Sterling Rule 62.1 Mem., 5/13/10, Ex. A (June 1 Award), at 5 n.1.

whether permitting class arbitration where the relevant arbitration clauses were "silent" on class arbitration was consistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* This Court denied the motion to stay for the reason, among others, that the Supreme Court's "eventual decision might be distinguishable on the basis that the agreements in *Stolt-Nielsen* arose in the maritime context, were standard industry contracts, and/or were entered into by sophisticated commercial parties." December 28 Order, 677 F. Supp. 2d at 667-68. [2] Applying the then-binding Second Circuit decision in *Stolt-Nielsen*, the Court denied the motion to vacate the June 1 Award, holding that the arbitrator's determination was not in excess of her powers or in "manifest disregard" of the law. *Id.* at 665-67.

On April 27, 2010, the Supreme Court issued its decision in *Stolt-Nielsen*, reversing the Second Circuit decision relied upon by this Court in the December 28 Order and by the arbitrator in her June 1 Award. The opinion of the Court held that the arbitration panel in *Stolt-Nielsen* exceeded its powers by "simply . . . impos[ing] its own view of sound policy regarding class arbitration" rather than "interpret[ing] and enforc[ing] [the] contract." 130 S. Ct. at 1767-68. This holding was founded on the "basic precept" that arbitration "'is a matter of consent, not coercion.'" *Id.* at 1773 (quoting *Volt Info. Scis., Inc. v. Bd.*

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[2] This Court had particular familiarity with the *Stolt-Nielsen* case because the case was originally assigned to the undersigned. It was the decision of this Court denying class arbitration, *see Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, 435 F. Supp. 2d 382 (S.D.N.Y. 2006), that the Second Circuit reversed in the decision that was in turn reversed by the Supreme Court.

of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)). Thus, the Court held that the arbitrator's task is to "to give effect to the intent of the parties" with respect to their agreement to arbitrate, including their specification of "*with whom* they choose to arbitrate their disputes." *Id.* at 1774-75.

The parties in *Stolt-Nielsen* stipulated that they had reached "no agreement" on the issue of class arbitration. *Id.* at 1775. The Supreme Court held that the arbitration panel there impermissibly required Stolt-Nielsen, S.A., the party seeking to avoid class arbitration, to "establish that the parties to the charter agreements intended to *preclude* class arbitration." *Id.* (internal quotation marks omitted). In passages highly relevant to the instant motion, the Supreme Court reasoned as follows:

> An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties'

> mutual consent to resolve disputes through class-wide arbitration.
>
> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited.

Id. at 1775-76 (citations omitted). For these reasons, the Court rejected the arbitration panel's presumption that "the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776.[3]

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[3] The Court in *Stolt-Nielsen* also rejected the threshold argument, also advanced at earlier stages by the plaintiffs in this matter, that judicial review of an arbitral award permitting class arbitration to go forward was constitutionally unripe for review. *See* 130 S. Ct. at 1767 n.2. The Court expressly declined to reach the related question of when judicial review of such an award might be unripe as a prudential matter. *Id.* In their opposition to Sterling's Rule 62.1 motion, plaintiffs assert that there "remains serious question" as to whether the June 1 Award is

Against this background, Sterling argues in its Rule 62.1 motion that the arbitrator here permitted class arbitration to go forward based on the kind of reasoning rejected by the Supreme Court in *Stolt-Nielsen*, and, in any event, that there is no indication in the record that the parties affirmatively intended to permit class arbitration. Thus, Sterling contends, a straightforward application of *Stolt-Nielsen's* holding requires the June 1 Award to be vacated. Plaintiffs resist on the grounds that *Stolt-Nielsen* is factually distinguishable in important respects, and, in any event, that the record here, unlike the record in *Stolt-Nielsen*, supports the inference that the parties implicitly agreed to permit arbitration of class claims. For the following reasons, the Court concludes, in light of *Stolt-Nielsen*, that the arbitrator's construction of the RESOLVE agreements as permitting class arbitration was in excess of her powers and therefore cannot be upheld.

Plaintiffs concede, as they must, that the June 1 Award did not by its terms rest upon a finding that the parties manifested any affirmative intention to permit class arbitration. *See* Transcript, 6/30/10, at 24 ("MR. SELLERS: . . . I will concede that there's nothing explicit in the [arbitrator's] clause construction that provides for a finding of assent by the parties; and that the arbitrator, based on the legal standards that were applicable

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ripe for judicial review. Pls' Rule 62.1 Resp., 5/28/10, at 22 n.8. Plaintiffs made this same argument as to prudential ripeness in opposing Sterling's prior motion to vacate the June 1 Award. The Court squarely rejected that argument in its December 28 Order, *see* 677 F. Supp. 2d at 664, and sees no reason to revisit that holding now.

then, was focused on whether there was any intention to preclude it."). Rather, consistent with the arbitral award upheld by the Second Circuit in *Stolt-Nielsen*, Arbitrator Roberts started from the premise that an arbitration clause silent on class arbitration may be construed to permit such arbitration, devoted her analysis to determining whether there was any indication that the parties intended to preclude class arbitration, and ultimately concluded that the agreements "do not prohibit" class arbitration. This approach is plainly incompatible with the Supreme Court's subsequent pronouncements in *Stolt-Nielsen*.

Nonetheless, plaintiffs urge the Court to leave the arbitrator's ruling undisturbed because, they argue, the record before the arbitrator evinces the parties' shared intent to permit class arbitration. Specifically, plaintiffs focus on the following aspects of the record before the arbitrator: (1) the broad language of the RESOLVE agreements' arbitration clauses, which provide for the arbitration of "any dispute, claim or controversy . . . against Sterling," and empower the arbitrator to award "any types of legal or equitable relief that would be available in a court of competent jurisdiction"; (2) that under Ohio law, any ambiguities in the arbitration agreements, which are contracts of adhesion, must be construed against the drafter (Sterling); (3) that there is a tradition of class claims in the context of employment discrimination litigation; (4) that Sterling deliberately chose not to amend the RESOLVE agreements to expressly preclude class claims; and (5) that certain consumer arbitration agreements drafted by Sterling, unlike the RESOLVE agreements, do include an express preclusion of class

claims. Assuming *arguendo* that the June 1 Award may be sustained, notwithstanding its silence on many of these issues, as long as the record before the arbitrator provides some indication that the parties intended to permit arbitration of class claims,[4] the Court finds that the record here does not so indicate.

First, as to the broad language of the arbitration clauses, the clauses at issue in *Stolt-Nielsen* contained similarly broad wording, providing for the arbitration of "[a]ny dispute arising from the making, performance or termination of this Charter Party." 130 S. Ct. at 1765. Second, as to the claim that the RESOLVE agreements are contracts of adhesion, while this might be a "colorable argument" in the abstract, *see* December 28 Order, 677 F. Supp. 2d at 667, an Ohio intermediate appellate court, construing the very agreement here in issue, has

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[4] In this regard, the plaintiffs rely on *Duferco International Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003), which, in explicating the "manifest disregard" standard for vacatur of an arbitral award, held that "[e]ven where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case," *id*. at 390. *Accord, e.g.*, *Stolt-Nielsen*, 548 F.3d at 97 ("Even where an arbitrator's explanation for an award is deficient, we must confirm it if a justifiable ground for the decision can be inferred from the record."), *rev'd on other grounds*, 130 S. Ct. 1758. It should be noted, however, that the opinion of the Court in *Stolt-Nielsen* expressly declined to reach the issue of whether the "manifest disregard" standard remains a viable basis for vacatur, 130 S. Ct. at 1767-68, and did not suggest that the reviewing court had any obligation or discretion to go beyond the arbitrator's decision in determining whether the parties had assented to class arbitration.

expressly reached the contrary result, *W.K. v. Farrell*, 167 Ohio App. 3d 14, 26-27, 2006 Ohio 2676, 853 N.E.2d 728 (2006) (rejecting Sterling employee's claim that RESOLVE agreement was adhesive or unconscionable), and there is no Ohio case to the contrary. Third, while many Title VII lawsuits are litigated as class claims (and many are not), there is no basis for asserting that there is any long-standing custom of class *arbitration* of such claims. Last, with respect to Sterling's final two arguments, these contentions presume that Sterling had some obligation to affirmatively clarify that the RESOLVE agreements precluded class arbitration, which is directly contrary to *Stolt-Nielsen's* rejection of the notion that "parties' mere silence on the issue . . . constitutes consent to resolve their disputes in class proceedings." 130 S. Ct. at 1776.

Even when the most persuasive aspects of the foregoing arguments are taken together, plaintiffs still fail to identify any concrete basis in the record for the arbitrator to conclude that the parties manifested an intent to arbitrate class claims.[5] At most, the record supports

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[5] The Court is unpersuaded by plaintiffs' argument that it should remand this matter to the arbitrator to determine in the first instance whether the record can support a finding of an intent to arbitrate class claims. First, a remand for this purpose appears to be barred by the *functus officio* doctrine, which "dictates that, once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, 'their authority over those questions is ended,' and "'the arbitrators have no further authority, absent agreement by the parties, to redetermine th[ose] issue[s].'" *T.Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 342 (2d Cir. 2010) (alterations in original). Second, even if a remand to the arbitrator were not so barred,

a finding that the agreements do not *preclude* class arbitration, but under *Stolt-Nielsen*, this is not enough. And while *Stolt-Nielsen* does not foreclose the possibility that parties may reach an "implicit" -- rather than express -- "agreement to authorize class-action arbitration," *id.* at 1775, the record here provides no support for such an implied agreement.

Finally, plaintiffs attempt to distinguish *Stolt-Nielsen* from this case on its facts. Plaintiffs emphasize that *Stolt-Nielsen* arose in the context of an antitrust dispute between two commercially sophisticated parties: Stolt-Nielsen, S.A., the owner and operator of parcel tankers, and AnimalFeeds International Corp., a cargo-shipper. Moreover, the arbitration clauses in *Stolt-Nielsen* were contained in maritime charter party agreements, and evidence in the record there showed that it is "customary in the shipping business for parties to resolve their disputes through bilateral arbitration." *Id.* at 1769 n.6. And in *Stolt-Nielsen*, unlike here, the parties stipulated to the arbitrators that their agreement was "silent" on the question of class arbitration. *Id.* at 1766. These and other distinguishable facts manifestly played some role in the Supreme Court's reasoning, *see, e.g.*, *id.* at 1775, and, indeed, the dissenting Justices read these distinctions as limitations on the Court's holding, *id.* at 1783 (Ginsburg, J., dissenting) ("[B]y observing that 'the parties [here] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter

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the Court sees no reason at this point to exercise its discretion to refer these questions to the arbitrator when the Court now has full familiarity with the record of this case as well as with the legal questions raised in the instant motion.

party that is used for a particular shipment,' the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis.").

This Court, however, does not read *Stolt-Nielsen* so narrowly, and instead finds that these distinctions cannot cure the defects in the June 1 Award in light of *Stolt-Nielsen's* essential holding. The opinion of the Court in *Stolt-Nielsen* clearly held, in unqualified terms, that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 1775. While contextual factors such as the sophistication of the parties, their relative bargaining position with respect to the arbitration clauses, and any pertinent tradition of dispute resolution might aid in construing ambiguous manifestations of the parties' intentions, they cannot establish assent to class arbitration where, as here, the contract itself provides no reason to believe the parties reached any agreement on that issue.

Finally, although plaintiffs are correct that here, unlike in *Stolt-Nielsen*, there is no stipulation between the instant parties that the RESOLVE agreements are "silent" on class arbitration, this is not a point that cuts in their favor. As noted, the RESOLVE agreements contain provisions that, among other things, require claimants to complete a multi-step process before submitting their disputes to an arbitrator, require the arbitration to take place in a local venue, and require the arbitrator to apply local law. While the June 1 Award concluded that these provisions were not incompatible with class arbitration, and this Court declined to vacate that award

under the law of the Circuit at the time, these features, if anything, support the inference that the parties here may have intended to *preclude* class arbitration; they certainly do not evince any assent to permit arbitration of class claims. *Cf. Fensterstock v. Educ. Fin. Partners*, --- F.3d ---, 2010 WL 2729759, at *14 (2d Cir. July 12, 2010) (holding that an arbitration clause expressly purporting to waive the right to class arbitration was unconscionable as a matter of California law; severing that clause as unenforceable; but then concluding that the arbitration agreement, as severed, was "silent as to the permissibility of class-based arbitration, and under *Stolt-Nielsen* we have no authority to order class-based arbitration").

For the foregoing reasons, if jurisdiction were restored to this Court, the Court would reconsider its December 28 Order and vacate the June 1 Award permitting class arbitration as having been made in excess of the arbitrator's powers. *See Stolt-Nielsen*, 130 S. Ct. at 1775 ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.").[6]

Pursuant to Rule 62.1(b), Sterling is directed bring this Memorandum Order to the attention of the Court of Appeals. The Clerk of this Court is directed to close documents 72 and 76 on the docket of this case.

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[6] Sterling's motion for a stay pending the Court's determination of the Rule 62.1 motion, which was preliminarily addressed in an Order dated July 6, 2010 that granted the stay only until July 30, is hereby denied as moot.

SO ORDERED.

Dated: New York, NY
July 26, 2010

JED S. RAKOFF,
U.S.D.J.

APPENDIX I — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 28, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

08 Civ. 2875 (JSR)

LARYSSA JOCK, *et al.*,

Plaintiffs,

-v-

STERLING JEWELERS, INC.,

Defendant.

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs, current and former female employees of defendant Sterling Jewelers, Inc. ("Sterling"), a nationwide specialty jeweler, brought this class action alleging that Sterling discriminated against them in pay and promotion on the basis of their gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d). By summary Order dated June 18, 2008, the Court granted plaintiffs' motion to refer the dispute to arbitration and to stay the instant litigation pending conclusion of that arbitration. In a Memorandum Order dated July 15, 2008 that elucidated the reasons for

that ruling, the Court determined that the arbitration agreement granted the Court discretion as to whether to decide or to refer to the arbitrator certain threshold issues, notably, whether the matter could proceed as a class action; and the Court decided that referral of such issues to the arbitrator made better sense. *Jock v. Sterling Jewelers, Inc.*, 564 F. Supp. 2d 307, 311 (S.D.N.Y. 2008). Thereafter, the arbitrator, on June 1, 2009, issued a threshold ruling that the arbitration agreement did not prohibit class arbitration. After the arbitrator further clarified this ruling on June 26, 2009, Sterling moved this Court to vacate this determination or, in the alternative, to stay the arbitration proceedings. By summary Order dated August 31, 2009, the Court denied Sterling's motion in its entirety. This Opinion gives the reasons for that ruling and directs the parties to update the Court on the status of the arbitration.

By way of background, in June 1998 Sterling put in place a three-step alternative dispute resolution program called "RESOLVE." Subsequently, the named plaintiffs in this action all signed Agreements requiring them to use RESOLVE for all employment disputes, including the Title VII and Equal Pay Act claims asserted here. *See* Aff. of Joseph L. Spagnola (Ex. B to Sterling Clause Construction Br.) ¶ 11 & Tab 2. Under RESOLVE, when an employee believes she has been subjected to an unlawful employment action, her first step is to contact the RESOLVE program administrator and file a complaint. If the employee is unsatisfied with the company's response, her second step is to file an appeal, which the program administrator may assign either to an outside administrator or to a peer review panel. Finally, if the

employee is still not satisfied, she may proceed to the third step, binding arbitration. *See id.* ¶ 8.

The RESOLVE Arbitrations are to be conducted by the American Arbitration Association ("AAA") in accordance with AAA rules, as amended or modified by certain RESOLVE-specific provisions, including the requirements, among others, that each arbitration be held near where the employee worked and that the arbitration agreements are to be construed according to Ohio law. *Id.* ¶ 14-15, 17, 19. Nowhere, however, is class arbitration expressly mentioned. Nonetheless, the arbitrator, in her ruling of June 1, 2009, determined that the RESOLVE agreements do not prohibit class arbitration. This, the arbitrator held, was because, under Ohio law, the RESOLVE agreements were contracts of adhesion that, as such, required Sterling to insert an express prohibition on class arbitration if it wished to bar resort to that procedural right. Clause Construction Award (Ex. F to Sterling Mem. Of Law in Support of Mot. To Vacate) at 4-5.

After receiving the June 1 ruling, Sterling sought clarification from the arbitrator as to, among other things, how class certification would proceed in light of the requirement that an employee exhaust RESOLVE Steps 1 and 2 before proceeding to arbitration and also in light of the provision requiring the arbitration to be held near where each employee worked. In response, the arbitrator specified that (1) "The RESOLVE Arbitration agreements do not require that class claims be resolved separately within each local venue."; (2) "The RESOLVE Arbitration Agreements do not require that every claimant complete RESOLVE Steps 1 and

2 prior to participating in a class arbitration."; and (3) "Determination as to whether a class should be certified, and the scope of the class, will be made after the parties have made an opportunity to develop the record and brief the appropriate scope of any class that may be certified." Disposition of Application of Clarification of Clause Construction Award (Ex. J to Sterling Mem. Of Law in Support of Mot. to Vacate). Sterling then filed the instant motion to vacate the award and to stay the arbitration.

Preliminarily, plaintiffs contend that, because no class has yet been certified, Sterling's motion is premature and unripe. "The ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction'...." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). A case is ripe for Article III purposes when it presents "a real or concrete dispute affecting cognizable current concerns of the parties." *Simmonds v. INS*, 326 F.3d 351, 357 (2d Cir. 2003). However, even if a case is constitutionally ripe, it may not be prudentially ripe if it "will be better decided later and . . . [if] the parties will not have constitutional rights undermined by the delay." *Id.* (emphasis omitted).

Here, allowing further proceedings before the arbitrator directed at certifying a class presents a real dispute affecting the parties; indeed, it materially transforms every aspect of how the arbitration proceeds. Indeed, this is so obvious that in the recent case of *Stolt-Nielsen SA v. Animalfeeds Int'l Corp.*, involving a challenge to an arbitrator's decision to permit class certification, first,

this Court, 435 F. Supp. 2d 382 (S.D.N.Y. 2006), and then the Second Circuit, 548 F.3d 85 (2d Cir. 2008), proceeded to review the merits of the arbitrator's ruling without even remotely suggesting that the controversy was unripe. Moreover, the Supreme Court, in subsequently granting Stolt-Nielsen's petition for a writ of certiorari, 129 S. Ct. 2793 (2009), only certified questions going to the merits of the dispute, thus implicitly making clear that the Court likewise sees no jurisdictional impediment to considering such issues.

As for "prudential" unripeness, the instant motion involves pure legal questions that will immediately impact the arbitration and, as such, is "eminently fit for judicial review." *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002) (internal quotation marks omitted).[1]

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[1] Plaintiffs also argue that Sterling waived its right to seek judicial review of the clause construction award through its "promise" in a RESOLVE program handbook that Sterling will not appeal arbitral decisions favoring employees. The relevant language appears in a chart contrasting the judicial system with the RESOLVE program: whereas, in the judicial system, "[d]ecisions can be appealed and overturned," under RESOLVE "[the] [d]ecision is protected if for you. The Company cannot appeal." RESOLVE Handbook Chart (Ex. 4 to Claimants' Opp.) (emphasis omitted). The Second Circuit, however, has refused to enforce contractual provisions that purport to bar judicial review of arbitration awards, and has instead held that "private parties may not dictate to a federal court when to enter a judgment enforcing an arbitration award." *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 65 (2d Cir. 2003), *overruled on other grounds, Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403-04 (U.S. 2008). While plaintiffs attempt to distinguish *Hoeft* on the basis that it did not involve a contract of adhesion, nothing about

Although the Court therefore chooses to exercise its jurisdiction to review the arbitrator's ruling on class certification, the scope of that review is narrow. Specifically, Sterling concedes that the arbitrator's decision to permit possible class certification may be overturned only if it exceeded the arbitrator's powers, in violation of Section 10(a)(4) of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or if it was made "in manifest disregard of the law," a doctrine that, while still recognized in the Second Circuit, is "severely limited," *Stolt-Nielsen*, 548 F.3d at 91, to cases where there is not even a "*barely colorable justification* for the outcome reached." *Telenor Mobile Commc'ns AS v. Storm, LLC*, 584 F.3d 396, 407 (2d Cir. 2009).

Here, Sterling first argues that vacatur is warranted under Section 10(a)(4) of the FAA because the arbitrator "exceeded [her] powers" by effectively nullifying certain provisions of the RESOLVE agreements. Specifically, Sterling contends that the award permitting class arbitration disregards RESOLVE's requirements that the arbitration take place in a local venue, that the arbitrator be licensed to practice law in the applicable state, that all claimants submit to Steps 1 and 2 prior to initiating Step 3 arbitration, and that claims under RESOLVE be adjudicated under the law of the jurisdiction in which

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that holding was based on the relative sophistication or degree of bargaining power of the parties. Furthermore, the purported "waiver" of judicial review in the RESOLVE handbook is far less clear than that at issue in *Hoeft*; it is at best ambiguous whether the clause construction award should be interpreted as a "[d]ecision . . for you" that Sterling cannot appeal under the vague terms of the handbook.

the claims arose. None of this, however, raises an issue of exceeding arbitral powers under Section 10(a)(4) of the FAA, because that section "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 220 (2d Cir. 2002) (internal quotation marks omitted). Here, where the arbitration clause was broad, the arbitrator clearly had the power to reach the issues now in question. Indeed, in its prior decision in this case, this Court *already determined* that the arbitrator (rather than the Court) should resolve the question of whether class arbitration should proceed. *See Jock*, 564 F. Supp. 2d at 310-12.

Sterling's challenges under the heading of "manifest disregard" likewise rest on the assertions that class certification is irreconcilable with the RESOLVE provisions regarding venue, arbitrator licensing, pre-arbitration procedures, and choice of law. Specifically, Sterling argues that, by reading the possibility of class arbitration into an agreement that nowhere expressly authorizes such a possibility, the arbitrator "nullifies" the foregoing provisions by (1) allowing the instant arbitrator, who is licensed only in New York and Oregon, to adjudicate a potentially nationwide dispute; (2) forcing many putative class members to arbitrate their claims in a distant venue; (3) permitting putative class members to circumvent Steps 1 and 2 of the RESOLVE program; and (4) rendering it impractical to arbitrate a nationwide class action based on the law of the jurisdictions in which each claim arose. Sterling adds that the arbitrator's award

violated the provision of Ohio law that requires that a contract be construed in a way that gives meaning to all its provisions.

To the extent that Sterling's papers may be read to assert that the arbitrator manifestly disregarded the law by construing an agreement that is silent on class arbitration to permit such arbitration to proceed, such an argument contravenes the holding of the Second Circuit in *Stolt-Nielsen*. The arbitration panel in *Stolt-Nielsen* construed the agreement as "bespeak[ing] an intent not to preclude class arbitration," and the Second Circuit held that "[t]hat reading . . . is at least 'colorable'," and therefore not subject to vacatur for manifest disregard. 548 F.3d at 99. Although the lower court (the undersigned) had to some extent disagreed, 435 F. Supp. 2d at 387, and although the Supreme Court has since granted certiorari, the Second Circuit's decision in *Stolt-Nielsen* remains binding at this time. Moreover, the oral argument in the Supreme Court at least suggests that the particular context of *Stolt-Nielsen*, a maritime dispute, may limit is applicability to other contexts. See Transcript of Oral Argument at 41:17-19, 58:2-3, *Stolt-Nielsen*, No. 08-1198 (U.S. Dec. 9, 2009).

But, in fairness, Sterling does not rely simply on the fact that the RESOLVE agreements are silent on class arbitration, but rather emphasizes the alleged inconsistency between class arbitration and the aforementioned provisions regarding venue, choice of law, etc. To be sure, these provisions might have supported a conclusion by the arbitrator that no class arbitration was intended. But the opposite result is not so completely beyond the pale of law and reason as to constitute manifest disregard

of law. In any class action, only the individually named plaintiffs are required to meet the various threshold requirements to bringing suit, and, if they are met, a court may then appoint them to represent a class that includes persons over whom the Court might not otherwise have proper venue or the like. The analogy may be imperfect, but it is not so indefensible as to violate what little is left of the "manifest disregard" doctrine.

Moreover, class treatment has its historic roots in the very kind of claims here made, with the Supreme Court even going so fair, as to quote approvingly, in dictum, legislative history declaring that "[T]itle VII actions are by their very nature class complaints," *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 n.13 (1977) (quoting S. Rep. No. 92-415, at 27 (1971)). The arbitrator's decision to allow unnamed class members to eschew certain RESOLVE requirements is arguably similar to Title VII cases holding that procedural requirements applicable to individuals need not be complied with by unnamed members. *See id.* at 389 n.6 (1977) ("[F]ull relief under Title VII 'may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members.'" (omission in original)); *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986) (adopting "single filing rule," whereby when "one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims 'aris[e] out of similar discriminatory treatment in the same time frame'" (alteration in original)). It may also be noted, as the arbitrator observed, that Sterling "has deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition [of class

arbitration], despite numerous arbitral decisions that class claims are permitted in the absence of an express prohibition." Clause Construction Award at 5; *see also In re Am. Express Merchants' Litig.*, 554 F.3d 300, 302-04 (2d Cir. 2009) (discussing the recent proliferation of class action waivers in arbitration agreements). Thus, there is a colorable argument that under Ohio law, this failure to clarify an ambiguity in the arbitration agreement is to be construed against the drafter. *See, e.g., Davidson v. Bucklew*, 629 N.E.2d 456, 458 (Ohio App. 1992) (because "appellee could have drafted the arbitration clause in a more limited manner but did not," "any ambiguity must be resolved in appellant's favor"). Taken together, the above arguments are more than sufficient for concluding that the arbitrator did not act in "manifest disregard" of the law.

Finally, as a fall-back, Sterling requests that the Court at least grant a stay of arbitration pending the Supreme Court's decision in *Stolt-Nielsen*. Assuming the Court has the power to grant such a stay,[2] this relief

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[2] Whether a district court has power to stay arbitration proceedings pending litigation is an "open question" in this Circuit. *United States v. Eberhard*, 2004 WL 616122, at *3 (S.D.N.Y. Mar. 30, 2004) (citing *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 266 n.3 (2d Cir. 1996)). However, cases that have found that courts have such power to stay "appear to have done so only in those circumstances where a stay would be incidental to the court's power under the FAA to enforce contractual agreements calling for arbitration" -- for example, where an arbitration proceeding was not authorized by contract or where the stay is granted in aid of a separate arbitration. *Id.* These situations are entirely different from the grounds for a stay that Sterling presses here. Therefore, this Court's power to stay, if any, must

would not be proper unless "the suppliant for a stay [can] make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *see also Paine, Webber, Jackson & Curtis Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980) ("Absent a showing of undue prejudice upon defendant or interference with his constitutional rights, there is no reason why plaintiff should be delayed in its efforts to diligently proceed to sustain its claim.") In fact, Sterling points to no substantial harm that would justify further delay. While there will undoubtedly be added litigation costs that will be occasioned by going forward with class arbitration proceedings (which is one of the reasons that the instant motion is ripe), the amount of these additional costs may be modest given that discovery would also be necessary for individual claims. Furthermore, as already noted, it is uncertain whether the decision in *Stolt-Nielsen* will dispose of the issues raised here. The eventual decision might be distinguishable on the basis that the agreements in *Stolt-Nielsen* arose in the maritime context, were standard industry contracts, and/or were entered into by sophisticated commercial parties. Finally, of course, there is no way to predict when the Supreme Court will decide *Stolt-Nielsen*, other than that it is likely to be no later than the end of the term in June. Given all of this, it makes better sense to "get on with the show." Delay is the bane of the American legal system, and this Court is loath to contribute to further delay.

The Court therefore reaffirms its August 31 ruling

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derive from "the power inherent in every court to control the disposition of the causes on its docket," *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and not from the provisions of the FAA.

and denies the motion to vacate the arbitrator's ruling or stay the arbitration proceedings. The parties are, however, directed to apprise the Court in writing, every three months beginning January 15, 2010, of the status of the arbitration.

SO ORDERED.

Dated: New York, NY
December 28, 2009

JED. S. RAKOFF,
U.S.D.J.

APPENDIX J — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of January, two thousand twenty.

ORDER

Docket No: 18-153

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, DAWN SOUTO-COONS,

Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,

Plaintiffs-Counter-Defendants,

v.

STERLING JEWELERS INC.,

Defendant-Counter-Claimant-Appellee.

Appendix J

Appellee, Sterling Jewelers Inc., filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE,
CLERK

APPENDIX K — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 6, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of September, two thousand eleven,

Docket Number: 10-3247

LARYSSA JOCK, CHRISTY CHADWICK, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA SMITH, MARIE WOLF, DAWN SOUTO-COONS, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, LISA FOLLETT, KHRISTINA RODRIGUEZ, KELLY CONTRERAS,

Plaintiffs-Counter-Defendants,

v.

STERLING JEWELERS INC.,

Defendant-Counter-Claimant-Appellee.

Appendix K

ORDER

Appellee Sterling Jewelers Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

CATHERINE O'HAGAN WOLFE,
CLERK

APPENDIX L — RELEVANT STATUTORY PROVISIONS

9 U.S.C. 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy

arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of

the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a

default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. 5

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. 6

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Appendix L

9 U.S.C. 7

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Appendix L

9 U.S.C. 8

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. 9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction

of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. 10

§ 10. Same; vacation; grounds; rehearing
Effective: May 7, 2002

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. 11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. 12

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Appendix L

9 U.S.C. 13

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. 14

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Appendix L

9 U.S.C. 15

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. 16

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX M — AMENDMENT TO CLASS DETERMINATION AWARD OF THE AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT AND CLASS ACTION TRIBUNAL, DATED MARCH 30, 2016

BEFORE THE AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT AND CLASS ACTION TRIBUNAL

AAA CASE NO. 11 20 0800 0655

LARYSSA JOCK, CHRISTY MEIERDIERCKS, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA MURPHY, DAWN SOUTO-COONS, AND MARIE WOLF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Claimants,

-against-

STERLING JEWELERS INC.,

Respondent.

Arbitrator: Kathleen A. Roberts

AMENDMENT TO CLASS DETERMINATION AWARD

Upon consideration of the Order of the United States District Court for the Southern District of New York (J.

Rakoff, November 16, 2015), which confirmed the Class Determination Award in all respects except for the provision allowing members of a class certified under Rule 23(b)(2) to opt out, Rule 5(c) of the AAA Supplementary Rules for Class Arbitration, which permits that a Class Determination Award may be altered or amended, and the record and findings herein, the Arbitrator modifies the Class Determination Award as follows:

Pursuant to Rule 5 of the AAA Supplementary Rules for Class Arbitration, I find that class members may not request exclusion from the injunctive and declaratory relief class certified under Fed. R. Civ. P. 23(b)(2) in this arbitration. Claimants' claims for injunctive and declaratory relief will "perforce affect the entire class at once." *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2558 (2011). The class-wide nature of the injunctive and declaratory relief sought, see Class Determination Award (February 2, 2015) at 103 and 107-112, therefore creates an "exceptional circumstance" that "makes it inappropriate to allow class members to request exclusion." AAA Supplementary Rule 5(c).

SO ORDERED.

KATHLEEN A. ROBERTS
ARBITRATOR

March 30, 2016

APPENDIX N — ARBITRATION AWARD OF THE AMERICAN ARBITRATION ASSOCIATION, EMPLOYMENT AND CLASS ACTION TRIBUNAL, DATED FEBRUARY 2, 2015

BEFORE THE AMERICAN
ARBITRATION ASSOCIATION
EMPLOYMENT AND CLASS
ACTION TRIBUNAL

AAA CASE NO. 11 20 0800 0655

LARYSSA JOCK, CHRISTY MEIERDIERCKS, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA MURPHY, DAWN SOUTO-COONS, AND MARIE WOLF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Claimants,

-against-

STERLING JEWELERS INC.,

Respondent.

Arbitrator: Kathleen A. Roberts

CLASS DETERMINATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreements entered into between the above-named parties, and having been duly sworn, do hereby find as follows:

Appendix N

This Class Determination Award addresses Claimants' motion for class certification, as well as the pending motions to exclude expert testimony filed by both parties pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert).*[1]

Claimants are current and former female employees of Respondent Sterling Jewelers, Inc. ("Respondent" or "Sterling"), who allege that Sterling has systematically paid female employees in its stores less than their male counterparts and promoted female employees less frequently and after a longer wait than their male counterparts. Claimants allege discrimination under both the pattern or practice disparate treatment and the disparate impact theories of liability under Title VII, and under the Equal Pay Act (EPA).[2] Claimants seek

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[1] 509 U.S. 579 (1993). Sterling's request for an evidentiary hearing with respect to its *Daubert* motions is denied for substantially the reasons set forth in Claimants' Opposition to Sterling's Motion for Hearings and Argument. In short, there is no need for an evidentiary hearing in light of the extensive written record pertaining to the qualifications of the experts, which includes expert reports and depositions, as well as briefing.

[2] The Named Claimants timely filed charges with the EEOC based upon Title VII and the Equal Pay Act. The EEOC issued a determination that Sterling "subjected charging parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation." The EEOC found that "[sitatistical analysis of pay and promotion data provided by Respondent reveals that Respondent promoted male employees at a statistically significant, higher rate than similarly situated female employees and that Respondent compensated male employees at a statistically significant, higher rate than similarly situated female employees." EEOC Letter of Determination (January 3, 2008) (Claimants' Exhibit 1).

certification of a class, pursuant to American Arbitration Association (AAA) Supplementary Rule 4 and Fed. R. Civ. P. 23, comprised of approximately 44,000 women who have worked in Sterling's retail stores as Sales Associates, Department Managers, or in any Assistant Manager, or Store Manager position[3] ("Retail Sales Employees" or "the putative class") for the period from June 2, 2002, to the first day of trial. Claimants seek declaratory and injunctive relief for the class, as well as back pay and punitive damages; they do not seek compensatory damages or individual injunctive relief.

SUMMARY OF CLAIMANTS' ALLEGATIONS

Claimants contend that throughout the proposed class period and across all of Sterling's retail operations, its workforce data show disparities adverse to women in pay and promotion decisions that cannot be attributed to legitimate, non-discriminatory factors. Claimants contend that there are disparities in pay at hire and for incumbent employees throughout their tenure, and that these disparities are the product of a system that sets starting pay rates based upon factors pertaining to prior job experience that are not job-related and which permit the intrusion of bias.

According to Claimants, rather than correcting these disparities at the time of annual merit increases, Sterling applies a percentage increase to employees'

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[3] In the Jared Division, Assistant Managers are called Assistant General Managers, and Store Managers are called General Managers. In this Award, Mall Assistant Managers and Jared Assistant General Managers will be referred as "Assistant Managers." Similarly, Mall Store Managers and Jared General Managers will be referred as "Store Managers."

base compensation, which perpetuates and magnifies disparities in the compensation of female employees. Claimants contend that Sterling's companywide policy of prohibiting employees from discussing the amount of their compensation with each other concealed these disparities and thus prevented putative class members from discovering pay inequities, insulating Sterling from challenge.

According to Claimants, promotions into and within management at Sterling's stores have been made pursuant to Sterling's "Succession Planning" system, which operates consistently throughout the Company. Claimants contend that throughout the time period covered by this case, Sterling promoted men more frequently and more quickly than similarly-situated women, meaning that fewer women are promoted than men, and that those women who are promoted work and wait longer for promotions than similarly-situated men.

Claimants contend that there is a corporate culture of gender bias at Sterling, based upon evidence of numerous instances of inappropriate sexual conduct demeaning to women by executives and managers from the CEO down, including executives and managers who were involved in decisions regarding compensation and promotion, and evidence that a number of corporate decisionmakers held and communicated negative gender stereotypes. Claimants contend that Sterling affords its managers who make pay and promotion decisions discretion in interpreting the common standards governing those decisions, creating the opportunity for this gender-negative corporate culture to influence pay and promotion decisions throughout the Company. Claimants further

contend that Sterling has a "dysfunctional" Human Resources department that has failed to curb or address ongoing discrimination.

CLAIMANTS' MOTION FOR CLASS CERTIFICATION

As noted above, Claimants seek certification of a single, nationwide class comprised of approximately 44,000 women who have worked in Sterling's retail stores as Sales Associates, Department Managers, or in any Assistant Manager or Store Manager position for the period from June 2, 2002, to the first day of trial.

Claimants propose a two-stage process for adjudication of their claims. In the first stage, the Arbitrator would determine "liability," *i.e.*, whether Claimants have established disparate impact or pattern and practice disparate treatment discrimination by Sterling. In this stage Claimants would present their evidence of class-wide discrimination, and Sterling would present those defenses that apply to the putative class as a whole and address Claimants' theories of class-wide discrimination. If Claimants prevail at this stage, they will have established entitlement to declaratory and injunctive relief, and will have established a rebuttable presumption that each class member was disfavored on account of her gender and therefore entitled to an award of back pay. Claimants propose that the Arbitrator also determine at this stage whether Sterling's conduct warrants an award of punitive damages. In the second stage, the Arbitrator would determine individual relief. In this stage, Sterling would have the opportunity to assert defenses with respect to individual claims, *i.e.*,

demonstrate that a particular individual was not disfavored, or disfavored for a legitimate reason unrelated to her gender, as well as any defenses related to the calculation of monetary damages. The Arbitrator would then determine the amount of back pay owed to those class members found to be entitled to an award. Finally, the Arbitrator would determine the amount of punitive damages to be awarded, if any.

APPLICABLE RULES

Claimants' motion is governed by the AAA Supplementary Rules for Class Arbitrations, which provide that an arbitrator must consider the criteria enumerated in AAA Supplementary Rule 4 "and any law or agreement of the parties the arbitrator determines applies to the arbitration."

AAA Supplementary Rule 4(a) provides that "the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described" and that the arbitrator shall permit a representative to do so only if each of six conditions is met:

> (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately protect the interests of the class;
>
> (5) counsel selected to represent the class will

> fairly and adequately protect the interests of the class; and
>
> (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

AAA Supplementary Rule 4(b) provides:

> An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
>
> (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
>
> (3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
>
> (4) the difficulties likely to be encountered in the management of a class arbitration.

AAA Supplementary Rule 4 essentially tracks the requirements of Fed. R. Civ. P. 23 (Rule 23). A class may be certified under Rule 23 only if Claimants meet the

requirements of Rule 23(a) and the requirements of one of the provisions of Rule 23(b). In this case Claimants seek certification of their claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and certification of their claims for monetary damages pursuant to Rule 23(b)(3).

Rule 23(a) provides:

> One or members of a class may sue or be sued as representative parties on behalf of all class members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

A class action may be maintained under Rule 23(b)(2) if:

> the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

A class action may be maintained under Rule 23(b)(3) if:

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and

> efficiently adjudicating the controversy.[4] The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> > (D) the likely difficulties in managing a class action.

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[5]

Because the requirements of AAA Supplementary Rule 4 are substantially identical to Rule 23, and because the vast majority of the case law on class certification applies Rule 23, this Award will analyze Claimants' motion and Sterling's opposition pursuant to the requirements of Rule 23.

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[4] Although under Rule 23, the predominance and superiority requirements apply only to claims certified under Rule 23(b)(3), the predominance and superiority requirements of AAA Supplementary Rule 4(b) must be met in all cases.

[5] AAA Supplementary Rule 4 does not contain a provision comparable to Rule 23(c)(4). For the reasons set forth below at pp. 110-111, I find that certification of a class arbitration with respect to particular issues is consistent with the AAA Supplementary Rules and therefore applies to this arbitration.

Appendix N

STERLING'S OPPOSITION TO CLASS CERTIFICATION

Sterling contends that Claimants have failed to meet the commonality, typicality and adequacy requirements of Rule 23(a), the "grounds that apply generally to the class" requirement of Rule 23(b)(2), as well as the predominance and superiority requirements of Rule 23(b)(3). Sterling also contends that the proposed class period is overbroad. Sterling further contends that Claimants' EPA claims may not be certified as an "opt-out" class, that Claimants have not met the "similarly situated" requirement for certification of their EPA claims as a collective action, and that a nationwide class cannot be certified under the EPA because the EPA applies only to discrimination within "establishments" that are defined as physical locations. Finally, Sterling contends that the Named Claimants have no standing to represent absent class members in this proceeding because absent class members did not agree to have an arbitrator decide whether to adjudicate their cases through the vehicle of a class arbitration.

SUMMARY OF AWARD

For the reasons set forth below, I find that the adjudication of Claimants' Title VII disparate impact claims with respect to declaratory and injunctive relief may be maintained as a class arbitration pursuant to AAA Supplementary Rule 4 and Rule 23(b)(2) and Rule 23(c)(4). Claimants' motion for class certification of their Title VII disparate impact claims with respect to monetary damages pursuant to AAA Supplementary Rule 4 and Rule 23(b)(3) is denied. Claimants' motion for class

certification of their Title VII disparate treatment claims is denied. Claimant's motion for certification of a Rule 23 "opt-out" class for their EPA claims is denied. Sterling's contention that the Named Claimants lack standing to represent absent class members in this proceeding is rejected. I find that the appropriate class period for Claimants' Title VII compensation claims is July 22, 2004, to the date of trial, and that the appropriate class period for Claimants' Title VII promotion claims is December 7, 2004, to the date of trial.

EVIDENCE PERTAINING TO CLASS CERTIFICATION

The parties have submitted voluminous evidence and legal briefs with respect to the pending motions. The evidence includes thousands of documents produced by Sterling, extensive excerpts of testimony taken at dozens of depositions, declarations of current and former Sterling employees submitted by Claimants-- including the declarations of close to 200 putative class members, declarations of Sterling executives and employees submitted by Sterling, and the reports and testimony of seven experts.

The following facts are not materially in dispute, except as specifically noted:

Sterling's Corporate Structure and Field Operations

Sterling is a wholly-owned subsidiary of Signet Jewelers. Sterling currently owns nearly 1,700 stores in all 50 states, consisting of its Mall Division, which includes the national Kay Jewelers brand, and its

free-standing Jared The Galleria of Jewelry ("Jared") stores.[6] Operation and oversight of these stores is known as "field operations" and is concentrated under Senior Vice President of Operations ("SVPO"), Tryna Kochanek.[7] Kochanek, who has held this position since 2000,[8] has responsibility and oversight for three divisions, each overseen by a Divisional Vice President ("DVP"): the Mall Division, the Jared Division, and Operations Administration.[9] DVPs Joseph Beck and Barry Fernholz oversee the Mall and Jared Divisions, respectively.[10] They provide functionally the same oversight and are responsible for performance and training in their divisions.[11] DVP Bill Luth currently oversees Operations Administration and has done so since 2000.[12]

As of year-end 2012, fourteen Vice Presidents of Regional Operation ("VPROs") reported to Beck and Fernholz--eleven in the Mall Division and three in the

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[6] 30(b)(6) Deposition of Tryna Kochanek (Oct. 25, 2012) (Kochanek Dep.) at 12:18-13:12; 70:9 (Claimants' Exhibit 8).

[7] *Id.* at 11:18-19; 12:13-19; Organizational charts, SJI 1929-36, 1948-49 (Claimants' Exhibits 11 and 12) ("SJI" designates a document produced by Sterling, followed by the "Bates Number" assigned to an individual page); *see* Glossary of Sterling Executives (Claimants' Exhibit 13).

[8] Kochanek Dep. at 11:23-25; 15:1-16 (Claimants' Exhibit 8).

[9] *Id.* at 14:23-25.

[10] *Id.* at 52:24-53:18.

[11] *Id.* at 54:3-56:12; 67:18-68:11; Deposition of Barry Fernholz (Feb. 6, 2013) (Fernholz Dep.) at 42:2-43:8 (Claimants' Exhibit 10).

[12] Kochanek Dep. at 53:16-18; 30(b)(6) Deposition of William Luth (Nov 12, 2012) (Luth I Dep.) at 11:5-8 (Claimants' Exhibit 14). Luth was deposed twice as a 30(b)(6) witness on Sterling's compensation and promotion policies and procedures and once in his individual capacity. These depositions are referred to as Luth I, II, and III.

Jared Division.[13] Each Region contained between seven and nine Districts. Of these, 91 are Mall Districts, containing between 11 and 15 stores, and 21 are Jared Districts, containing 10 or fewer stores.[14] District Managers ("DMs") report to the VPROs. The duties of DMs are the same across the Company.[15]

The offices of the SVPO, the three DVPs and the VPROs are all located at Sterling's headquarters in Akron, Ohio, and these executives meet regularly regarding the oversight and performance of Sterling's field operations.[16] The DMs, with VPRO oversight, are largely responsible for determining compensation of Retail Sales Employees. DMs set starting pay rates for new Retail Sales Employees, determine merit increases, and set pay rates upon promotion, with VPRO oversight. DMs and VPROs have performed these responsibilities since at

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[13] Deposition of Joseph Beck (Beck Dep.) at 10:7-10 (Claimants' Exhibit 9); Fernholz Dep. at 27:1-6 (Claimants' Exhibit 10). Prior to February 2004, Sterling did not distinguish between Divisional and Regional Vice Presidents; instead Sterling employed ten Vice Presidents, each of whom oversaw a region and reported directly to Kochanek. Kochanek Dep. at 59:10-19 (Claimants' Exhibit 8).

[14] Store Lists, SJI 181771-72; 1242081-91; 1255868 (too voluminous to submit as exhibits).

[15] Luth I Dep. at 75:15-76:5 (Claimants' Exhibit 14). All DMs share a single position description. Kochanek Dep. at. 161:23-162:21; 162:22-164:5 (Claimants' Exhibit 8).

[16] Kochanek Dep. At 73:1-15; 118:16-19 (Claimants' Exhibit 8); Fernholz Dep. at 100:20-102:2, 105:2-7 (describing regular operations meetings that have taken place the entire time that Fernholz has been a DVP) (Claimants' Exhibit 10); Beck Dep. at 15:4-16:9 (describing regular one-on-one meetings with VPROs and operations meetings of VPROs and DVPs) (Claimants' Exhibit 9).

least 2002.[17] In awarding promotions, DMs are charged with identifying, grooming, and recommending candidates for their VPROs' review and approval. VPROs must approve all management-level promotions, subject to the final approval of the DVPs.[18] Sterling reports that between January 1, 2002 and March 1, 2013, a total of 23 individuals have been VPROs, and 229 individuals have been DMs.[19]

In the stores, the highest-ranking employee is the Store Manager (SM); Jared GMs and Mall SMs have same duties.[20] Sterling's data reflects that between January 1, 2002 and March 1, 2013, a total of 5,150 individuals have been SMs.[21] Below the SM is an Assistant Manager, whose duties are essentially the same in Mall

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[17] Luth I Dep at 230:16-22, 235:19-236:17 (merit pay ranges set by HR; DM determines percentage given to employees), 93:8-94:11 (VPROs oversee DMs and work to determine ranges for setting starting pay) (Claimants' Exhibit 14); Kochanek Dep. at 94:22-95:6 (DMs set starting pay for sales employees), 96:23-98:2 (VPROs provide oversight for setting pay) (Claimants' Exhibit 8); see SJI 291798-19 (email from DM to VPRO regarding pay for potential new hires); SJI 160099; SJI 183093-94; SJI 280041-42; SJI 586813 (emails between DMs and VPROs regarding pay upon promotion) (Claimants' Exhibits 15-18).

[18] Fernholz Dep. at 139:5-7 (Claimants' Exhibit 10).

[19] Declaration of William Luth (Luth Decl.) ¶ 3 (Respondent's Exhibit 5).

[20] *See* Mall Stores Store Manager Job Description, SJI 2079 (Claimants' Exhibit 2); Jared General Store Manager Job Description, SJI 2099 (Claimants' Exhibit 3); Kochanek Dep. at 14:9-14; 168:1-178:1 (Claimants' Exhibit 8).

[21] Luth Dec1. ¶ 3 (Sterling's Exhibit 5).

and Jared stores.[22] Jared stores employ a third tier of management-level employees, Diamond and Timepiece Department Managers. All Sterling stores have Sales Associates, whose duties are virtually identical in the Mall and Jared Divisions.[23] Sterling maintains uniform job descriptions for all Retail Sales Employee positions that are applicable companywide. Employees are allowed to move between stores within the same district, and across districts (movement between the Mall and Jared Divisions is permitted, but rare).[24]

Currently, 34% of VPROs are women; 43% of DMs are women; 60% of SMs are women; 72% of Assistant Managers are women; 57% of Department Managers are women, and 73% of Sales Associates are women.[25]

Human Resources

Sterling's Human Resources ("HR") department operates out of its corporate headquarters and is overseen by Steven Becker, Senior Vice President of HR.[26] HR

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[22] *See* Jared Assistant General Manager Job Description, SJI 1597-98; Mall Assistant Store Manager Job Description, SJI 1614-16 (Claimants' Exhibits 24 and 25).

[23] *See* Jared Sales Associate Job Description, SJI 1606-07; Mall Sales Associate Job Description, SJI 1617-18 (Claimants' Exhibits 26 and 27).

[24] Sterling's Career Advancement Register 2009, SJI 8744-62 at 8751 ("Team members move frequently from store to store and across districts and regions") (Claimants' Exhibit 28); 30(b)(6) Deposition of William Luth (Nov. 13, 2012) (Luth II Dep.) at 213:22-218:22 (Claimants' Exhibit 29); Kochanek Dep. at 178:2-25 (Claimants' Exhibit 8).

[25] Report of Claimants' expert Dr. Louis R. Lanier (Lanier Report) at Table 2 (Claimants' Exhibit 41).

[26] 30(b)(6) Deposition of Steven Becker (Dec. 4, 2012) (Becker Dep.) at. 6:5-20 (Claimants' Exhibit 33).

contains a Training Division, responsible for promulgating uniform training for field operations throughout the Company.[27] Training is an integral part of Sterling's corporate culture and is consistent across the nation throughout the field.[28] HR also contains an Employee Relations Division, overseen by Vice President of Employee Relations, Michael Lynch. Employee Relations "provid[es] employee relations support to the field organization," including management and non-management employees.[29] Maryellen Mennett is the Director of Field HR. Under the direction of Lynch and Mennett, Regional HR Specialists provide HR services to employees in the field, including advice concerning personnel and HR policies, and receiving and investigating complaints. Each Regional HR Specialist is assigned to serve employees in one or more regions. These Regional HR Specialists follow a common set of guidelines for responding to and investigating employee complaints.[30] Throughout the proposed class period, Sterling's EEO policies, Code of Conduct and Standards of Business Ethics, and Zero Tolerance Policy have prohibited discrimination and sexual harassment, and managers are trained at frequent

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[27] Kochanek Dep. 74:9-76:11 (Claimants' Exhibit 8). Until 2012, training was housed under Luth in Operations Administration. *Id.*

[28] *Id.* at 146:21-151:8.

[29] Becker Dep. at 51:4-17 (Claimants' Exhibit 33).

[30] *See, e.g.*, Instructions for Drafting Internal Investigation Summary, SJI 238039; Guidelines for Investigation Closure, SJI 628154; Steps to a Proper and Legal Investigation, SJI 704873-78; Investigation Procedures Refresher, SJI 59056-58 (Claimants' Exhibits 34-37).

intervals on these policies.[31] The evidence pertaining to Claimants' allegations of deficiencies in Sterling's HR policies and practices is discussed below in the section on expert evidence.

Compensation Policies and Practices

For the entire period covered by this case, Sterling's policies and practices governing compensation have applied companywide and uniformly to all Retail Sales Employees, including members of the putative class, in each of Sterling's stores.[32] Under these policies and practices, Sterling's DMs are primarily responsible for making determinations about the compensation of Retail Sales Employees; however, DMs routinely consult with and receive input and recommendations from SMs.[33]

Claimants challenge the following aspects of Sterling's compensation process:

- *Setting Starting Pay*: Throughout the period covered by this case, Sterling has directed DMs to set starting pay for newly hired Sales

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[31] Consolidated Exhibit of Equal Employment Opportunity and Human Resources Policies ("EEO and HR Policies") (Sterling's Exhibit 24); Consolidated Exhibit of Training Materials ("Training Materials") (Sterling's Exhibit 28).

[32] *See, e.g.*, Sterling Wage and Salary Administration, SJI 10885-86 and Compensation Administration Management Guidelines, SJI 10883-84 (Claimants' Exhibits 38 and 39).

[33] *See, e.g.*, Business Process Overview, Merit Increases, SJI 1269912-17 (Claimants' Exhibit 40); Luth I Dep. at 93:8-94:11 (using wage engine, VPROs oversee DMs to set starting pay), 230:16-19 and 232:11-22 (percentages for merit pay increases signed off by DMs) (Claimants' Exhibit 14); Kochanek Dep. 89:14-92:22 (Claimants' Exhibit 8).

Associates using prior job experience, including prior management experience, as the touchstone. But Sterling has afforded its DMs considerable discretion in determining how to value prior job experience in setting starting pay rates. As a result, the process for setting starting pay rates is susceptible to the influence of bias. Even when Sterling identified particular types of experience to credit in setting starting pay rates, some, such as prior management experience, have no bearing on performance as a Sales Associate and should not have been considered in setting starting pay.

- *Annual Merit Increases*: Sterling's policy is to award annual merit increases based on the employee's performance. By formulating the amount of the merit increase as a percentage increase to an employee's base compensation, Sterling perpetuates, and in some cases magnifies, the prior disparities in base pay rates. Rather than correcting these disparities at the time of annual merit increases, through out-of-cycle adjustments, Sterling has consistently failed to address these wage disparities.
- *Compensation is Unrelated to Performance*: There are two measures of performance primarily used at Sterling. First, Sterling evaluates the performance of employees annually. These performance evaluations are used to set annual merit increases. Women consistently have received higher performance evaluations on average than men. Second, Sterling pays sales employees a fixed commission based on the amount of

> merchandise they sell. Women on average receive higher commissions than men who work in the same stores. Notwithstanding that female Retail Sales Employees outperform similarly-situated men, women have consistently received lower base rates, and accordingly lower merit increases.[34]

Starting Pay

Virtually all new Retail Sales Employees are hired for the position of Sales Associate.

During the proposed class period, Sterling has implemented four major iterations of the process for setting starting pay rates: (i) a wage engine in 2002; (ii) a wage floor and wage ceiling in 2007; (iii) the Wage Rate Generator ("WRG") system with three pay rates in 2009; and (iv) the WRG system with one pay rate in 2012.[35] In all four iterations, Sterling has directed DMs to set starting pay levels for Sales Associates based on the nature and amount of prior job experience candidates possess at the time of hire.[36]

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[34] Claimants' Memorandum in Support of Motion for Class Certification (Claimants' Memo) at 10.

[35] Specifically, the four time periods are the wage-engine only period (1/1/2003-8/29/2007), the wage-floor/wage-ceiling period (8/30/2007-7/12/2009), the WRG with three rates period (7/13/2009-1/4/2012), and the WRG with one rate period (1/5/2012-12/31/2012). Lanier Report at Table 8a (Claimants' Exhibit 41).

[36] *See, e.g.*, Wage and Salary Administration Guidelines (Claimants' Exhibit 38); Compensation Administration Management Guidelines (Claimants' Exhibit 39); Luth I Dep. at 183:10-25 (previous experience primary driver for setting starting pay for past decade); 189:17-190:2 (prior to WRG, managers were entrusted

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In the two iterations before 2009, Sterling directed its DMs to set starting pay for Sales Associates "with no applicable experience" "at the minimum rate assigned to their job."[37] Higher starting pay rates could be awarded to new hires with prior job experience that the DMs regarded as relevant.[38] Generally, the iterations before 2009 were designed to ensure that the overall wages offered for starting pay fit within the budget for the district.[39] Sterling provided limited guidance as to what types of prior job experience warranted pay rates above the minimum level, including whether or to what extent to credit prior job experience that did not involve sales.[40]

In July 2009, Sterling instituted the third iteration: a computer-based algorithm called the Wage Rate Generator, which computed the starting pay rates that could be offered to new Sales Associates based upon the nature and amount of their prior job experience, prior sales volume, the location of the store, and the cost of living in the area.[41] With respect to prior experience,

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within certain constraints to give credit to prior work experience they regarded as relevant) (Claimants' Exhibit 14).

[37] Compensation Administration Management Guidelines (Claimants' Exhibit 39).

[38] *Id.*; Luth I Dep. at 196:13-17 (certain prior job experience could justify pay adjustment above base starting pay) (Claimants' Exhibit 14).

[39] Kochanek Dep. at 94:3-95:20 (Claimants' Exhibit 8).

[40] *See, e.g.*, Luth I Dep. at 197:15-198:6 (prior to WRG a school teacher might get some credit for prior job experience based on discretion of manager) (Claimants' Exhibit 14).

[41] Luth I Dep. at 154:18-155:17 (WRG provided a more sophisticated analysis of experience, store and geographic area, and store volume) (Claimants' Exhibit 14); Beck Dep. at 33:15-24 (WRG is "same process" as prior iterations) (Claimants' Exhibit 9).

the WRG components are retail sales experience, store management experience, and "other" management experience, volume of personal retail sales (broken down by jewelry and non-jewelry) and store volume for managers (also broken down by jewelry and non-jewelry).[42] The WRG assigns weights to each of these components; prior retail sales experience, especially sales volume in jewelry, has the biggest impact on an applicant's recommended rate.[43] There is evidence that Sterling's managers had considerable discretion in determining what constituted retail sales experience.[44]

Based upon the inputs by DMs, the WRG returned three starting pay options: a "recommended rate," a "plus rate" and a "maximum rate." On rare occasions, the DM could seek VPRO approval to exceed the "maximum rate." In mid-2010, Sterling required DMs to obtain approval from their VPROs before offering either of the two higher rates. In the fourth iteration, the WRG was revised in January 2012 to return a single pay rate.[45]

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[42] The WRG does not distinguish between jewelry and non-jewelry prior experience unless the applicant provides verifiable information regarding sales volume.

[43] Report of Sterling's expert Dr. Michael P. Ward (Ward Report) at Appendix A1-2 to A1-4.

[44] Deposition of William Frank Luth (Apr. 4, 2013) (Luth III Dep.) at 52:6-54:17; 57:22-64:4 (Claimants' Exhibit 44); Claimants' Exhibit 45.

[45] DMs may still request an exception from the VPRO, but these requests are rare. *See* Kochanek Dep. at 97:12-22 (Sterling Exhibit 2); Luth Dep. I at 155:18-158:15 (Sterling Exhibit 6) (beginning in second half of 2010, DMs had to confer with a VPRO to offer the "plus" or "max" rate provided by the WRG; in Fall 2011, DMs were no longer given this option).

The inputs into the WRG formula and the weights associated with those inputs have remained unchanged.[46]

At no time did Sterling conduct a job analysis of the Sales Associate position to determine and weight professionally and systematically the types of prior job experience that correlate most closely with successful performance.[47]

Claimants' evidence of gender-based disparities in compensation is discussed below in the section on expert evidence.

Merit Increase Policies and Practices

Sterling's policy governing merit raises provides that pay adjustments may be made once each year based upon the results of documented performance in a written performance appraisal."[48] Sterling's merit increase process requires that DMs propose a merit increase based upon the employee's aggregate performance appraisal score.[49] The proposed merit increase must be approved by top executives at the Company before it becomes final.[50] Merit

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[46] Ward Report at Appendix A1-1.

[47] Luth II Dep. at 45:19-24, 170:2-171:12 (Claimants' Exhibit 29); Becker Dep. 19:3-6 (Claimants' Exhibit 33); Deposition of Sterling's Vice President of Employee Relations Michael Lynch (Jan. 23, 2013) (Lynch Dep.) at 44:17-25 (no knowledge of Uniform Guidelines) (Claimants' Exhibit 72).

[48] Business Process Overview, Merit Increases (all full-time and part-time employees, with at least 10 months of service at Sterling, are eligible to receive an increase once a year) (Claimants' Exhibit 40).

[49] *Id*. at SJI 1269914 (DMs propose merit increases; VPROs review and "appropriate changes are made.").

[50] Luth I Dep. at 232:11-234:3, 233:18-234:3, 234:25-235:7 (executive management team approves budgetary determinations,

increases are computed by application of a companywide formula, increasing the base wage of employees by a percentage determined by the level of each employee's performance. Sterling generally does not use the merit increase process or any other established process to correct pay disparities between comparably performing employees that are attributable to differences in starting pay.[51] Accordingly, Sterling's policy for awarding annual merit increases can perpetuate any disparities adverse to women in starting pay rates. The statistical evidence with respect to merit pay is discussed below in the section on expert evidence.

Promotion Policies and Practices

Throughout the proposed class period, Sterling has used an approach known as "Succession Planning" or "Succession Management,"[52] to make all promotions into and within management positions in its stores. "Succession Management is the ongoing, dynamic process of identifying talented employees then training and coaching them in order to prepare them for future, higher-level positions."[53] Sterling has consistently followed a policy of promoting internal candidates into and within management, rather than hiring candidates for

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including aggregate merit increase amount) (Claimants' Exhibit 14).

[51] *See* Claimants' Memo at 14-16.

[52] Luth II Dep. at 69:3-70:18 (Succession Planning is "is a strategy to understand candidates that would be considered promotion ready for any open vacancies in my market as a district manager") (Claimants' Exhibit 29).

[53] Succession Management District Manager Lesson Plan at SJI 32427 (Claimants' Exhibit 53).

management positions from outside the Company.[54]

Sterling's promotion process begins with the DMs, who, with the assistance of SMs, are directed to identify, groom and recommend candidates for promotion, subject to approval by the VPROs and DVPs.[55] DMs identify candidates for promotion by meeting regularly with Retail Sales Employees on a one-one basis, where they are expected initiate conversations about career paths and interest in promotion.[56] Under this policy it is a core responsibility of a DM to develop a succession plan, which DMs are required to regularly update and submit to VPROs, and which are monitored by DVPs.[57]

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[54] Luth II Dep. at 41:17-22, 70:16-18 ("Sterling strongly believes in promotion from within whenever appropriate," and this policy has been consistently in place for the past decade) (Claimants' Exhibit 29); Succession Management District Manager Lesson Plan, SJI 32416-67 at SE 32421-22 (describing promote-from-within culture of Sterling as "corporate strategy") (Claimants' Exhibit 53).

[55] *See* Luth II Dep. 35:3-37:23 (VPRO approval of all promotions of Retail Sales Associates has been in place for at least the last decade); 142:18-145:1 (VPROs "partner with the district manager to have a firsthand understanding of the district manager's market and attempt to mentor, guide, manage, oversee the district manager's performance and how they're managing their own district and market"), 189:12-17 (DVPs finalize promotions "to ensure that the [regional] vice president and the district manager have taken the proper steps to validate the candidate and have verified from the procedural standpoint that all looks in order") (Claimants' Exhibit 29); Kochanek Dep. at 103 (describing SM participation in Succession Planning) (Claimants' Exhibit 8).

[56] Luth II Dep.at 59:23-61:10 (Sterling Exhibit 4); The Source Promotion/Transfer Policy (Sterling Exhibit 9).

[57] *See* Claimants' Exhibits 56-60, 70. DMs also track candidates being groomed on centrally-developed forms. Luth II Dep. at

This process results in the establishment of a ready stable of "promotables" who can fill current and future management needs. As vacancies arise, the DMs select and recommend a preferred candidate, subject to review and approval by the VPROs and DVPs.[58]

Sterling provides training in Succession Planning that describes the process of identifying promotable candidates and grooming them for promotion.[59] Sterling directs the DMs to consider "Performance Standards" as well as seven "Mission Statement/Leadership Behaviors" in identifying the candidates groomed for promotion. Performance Standards pertain to sales metrics, which are also used in annual performance evaluations. Candidates for promotion must be performing at or above expectations in sales.[60] The seven

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127:19-128:20, 129:19-130:12 (describing Career Path Summary form) (Claimants' Exhibit 29); Deposition of VPRO David Everton (February 8, 2013) at 74:21-76:7 (as VPRO, he received regular "Projected and Potential" charts to track potential candidates for promotion into management) (Claimants' Exhibit 62).

[58] *Id.* at 78:9-80:13 (DMs make recommendation of candidate to VPRO when vacancy arises).

[59] *E.g.*, Module 4, at SJI 28894 (Claimants' Exhibit 55); Phase 2 DM Development Program Succession Management Leader's Guide, SJI 35478-530 (Claimants' Exhibit 67).

[60] Module 4 at SJI 28900 (Claimants' Exhibit 55); Succession Management Lesson Plan, at SJI 32438 ("**The sales standard is a must-have**") (emphasis in original) (Claimants' Exhibit 53); Luth II Dep. at 154:3-6 (sales performance is "at the heart and is the cornerstone of whether someone should be qualified to more forward or not"), 154:20-155:2 (meeting daily sales goal is "cornerstone" of whether you are a suitable candidate for Succession Planning) (Claimants' Exhibit 29).

Mission Statement/Leadership Behaviors are 1) customer 1st perspective; 2) rewards; 3) return on assets; 4) continuous improvement; 5) teamwork; 6) integrity; and 7) communication. In order to be considered promotable a manager must demonstrate five out of seven of these characteristics.[61] Sterling has not conducted any studies to determine whether the Performance Standards or Mission Statement/Leadership /Behaviors correlate with successful performance in the jobs being filled.[62]

It is Sterling's corporate policy not to post vacancies for management positions. Until 2007, Sterling had no formal mechanism for offering candidates for promotion formal notice and an opportunity to apply or register their interest in promotion. Before 2007, employees were expected to express their interest in promotion to their managers, which expression of interest may or may not have been recorded or communicated to other managers when vacancies arose.[63]

In 2007, Sterling created a system for the registration of interest known as the Career Advancement Register ("CAR").[64] CAR allows employees to register

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[61] Module 4, at SJI 28909 (Claimants' Exhibit 55); Phase 2 DM Development Program Succession Management Leader's Guide, SJI 35478-530 at 35496 (Claimants' Exhibit 67).

[62] Luth II Dep. at 220:19-23 (Claimants' Exhibit 29).

[63] *See* Luth II Dep. at 64:6-65:13 (describing process for tracking employees' interest in promotion before 2007) (Claimants' Exhibit 29); Promotion/Transfer Policy (Claimants' Exhibit 54) at SJI 10882 ("In the field, employees should make their Store/Shop Manager and District or Regional Management aware of their desire to be considered for future vacancies/promotional opportunities").

[64] *See* CAR Powerpoint Presentation, SJI 723150-193 at SJI 723153-54 (describing the new CAR as a "uniform and consistent

interest, change their expression of interest, indicate to what extent they are available for relocation, and review minimum job requirements for various managerial positions.[65] Sterling requires that DMs or SMs meet one-on-one with each employee who registers in CAR to discuss his or her career development. Since January 1, 2008, Sterling has required registration in CAR for an employee to receive a promotion.[66] Based upon the CAR data, women are proportionally less interested in promotion than men. Claimants' evidence that CAR is not a reliable indicator of women's interest in promotion because registration in CAR has been "manipulated," as well as Claimants' statistical evidence of gender-based disparities in promotions, is discussed below in the section on expert evidence.

Policy Against Discussing Compensation

Claimants contend that throughout the period covered by this case, Sterling has had a practice or unwritten policy prohibiting its employees from discussing their compensation with other employees. Although Sterling

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system for all Associates that wish to advance within the Company" and explaining that it is "[b]eing implemented to ensure all Associates are given fair, equitable, and objective consideration for advancement within the organization") (Claimants' Exhibit 71). *see also* Lynch Dep. at 212:18-215:16 ("It was my opinion that promoting individuals who had not registered could be discriminatory in nature and should not be tolerated.") (Claimants' Exhibit 72); Email from Lynch to field operations (Dec. 13, 2007) at SJI 286305 (failure to use CAR gives rise to liability risk) (Claimants' Exhibit 73).

[65] Luth Decl. ¶ 6 (Sterling Exhibit 5).

[66] *Id*.

disavows such a policy,[67] Claimants have submitted numerous declarations reporting instances in which Sterling managers communicated to employees that it was Sterling's practice to prohibit discussion of pay throughout the Company and that discussing pay could lead to disciplinary action.[68]

Sterling's Knowledge of Pay Disparities

Claimants have submitted several documents reflecting internal workforce analyses conducted by Sterling with respect to its compensation policies and practices.

In July 2006, Sterling Vice President of Employee relations Michael Lynch reported:

> A comprehensive analysis by two consulting expert groups to assess our data and determine if we have any systemic issues is ongoing. The analysis of payroll data shows that female hourly sales employees on average are paid approximately .[]40 [cents] per hour less than male employees. **This equates to over 7 million annual affected hours.** Numerous models which looked at a spectrum of variables failed to alter the forty cent factor. The disparity begins at the time of hire and generally continues throughout the employee lifecycle.[69]

This document further notes that "Sterling will need to undertake a review of its compensation and promotional

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[67] Kochanek Dep. at 194:6-195:2 (Claimants' Exhibit 8); Deposition of Maryellen Mennett (March 21, 2013) at 218:21-219:17 (Claimants' Exhibit 49).

[68] Claimants' Memo at 16-19.

[69] Compliance Management (July 2006) at SJI 1050046 (Claimants' Exhibit 209) (emphasis in original).

practices and make necessary adjustments to avoid sustained issues."[70]

An internal memo from 2007 entitled "Post-Merit Field Operations EEOC Analysis," reports that "Male manager populations, on average earn * * * higher base salaries than female * * *. Both DM and SMGR populations show that Females scored higher performance scores, yet received lower dollar increases than males * * *. At the store level (excluding DMs), males earn, on average, 12.5% higher base pay wages. In addition this merit cycle shows that males will be increasing $0.05/hour more than women."[71]

Finally, Claimants contend that a 2010 "Merit Payout Alternative" spreadsheet reflects Sterling's knowledge that although women generally received higher performance appraisals ("Merit Scores"), Sterling's policy of setting merit pay increases as a percentage of base pay perpetuated disparities in compensation adverse to women.[72] Sterling apparently disputes Claimants' interpretation of this document, but has not offered any alternative explanation of the data.[73]

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[70] *Id.*, at SJI 1050048.

[71] Claimants' Exhibit 211 at SJI 1285226.

[72] Claimants' Exhibit 212 at SJI 01046514.

[73] Sterling Jewelers Inc.'s Memorandum of Law in Opposition to Claimants' Motion for Class Certification (Sterling Opposition Memo) at 26 ("Claimants have offered no analysis of these worksheets or the purported qualifications of anyone interpreting them as experts. It is nothing more than counsel's biased interpretation of a singular communication, lacking any factual context or explanation of the figures contained therein").

Appendix N

Evidence of Behavior Demeaning to Women and Gender Stereotypes

Claimants have submitted extensive evidence of alleged improper sexual conduct and comments reflecting gender stereotypes by numerous executives and senior managers (including Sterling's CEO and all three of the DVPs who have overseen store operations for most of the last decade) throughout the Company beginning in the early 1990s and continuing to the present. This evidence consists primarily of declarations and testimony by current and former male and female Sterling employees, as well as testimony from Sterling executives and senior managers. The conduct described in the declarations and testimony has occurred in settings that are public and private, ranging from banter in hallways and elevators to interactions within Sterling stores and at the mandatory annual meeting of all Sterling managers held in Orlando, Florida. It includes references to women in sexual and vulgar ways, groping and grabbing women, soliciting sexual relations with women (sometimes as a *quid pro quo* for employment benefits), and creating an environment at often-mandatory Company events in which women are expected to undress publicly, accede to sexual overtures and refrain from complaining about the treatment to which they have been subjected. In addition, the testimony and declarations submitted by Claimants describe numerous instances in which managers at all levels of the company and throughout the entire period covered by this action have made comments reflecting negative gender stereotypes, and have relied upon such stereotypes to justify biased pay and promotion

decisions.[74] For the most part Sterling has not sought to refute this evidence; rather Sterling argues that it is inadmissible, irrelevant and insufficient to establish a corporate culture that demeans women.

Claimants' expert evidence regarding the existence at Sterling of a corporate culture that demeans women, and the effect of that culture on pay and promotion decisions, is discussed below.

EXPERT REPORTS AND TESTIMONY

In support of the motion for class certification, Claimants have offered the reports and testimony of proposed experts Drs. Louis R. Lanier, Kathleen Lundquist and James Outtz. In opposition to the motion, Sterling has offered the reports and testimony of proposed experts Drs. Michael P. Ward, Eric M. Dunleavy and Kayo Sady, and Margaret S. Stockdale. Sterling has filed *Daubert* motions to exclude the reports and testimony of each of Claimants' experts. Claimants have filed *Daubert* motions to exclude the reports and testimony of Drs. Dunleavy and Sady and Dr. Stockdale.

The presentation of the expert evidence is somewhat complicated by the fact that the parties' respective experts often rely upon each other's analysis and findings, and by the sequential development of the expert evidence. Claimants' three proposed expert witnesses submitted initial reports, setting forth opinions that are in some respects based upon each other's analysis and findings. Sterling submitted three expert reports. In addition, in response to the reports of Sterling's experts, Claimants' experts submitted rebuttal reports that respond to and

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[74] *See* Claimants' Memo at 33-43 (detailing evidence).

critique Sterling's experts. Significantly, the rebuttal reports of Drs. Lanier and Lundquist reflect further empirical and statistical analysis and contain additional findings that are addressed to Sterling's critique of their initial reports. All of the experts except Dr. Sady were deposed.[75] Finally, Dr. Ward has submitted a declaration that addresses Dr. Lundquist's rebuttal report and new analyses.

As a result of this sequential development of the record, the expert evidence is best understood and appreciated by first setting forth the initial analysis and opinions of Claimants' experts, followed by the critique by Sterling's experts, the rebuttal of Claimants' experts, and Dr. Ward's declaration.

Initial Reports of Claimants' Experts

Dr. Lanier's Initial Report

Dr. Lanier performed a statistical investigation into whether gender is related to the compensation and promotion practices at Sterling.[76] Dr. Lanier is a Senior Economist and Managing Director at Econ One Research, Inc., an economic consulting firm.[77] He holds a Ph.D. in Applied Economics and has significant

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[75] Dr. Sady was not deposed because Dr. Dunleavy had equal responsibility for writing the opinions in the report and because Sterling's counsel stipulated that Dr. Sady would not provide any additional opinions or materially different responses in a deposition than Dr. Dunleavy.

[76] Lanier Report ¶4 (Claimants' Exhibit 41).

[77] *Id.* ¶ 1.

experience in the area of labor economics.[78] Dr. Lanier has provided expert testimony in several class and collective actions.[79]

Analysis of Compensation Disparities

Dr. Lanier conducted a detailed multiple regression analysis that isolated gender differences in regular base pay from the effects of other employee characteristics.[80] Dr. Lanier found that females who have worked as part-time and full-time Sales Associates, Department Managers, Assistant Managers, and Store Managers at Sterling during the years 2003 to 2012 received less regular base pay than male employees working in the same jobs and in the same stores, who had the same amounts of company and job tenure, same potential years spent at other companies after age 18, and the same levels of performance as measured by sales commissions and performance reviews.[81] Gender-related pay disparities range from $488 per year to $1,308 per year and are all statistically significant at standard deviations ranging from 4.7 to 9.8.[82] In this analysis, Dr. Lanier allowed his control variables to interact in each Sterling District to control for the fact that DMs are responsible for setting pay rates in the Sterling stores.[83]

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[78] *Id.* ¶¶1-2.

[79] *Id.* ¶2.

[80] *Id.* ¶27 and Table 7.

[81] *Id.*

[82] *Id.*, Table 7. Roughly two or more standard deviations (a 0.5 level of statistical significance) are considered statistically and legally significant and may be sufficient to establish a *prima facie* case of discrimination. *See, e.g., Hazelwood School Dist. v. United States*, 433 U.S. 299, 301-11 & nn.14, 17 (1977).

[83] *Id.* ¶28.

Appendix N

Dr. Lanier examined whether male employees outperform female employees at Sterling, which might provide some justification for the pay disparities. Dr. Lanier found that female employees were more likely than male employees to receive higher performance ratings, a finding that is statistically significant at 15.6 standard deviations (meaning the probability that this relationship between gender and performance ratings occurred by chance is effectively zero).[84] Dr. Lanier also performed a multiple regression analysis to determine whether female employees in the same store and same jobs earned sales commissions that were greater on average than similarly-situated male employees.[85] Dr. Lanier found that women in full-time Sales Associate positions earned higher sales commissions than men on average (a statistically significant finding at 2.2 standard deviations) and that in other positions women performed equally well or better than men.[86]

Dr. Lanier examined whether differences in the prior job experience of male and female employees could explain the disparities he observed at Sterling. To do so, Dr. Lanier worked with Dr. Lundquist and APTMetrics to analyze a random sample of the applications of over 5,000 male and female employees at Sterling during the years 2003 to 2012.[87] APT Metrics determined the amount of prior experience that each employee had in the six categories that Sterling currently uses in its

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[84] *Id.* ¶23.

[85] *Id.* ¶25 and Table 5.

[86] *Id.*

[87] *Id.* ¶30; Report of Claimants' Expert Dr. Kathleen Lundquist (Lundquist Report) at 30 (Claimants' Exhibit 46).

WRG: jewelry sales, jewelry store management, jewelry other management, non jewelry sales, non-jewelry store management, and non-jewelry other management.[88] Dr. Lanier then performed multiple regression analyses during the four different time frames when Sterling used different methodologies for setting starting pay for Sales Associates designed to measure whether differences in prior experience could explain the initial pay disparities between male and female Sales Associates at Sterling.[89] Controlling for the same job, same hire year, same district, and the same amounts and types of prior job experience as Sterling uses in its WRG, Dr. Lanier found that in the period January 1, 2003 to July 12, 2009, female employees are initially paid less than male employees on average at statistically significant levels and that these disparities cannot be explained by including the same types of experience that Sterling currently uses in its WRG.[90] In the period during which the WRG has been in use, July 13, 2009 to the present, Dr. Lanier found that female Sales Associates were paid lower starting pay than male Sales Associates, but that these disparities were not statistically significant.[91]

Dr. Lanier also considered whether Sterling's use of prior management experience in setting the pay of Sales Associates adversely affected female employees. In Tables 8b and 8c, Dr. Lanier shows that the statistical

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[88] Lanier Report ¶¶30-33 and Table 8a (Claimants' Exhibit 41). In this analysis, neither Dr. Lundquist nor Dr. Lanier used actual data from the WRG, which Dr. Lundquist found unreliable, and which is limited to hires after July 2009.

[89] Lanier Report ¶31 and Table 8a.

[90] *Id.* ¶33 and Table 8a.

[91] *Id.*

disparities increase in each of the four timeframes when prior non-jewelry management experience is removed from the regression analysis (Table 8b), and when all prior management experience is removed from the regression analysis (Table 8c).[92]

Dr. Lanier also analyzed whether the recommended rate established by Sterling's WRG is an accurate predictor of an employee's first year sales productivity.[93] Using two separate measures of productivity, Dr. Lanier showed that the WRG is a poor predictor of an employee's first-year sales productivity. In fact, the WRG assigned a lower annual pay rate of between $779 and $1,172 to female employees, which are statistically significant at 5.2 and 6.6 standard deviations.[94]

Having determined that Sterling sets initial pay rates for female Retail Sales Employees at rates that are statistically significantly lower than similarly situated males, Dr. Lanier analyzed whether Sterling used its merit review process to correct the initial pay disparities or whether the merit review process results in a continuation of the disparate pay of female employees.[95] Dr. Lanier found that the merit review process used by Sterling did not correct initial pay disparities; instead, the merit review process resulted in female associates who worked in the same job, same store, and with the same performance rating as male associates getting lower raises in pay compared to similarly-situated males working in Sales Associate and Store Manager positions and slightly larger raises than males in Department

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[92] *Id.* ¶¶33-36 and Tables 8b and 8c.

[93] *Id.* ¶¶37-40 and Table 9.

[94] *Id.* ¶39.

[95] *Id.* ¶¶42-45.

Managers and Assistant Manager positions.[96] Merit raises did not correct the pay disparities found in each of these positions.[97]

Analysis of Promotion Disparities

Dr. Lanier analyzed whether Sterling's promotion practices have an adverse impact on female Retails Sales Employees. Dr. Lanier conducted a regression analysis designed to isolate the extent to which the likelihood of promotion correlates with gender.[98] In the regression, Dr. Lanier controlled for length of tenure within the Company and within a particular job; potential years spent not employed by Sterling after the age of 18; employee performance, as shown by commissions and performance review ratings; and store and year of employment. Controlling for these factors, Dr. Lanier determined that gender correlates with the probability of promotion at all levels within Sterling stores.[99] The likelihood of promotion from Sales Associate, Assistant Manager, and to a larger store for Store Managers, each show statistically significant disparities adverse to women, while the Department Manager to Assistant Manager and Store Manager to District Manager disparities are shy of statistical significance, though also negative.[100] In conducting this analysis, Dr. Lanier assumed that all male and female employees with a defined tenure were equally available and interested

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[96] *Id.* ¶¶42-43.
[97] *Id.* ¶¶43-45.
[98] *Id.* ¶47 and Table 12a.
[99] *Id.* ¶47-49.
[100] *Id.* ¶49 and Table 12a.

in promotion. Dr. Lanier chose not to use the available CAR data to define the pool of interested candidates, based upon evidence that the CAR system may have been manipulated in favor of pre-selected candidates. Specifically, Drs. Lanier and Lundquist noted that with respect to a large number of promotions made after CAR was implemented, employees had been registered in CAR for only a short amount of time,[101] and that Sterling employees were directed to back-date CAR registrations to ensure they pre-dated the date of their promotion, or to alter the promotion date in order to ensure it followed the date of registration in CAR.[102] Nevertheless, Dr. Lanier also performed an analysis that found similar statistical disparities in the rate of promotion from Sales Associate and Assistant Manager among employees who expressed interest in being promoted using the CAR data; the results for promotions from Store Manager to larger store and from Store Manager to District Manager were statistically insignificant.[103]

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[101] More than forty percent of the promoted employees in the CAR first registered less than a month before their promotion was dated. Lanier Report ¶52, Table 13 (Claimants' Exhibit 41).

[102] *See* Divisional VP Administrative Asst. Manual, SJI 189687-95 at 189690-91 (Claimants' Exhibit 74); SJI 76416, 82175, 90858, 91681, 103755, 69115, 72859 (emails from DVPs' administrative assistant instructing VPRO that candidate must post in CAR before promotion can be finalized) (claimants' Exhibits 75-81); SJ1 77464, 91618, 66234 (emails stating effective date of promotion must be changed such that it falls after date on which candidate posted in CAR) (Claimants' Exhibits 82-84); SJI 104915; 93094 (emails addressing need for candidate to post in CAR and subsequent adjustment to effective date) (Claimants' Exhibits 85-86).

[103] Lanier Report ¶50 and Table 12b (Claimants' Exhibit 41).

Dr. Lanier also analyzed whether any disparity existed in the time it took for male and female employees to get promoted at Sterling.[104] Dr. Lanier found that female employees were employed with the Company longer than similarly-situated male employees when they received promotions and that female employees also spent more time in the job prior to promotion than similarly situated males.[105] In his promotion regressions, Dr. Lanier allowed his control variables to interact at the Region level to isolate the effects of these controls in each Region of Sterling because promotion decisions are controlled at the Region level by VPROs.[106]

Extent of Disparities

Finally, Dr. Lanier also conducted a statistical analysis to determine whether the pay and promotion disparities that he observed were widespread in terms of the number of districts and regions where disparities were adverse to female employees and whether they occurred in each year in the 2003 to 2012 time period of his statistical study. Dr. Lanier found that the pay and promotion disparities are widespread.[107] For example, with respect to base pay for full-time Sales Associates, 71% of all Districts show adverse impacts on females, while 100% of the ten years of the available pay data show adverse impacts on females.[108] With respect to annual promotion rates for full-time Sales Associates, 89.5% of all Regions show adverse impacts on females,

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[104] *Id.* ¶¶54-56 and Tables 14a and 14b.
[105] *Id.*
[106] *Id.* 48.
[107] *Id.* ¶¶57-62 and Table 15.
[108] *Id.* ¶59.

while 100% of the nine years of the available promotion data show adverse impacts on females.[109]

Dr. Lundquist's Initial Report

Dr. Lundquist is an Industrial/Organizational (IO) psychologist who, over more than 30 years, has advised employers, both private and governmental, on matters related to the selection, evaluation and compensation of employees, including the design of related human resource processes, the analysis of job contents and job requirements, and the validation of employee selections and compensation procedures.[110] During her professional career she has performed consulting work for companies in many areas, including retail, has served as an expert witness on behalf of both plaintiffs and defendants in numerous cases and also as a court-appointed expert in several cases where she was charged with assuring that provisions of Consent Decrees were properly implemented.[111]

Dr. Lundquist submitted a report that "analyzes the policies, procedures and decision-making processes relevant to compensation and promotion decisions at Sterling Jewelers in January 2003 through the present time frame."[112] Specifically, Dr. Lundquist was "asked to examine the job-relatedness of the policies and procedures Sterling uses to assess and promote job candidates, and evaluate employees for compensation purposes;

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[109] *Id.* ¶61.

[110] Lundquist Report at 5; Attachment A (Curriculum Vitae) (Claimants' Exhibit 46).

[111] *Id.* at 5-6.

[112] *Id.* at 2.

and to determine if the manner in which those policies are implemented permits biases to affect employment decision-making at Sterling."[113]

Dr. Lundquist observed that "[n]o job analysis or other formal study was ever performed to identify the knowledge, skills, abilities and experiences relevant to successful job performance at Sterling. Consequently, Sterling has not demonstrated the job relatedness of the factors it considered in setting starting salaries that resulted in pay discrepancies between men and women at the time of hire, which continued over the course of their employment. Nor has Sterling demonstrated the job-relatedness of the factors it considered in making promotion decisions, which resulted in women receiving proportionally fewer promotions."[114]

Dr. Lundquist further concluded that "Sterling's processes were executed in a manner that was unstructured and inconsistent, leading to unreliable and inconsistent evaluation of candidates. Managers were permitted to make decisions about compensation and promotion with insufficient guidance, ambiguous criteria, and without adequate oversight and monitoring to ensure the fairness of the decision making process. In essence, there was a centrally-mandated process that was poorly executed."[115] Dr. Lundquist specifically noted that internal Sterling documents reflect uncertainty and lack of consistency in the definition of what constitutes prior retail sales experience.[116]

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[113] *Id.*

[114] *Id.* at 3.

[115] *Id.*

[116] *Id.* at 25-26.

Dr. Lundquist concluded that "the promotion and compensation decisions made for the retail jobs at Sterling lack sufficient reliability and validity to be considered job-related. Moreover, the lack of consistency and structure permitted measurement error to occur, including intentional and unintentional biases."[117]

Dr. Lundquist opined that Sterling's selection and compensation practices failed to meet basic professionally accepted standards. Sterling prepared no job analysis, did not conduct any validity study, and did no evaluation of whether its compensation system resulted in women receiving unequal pay or whether its promotion process had an adverse impact on women.[118]

Starting Pay

Dr. Lundquist conducted an evaluation of Sterling's compensation practices focusing on Sterling's use of prior work experience in setting starting salaries for Sales Associates. Dr. Lundquist analyzed and "coded" over 5,000 randomly-selected job applications for Sales Associates hired in the 2003-2012 time frame to investigate "gender differences in the types of job experience judged relevant to performance in the retail sales jobs at Sterling. The goal was to determine if gender differences in starting salary were a function of Sterling's failure to credit relevant job experience and/or the crediting of non-job-related experience such as management experience."[119] For purposes of this analysis, Dr. Lundquist looked at categories of prior experience

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[117] *Id.* at 5.

[118] *Id.* at 16-18.

[119] *Id.* at 30-31.

credited by the WRG, as well as other types of job experience she found relevant based upon Sterling's job descriptions, the Department of Labor's O*NET data and other research literature, including non-sales Direct Customer Service experience.[120]

Dr. Lundquist observed that the WRG credits retail sales experience, store manager experience and other management experience in setting starting pay rates. Based upon an examination of the company job description for Sales Associate, the O*NET description for the job of Retail Salesperson, and other academic literature, Dr. Lundquist found that in the absence of a validation study, the decision to credit prior management experience and the decision to place a 5-year cap on the crediting of experience was "both arbitrary and not job-related."[121] Dr. Lundquist noted that an internal analysis conducted by Sterling in 2012 concluded that management experience did not translate into better job performance as a Sales Associate.[122] Dr. Lundquist found that female applicants hired by Sterling were

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[120] *Id.* at 31-32. As noted above, Dr. Lundquist relied on coding of applications for the entire proposed class period. She did not use or analyze the prior experience factors actually recorded in the WRG, in light of her finding that Sterling does not give DMs clear and consistent direction regarding how to evaluate and categorize prior experience, and that the evaluation and categorization of prior experience by DMs is "vulnerable" to the discriminatory exercise of discretion. *See id.* at 22-25. Dr. Lundquist also observed that that reported store volume was not consistently verified, and that the option to offer Plus and Maximum rates allowed DMs to set starting wages inconsistently or according to their biases. *Id.* at 23-24.

[121] *Id.* at 25.

[122] *Id.* at 29.

significantly less likely to have experience as store managers and had significantly fewer years of experience in store management than their male counterparts.[123] Dr. Lundquist found that because Sterling gave "strong consideration of management experience" when setting staring salaries of Sales Associates, the difference in prior management experience "undoubtedly had a negative impact on female employees' initial pay rates."[124] In addition, Dr. Lundquist opined that women were disadvantaged by the WRG because even though females had either similar or greater jewelry-specific sales experience than males, Sterling failed to capture jewelry-specific sales experience in its WRG algorithm unless documentation of the volume of such sales was provided.[125] Dr. Lundquist further reported that "[w]hile Males have significantly more experience in Active Selling in all time frames, Females have significantly more experience in Direct Customer Service than males in all time frames, a job-related factor that wasn't credited by the WRG."[126]

Because the coding of applications requires interpretation and "judgment" as to the nature of an applicant's prior experience, Dr. Lundquist conducted a "coder reliability" evaluation to verify that coders were consistently applying her rules for classification of 18 experience categories.[127] Dr. Lundquist selected 50 applications for review by ten coders each, randomly chosen by "manually picking a few applications from

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[123] *Id.* at 36-37.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 37.

[127] See Ward Report at 18, n. 27 (setting forth the 18 categories)

each year."[128] Dr. Lundquist used an intraclass correlation coefficient (ICC) "employing the one-way analysis of variance model for average measurements" to assess coder reliability, which showed consistent application of the rules by coders.[129]

As noted above, Dr. Lundquist's application coding data was provided to Dr. Lanier, who performed a statistical analysis with respect to the impact of consideration of prior management experience on female starting pay.[130]

Merit Increases

With respect to merit increases, Dr. Lundquist noted that Sterling's approach is "problematic because gender differences in starting salary tend to be perpetuated, and exacerbated, over time when increases are based exclusively on a percentage of base pay."[131] She observed that "[a] common organizational practice to maintain pay equity is to grant a high-performing employee with a relatively low salary a larger merit increase than a high performing employee with a relatively high salary."[132]

Promotions

With respect to promotions, Dr. Lundquist observed:

"While Sterling's promotion procedures may seem reasonable on their face, to the extent that they have adverse impact, the characteristics evaluated would have to

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[128] *Id.* at 18 and nn. 25 and 26.

[129] Lundquist Report at 32-33.

[130] Neither Dr. Lanier nor Dr. Lundquist performed any statistical analyses with respect to her other conclusions, such as the 5-year experience cap or failure to credit Direct Customer Service.

[131] *Id.* at 38.

[132] *Id.*

be shown to be job-related. In this case, the suitability of the characteristics assessed was never confirmed using a professionally-acceptable job analysis and validation process. Despite their impact on succession planning and promotion the rating factors included in Sterling's performance management system have never been validated."[133] In particular, Dr. Lundquist found that the "heavier emphasis on sales performance in comparison with other attributes makes the job-relatedness of the promotion criteria questionable when applied to the work performed in the managerial job."[134] Dr. Lundquist also found that the promotion decision-making process at Sterling is "highly subjective. No guidance is provided to decision makers to structure their final evaluation of candidates; in other words, no criteria are provided on how to evaluate candidate information in a job-related fashion, nor were decision makers instructed on what weight to give the various sources of information (e.g., performance appraisal, interviews, assessment results) provided about the candidates. Furthermore, monitoring of decision making for consistency and fairness is virtually non-existent. For these reasons the decision making process is unreliable and therefore vulnerable to non-job-related errors including both intentional and unintentional biases and manipulation."[135]

Dr. Lundquist criticized the absence of posting of promotional opportunities, and opined that the CAR as a prerequisite for promotion is a "pretense," based upon the evidence described above that some employees did

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[133] *Id.* at 41-42.

[134] *Id.* at 42.

[135] *Id.* at 42-43.

not register in CAR until after they had already been selected for promotion.[136]

Dr. Lundquist concluded that:

> "It is my professional opinion that the promotion and compensation decisions made for the retail sales and management jobs at Sterling lack sufficient reliability and validity to be considered job-related. Moreover, the lack of consistency and structure permitted measurement error to occur, including intentional or unintentional biases. Additionally, barriers to the advancement and equitable compensation of female employees increased the likelihood of gender discrimination in promotions and compensation at Sterling."[137]

Human Resources Deficiencies

Dr. Lundquist found that Sterling's HR managers lacked knowledge concerning professional standards and legal requirements.[138] In addition, Sterling's HR managers did not undertake basic tasks routinely performed by HR managers at other companies and that are essential for assuring the fair and non-discriminatory application of personnel practices. For example, Sterling's HR department failed to conduct comprehensive pay equity studies or an assessment of the job-relatedness of Sterling's pay and promotion criteria—notwithstanding complaints of

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[136] *Id.* at 43-44.

[137] *Id.* at 44.

[138] *Id.* at 17-18 (noting that Sterling's senior HR managers testified that they had little or no familiarity with the Uniform Guidelines on Employee Selection Procedures).

gender-based pay disparities. Dr. Lundquist also found that Sterling's HR Department has failed to conduct adequate oversight with respect to the application of Sterling's promotion and compensation practices, and has done nothing to ensure their consistent implementation.[139] Lastly, the HR Department failed to assure the application of minimum standards required for the operation of an effective system for the resolution of harassment and discrimination complaints, including the failure to ensure the confidentiality of the names of complainants, and the absence of any role for HR in determining disciplinary actions for issues such as harassment beyond making recommendations to the field, which can be freely ignored.[140]

Dr. Outtz's Initial Report

Dr. Outtz has worked as an I/O Psychologist for over 30 years. During that time he has served in a number of professional and governmental positions including several committees of the National Academy of Sciences.[141] Recently, Dr. Outtz edited a volume on the measurement and minimization of the adverse impact of employment measures upon women and minorities.[142] Throughout his professional career Dr. Outtz has consulted with private and governmental employers in the development of personnel practices.[143] On numerous occasions, Dr. Outtz

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[139] *Id.* at 15-18.

[140] *Id.* at 14-20.

[141] Report of Claimants' expert Dr. James Outtz (Outtz Report) at Appendix 2 (Curriculum Vitae) (Claimants' Exhibit 103).

[142] *Id.* at 2-3.

[143] *Id.* at 3.

has served as an expert witness for both plaintiffs and defendants.[144]

Dr. Outtz's report addresses (a) whether the behavior and comments of Sterling executives and senior managers can establish workplace norms that guide the behavior of managers elsewhere in the organizational hierarchy;[145] (b) whether the record evidence describing the behavior of Sterling's executives and senior managers is sufficient to have established workplace norms guiding the behavior of managers elsewhere in the organizational hierarchy;[146] and (c) whether the record evidence indicates that the behavior and comments of senior managers toward women were capable of influencing the exercise of discretion adversely to women regarding compensation and promotion decisions made by managers, even though women held managerial positions at various levels, and even though Sterling had in place a written policy prohibiting sex discrimination and prohibiting managers from "fraternizing" with employees under their direct or indirect supervision.[147]

Dr. Outtz's report is based on his review of the depositions of Sterling executives and managers, internal Sterling documents, and the declarations of over 200 current and former male and female Sterling employees, as well as his professional experience and relevant professional research. Dr. Outtz also interviewed ten of Claimants' declarants.

Dr. Outtz's report relies on research on "modeling"

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[144] *Id.* at 4.

[145] *Id.*

[146] *Id.* at 10.

[147] *Id.* at 18.

(the extent and manner in which subordinates imitate supervisor behavior), which Dr. Outtz contends demonstrates that that negative behavior of leaders of an organization will "trickle down" to influence lower-level managers to engage in similar behavior.[148] Dr. Outtz observes that Sterling has an explicit practice of "leading by example" that reinforces the pattern of lower-level managers modeling their actions upon the conduct of Sterling executives and senior managers.[149] Dr. Outtz finds that the conduct demeaning to women that is reflected in the record, including unwanted sex-related behavior engaged in by its CEO and other high-level managers, has been emulated by subordinates resulting in a "climate and culture at Sterling in which female employees and their work are devalued when compared to male employees."[150] Dr. Outtz opines that the devaluation of women resulting from the conduct of executives and senior managers can influence their value, as perceived by lower-level managers, both at the time of hire and as employees, and can adversely affect the way that these managers exercise their discretion in making compensation and promotion decisions.[151]

Dr. Outtz further concludes that the presence of women in managerial ranks cannot by itself overcome the discriminatory consequences of the devaluation of women resulting from the conduct of Sterling executives and senior managers. He notes that the failure

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[148] *Id.* at 4-10.

[149] *Id.* at 12-13.

[150] *Id.* at 18. Dr. Outtz identifies sixteen VPROs alleged to have engaged in inappropriate sexual behavior.

[151] *Id.* at 29.

of a company to take harassment and discrimination complaints seriously by investigating those complaints and disciplining offenders, has been shown by research to have substantially more of an impact on whether there is a non-discriminatory workplace than whether or not women occupy some managerial positions.[152] Dr. Outtz acknowledges that Sterling has a policy prohibiting sex discrimination and prohibiting managers from fraternizing with employees under their direct or indirect supervision, but identifies several factors that undermine Sterling's official policies--including fear of retaliation, failure to maintain the confidentiality of complaints and failure to discipline managers, as reported in Claimants' declarations, and inadequate resources to handle complaints.[153]

Dr. Outtz observes that Sterling senior managers and executives have significant discretion in setting compensation, and that certain factors used in selecting candidates for promotion are highly subjective, introducing opportunities for managers to exercise bias.[154] He

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[152] *Id.* at 21-29.

[153] *Id.* at 24-28. Dr. Outtz's stated in his initial report that Sterling reported that only 8% percent of sexual harassment complaints received in 2006 were investigated. *Id.* at 28. However, the document cited by Dr. Outtz reflects that 8% is the percentage of all investigations conducted in 2006 that involved allegations of sexual harassment. Sterling Jewelers Inc.'s Reply in Support of its Motion to Exclude the Report and Testimony of Dr. James Outtz (Sterling's Outtz *Daubert* Reply) at 15. Dr. Outtz also based his opinion on the fact that Sterling employed only five Regional HR Specialists to handle thousands of calls each year. Outtz Report at 27.

[154] *Id.* at 29-38.

concludes that the demeaning and devaluing comments and behavior of Sterling executives and senior managers "have influenced the exercise of discretion in pay and promotions."[155]

Critique and Expert Evidence Presented by Sterling and Claimants' Response

Compensation

Sterling's critique of Claimants' expert evidence pertaining to compensation is contained in the reports of Dr. Ward, Drs. Dunleavy and Sady, and Dr. Stockdale.

Dr. Lanier's statistical analysis and the conclusions of Dr. Lundquist are addressed by Dr. Ward. Dr. Ward has a Ph.D. in economics and works as a consultant specializing in economic and statistical research, including statistical studies of hiring, pay, promotion and termination practices. He has testified as an expert on economics and statistics in federal and state courts.[156]

Dr. Ward conducted a number of statistical and other analyses of the work performed and conclusions reached by Drs. Lanier and Lundquist regarding compensation. He challenges their opinions regarding the job-relatedness of prior experience criteria used by Sterling in setting starting pay, including the validity of the WRG factors, on multiple grounds.

Dr. Ward acknowledges that the WRG leads to lower starting pay for women than for men.[157] Dr. Ward attributes this to the fact that women have less

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[155] *Id.* at 39.

[156] Ward Report at 1-2.

[157] *Id.* at 7-8

experience—including management experience, which Dr. Ward finds to be job-related—and lower pre-hire sales volume than men (a factor Claimants' experts did not consider).[158] He concludes that when these factors are fully accounted for, men and women receive the same initial pay.[159] Similarly, Dr. Ward concludes that men and women earn the same regular base pay "after adjusting for differences in pre-hire experience."[160]

With respect to prior managerial experience, Dr. Ward analyzed Dr. Lundquist's application coding data to determine the relationship between prior management experience and sales productivity. He concluded that actual first year sales production is significantly increased with more management experience.[161]

Dr. Ward also faults Drs. Lanier and Lundquist for failing to consider evidence of prior sales volume in their analyses. Analyzing the WRG data, Dr. Ward concluded that the most important factor in predicting subsequent sales productivity at Sterling is the volume of sales achieved by applicants before hire.[162] With respect to Dr. Lundquist's observation that sales volume was not in fact "proven," Dr. Ward "found ample evidence that sales volumes are documented."[163]

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[158] *Id.* at 4.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 2. Dr. Ward also questions Dr. Lundquist's opinions regarding the five-year cap on experience and the failure to include Direct Customer Service experience. Analyzing Dr. Lundquist's data, Dr. Ward found that experience over five years had no significant impact on first year sales production and that Direct Customer Service experience is not associated with higher sales. *Id.*

[162] *Id.* at 3, 7, 10-11.

[163] *Id.* at 3.

Dr. Ward also criticizes Dr. Lundquist's conclusions regarding coder reliability and consistency, arguing she should have examined separately for each type of experience, consistency should have been evaluated on a question-by-question basis, and concluding that calculating "match rates" on this basis reveals significant disagreement among coders.[164]

With respect to Dr. Lanier's statistical analyses, Dr. Ward challenges Dr. Lanier's conclusion that the WRG is "a poor predictor of sales productivity." Dr. Ward found that "as the WRG wage goes up by one dollar, average annual sales increased by approximately $32,207."[165]

Finally, Dr. Ward contends that Dr. Lanier committed a number of methodological and data errors that call his conclusions into question.[166]

Dr. Lundquist's report with respect to compensation is also addressed by Sterling's experts Drs. Dunleavy and Sady, each of whom has a Ph.D. in I/O Psychology. Drs. Dunleavy and Sady contend that Dr. Lundquist's use and analysis of application data and conclusions regarding job-relatedness are unscientific, unreliable and flawed.

First, Drs. Dunleavy and Sady contend that Dr. Lundquist used unreliable and unscientific methods in coding applications and made no scientific attempt to measure the accuracy of coding, resulting in significant coding errors, and that the sub-study designed to verify that data was consistently coded was flawed.[167]

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[164] *Id.* at 3-4, 18-20.

[165] *Id.* at 4, 6-7 and n.8.

[166] *Id.* at 5, Appendix 2.

[167] Report of Sterling experts Drs. Eric M. Dunleavy and Kayo Sady (Dunleavy/Sady Report) at 25-27.

Second, Drs. Dunleavy and Sady criticize Dr. Lundquist's opinions regarding job-relatedness, contending that the research literature supports a link between managerial experience and sales productivity, and that Dr. Lundquist failed to evaluate all of the available and relevant information in O*NET.[168] Using an expanded universe of relevant worker characteristics, Sterling's experts conducted an analysis of worker characteristics necessary for two O*NET positions--Retail Salespersons (considered by Dr. Lundquist), as well as First-Line Supervisors of Retail Sales Workers, concluding that managerial experience is job-related for retail sales jobs.[169]

Drs. Dunleavy and Sady also criticize Dr. Lundquist's conclusion that the WRG was inconsistently applied and therefore unreliable.[170] They state that the research literature on HR process structure "suggests that semi-structured tools with guardrails on content and process reduce measurement error and vulnerability to EEO bias."[171] They assert that the WRG process imposes structure on content and process features that reduces the likelihood of both measurement error and vulnerability to EEO bias, and observe that although Dr. Lundquist asserts that the WRG may be "vulnerable" to rating biases, there is no evidence in her report related

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[168] *Id.* at 12-18.

[169] *Id.* at 19. Drs. Dunleavy and Sady also point out that Dr. Lundquist's opinions regarding job-relatedness are contradicted by the statistical analysis of WRG data performed by Sterling's expert Dr. Ward. *Id* at 18-19.

[170] Dunleavy/Sady Report at 19-24.

[171] *Id.* at 22.

to the extent to which bias actually occurred.[172] With respect to job-relatedness, Drs. Dunleavy and Sady note that although the WRG was not based on a formal job analysis, "it was developed and refined by subject matter experts over an extended period of time involving multiple development stages and reviews," using "internal job performance metrics to determine prior experience factors associated with sales performance."[173]

Finally, with respect to starting pay, Sterling offers the testimony of Dr. Stockdale. Dr. Stockdale holds a Ph.D. in I/O Psychology, is Professor and Chair of Psychology at Indiana University-Purdue University, has for over 25 years conducted both field and laboratory research on gender discrimination and sexual harassment, has authored numerous publications, and has previously testified as an expert witness in several cases involving allegations of sex discrimination.[174]

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[172] *Id.* at 21-22.

[173] *Id.* at 24. Drs. Dunleavy and Sady also challenge Dr. Lundquist's assertion that the WRG cap of five years of experience is problematic because it reduces job-relatedness and may increase adverse impact against women. They argue that use of an experience cap is not unreasonable because (1) applicant self-report data from applications may be less accurate for older experience; and (2) the strength of the relationship between years of experience and job performance may diminish over time, such that years of experience no longer correlates with productivity past a certain number of years. *Id.* at 25. They further note that Dr. Ward's statistical analysis showed that the five-year experience cap impacts men and women about the same, and that experience beyond five years has no statistically significant impact on productivity. *Id.*

[174] Report of Sterling's expert Dr. Margaret S. Stockdale (Stockdale Report) at 5-6 and Exhibit A (Curriculum Vitae).

Dr. Stockdale opines that that Sterling's corporate practices, including the WRG, "provide minimal opportunity for managerial discretion in determining starting pay."[175] Dr. Stockdale also discusses the literature on "gender role socialization," as well as national occupational statistics, from which she concludes that men are likely to have more managerial experience than women, which provides an explanation for gender differences in starting pay.[176]

Merit Pay

Regarding merit pay, Dr. Ward opines that "women receive higher unadjusted pay raises than men."[177] He does not, however, directly address the conclusion of Claimants' experts that the merit pay system perpetuates initial pay disparities that are based on the use of prior experience factors that Claimants contend are not job-related, and that the merit pay system fails to remedy compensation gaps between male and female employees with equal performance.

Promotion

Dr. Ward's report contains an extensive critique of Dr. Lanier's analysis of promotions, finding numerous data errors and anomalies.[178] Dr. Ward's most significant

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[175] Stockdale Report at 7.

[176] *Id.*

[177] Ward Report at 5, 7.

[178] Dr. Ward finds that "Dr. Lanier's data errors cause him to find promotional differences where there are none. Approximately 73% of sales employees are women and approximately 72% of Assistant Managers are women. There is no gender difference in promotion to this first level of management." Ward Report at 7-8.

objection to Dr. Lanier's analysis is that Dr. Lanier largely ignored information contained in the CAR system with respect to interest in being promoted and willingness to relocate to receive a promotion. Dr. Ward concludes that if the pool of eligible candidates is limited to those who registered their interest and availability in CAR, the promotion rate for women equals or exceeds the promotion rate of men.[179] Accordingly, the critical difference between Dr. Lanier and Dr. Ward with respect to disparity in promotion rate is whether the pool of available candidates should be defined by those who registered their interest in CAR. Dr. Ward performed a number of analyses to determine whether the alleged improprieties in the administration of CAR disadvantaged women. Specifically, Dr. Ward addressed Dr. Lanier's concern that because there are many promotions from the CAR register that occur soon after, or even concurrently with registration, a promotional "tap on the shoulder" may have resulted in CAR registration. Dr. Ward concluded that if there are "taps," they are more often on women.[180]

Dr. Ward also faults Dr. Lanier's analysis of disparities in the time it took for male and female employees to get promoted at Sterling. Specifically, Dr. Ward found that after accounting for the timing of expression of interest (as determined from the CAR data), "women

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[179] CAR was introduced in April 2007. Dr. Ward opines that the conclusions reached from an analysis of the CAR period can be extrapolated to the full 2003-20U period, based upon an analysis of all promotions in that period, which showed that the percent of promotions that go to women in the full period is very similar to the percentages in the CAR period. Ward Report at 36.

[180] *Id*. at 21-22.

are promoted slightly faster than men" (not statistically significant).[181]

Finally, with respect to Sterling's promotion practices, Sterling offers the expert opinion of Dr. Stockdale, who concludes that based upon "gender role socialization" and national occupational statistics, men are more interested in promotion than women, which is consistent with their proportionally greater representation in CAR.[182] Dr. Stockdale also endorses Sterling's promotion practices and performance appraisal process, concluding that Sterling "relies heavily on objective, results-oriented criteria" that are "not vague and leave little room for interpretation."[183] Dr. Stockdale faults Dr. Outtz for "cherry-picking" Sterling's promotion criteria, and asserts that his analysis of Sterling's promotion practices is "not grounded in scientific methods nor in the established practices of I/O psychologists."[184]

Extent of Disparities

With respect to Dr. Lanier's conclusion that gender differences in pay and promotion are widespread across districts (pay) or regions (promotion), Dr. Ward points out that Dr. Lanier offered no analysis to demonstrate whether or where the differences are statistically significant. According to Dr. Ward's analysis, the pay differentials identified by Dr. Lanier vary by district, and promotion shortfalls vary by region, sometimes favoring women and sometimes favoring men.[185]

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[181] *Id.* at 5, 21-22 and Table 5.

[182] Stockdale Report at 7-8.

[183] *Id.* at 8.

[184] *Id.*

[185] Ward Report at A2-19; Tables 20 and 21.

Appendix N

Compensation and Promotion: Claimants' Rebuttal

The critique by Sterling's experts regarding Claimants' analysis of compensation and promotion is addressed in the rebuttal reports of Drs. Lanier and Lundquist.

Dr. Lanier's rebuttal report begins by pointing out that he and Dr. Ward both observe the same gender-related pay gaps, and "agree that the pay difference between male and female employees begins with the assignment of initial pay on hire; that Sterling's system of merit pay raises perpetuates, rather than eliminate, the gender pay gaps that were created at hire; that pay changes associated with promotions to management also perpetuate the pay differences; and that females out performed males, on average, with respect to performance evaluation scores."[186] Their analyses differ based upon whether these gaps are justified by consideration of prior experience factors that Claimants contend are not job-related. As Dr. Ward testified, "[A]ll of the pay differences up the line that you see, all those gender pay differences, are due to starting pay."[187]

Dr. Lanier notes that Dr. Lundquist concludes in her rebuttal analyses that the only valid predictor of first-year sales is prior personal jewelry sales volume.[188] Dr. Lanier observes that the use of volume data in setting initial pay is optional for managers, even under the WRG, and that among applicants with prior sales

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[186] Rebuttal Expert Report of Dr. Louis R. Lanier (Lanier Rebuttal Report) at 1.

[187] *Id.* ¶5 (citing Ward Dep. at 244:18-21).

[188] *Id.* ¶10.

experience, men are more likely to have recorded sales volume data than are women.[189] Dr. Lanier provides an analysis of the WRG timeframe showing that if only prior personal jewelry sales volumes are included, there are significant differences in starting pay, adverse to women for both part-time and full-time employees.[190]

Dr. Lanier also faults Dr. Ward for relying on measures of employee sales performance without controlling for the store in which they work, despite Dr. Ward's acknowledgement of the importance of stores at which employees work in affecting the volume of sales they are able to make.[191]

With respect to Dr. Ward's criticism of his data errors, Dr. Lanier includes rebuttal analyses that use Dr. Ward's data, and which for the most part do not materially change Dr. Lanier's earlier findings and conclusions.[192]

Regarding promotions, Dr. Lanier criticizes Dr. Ward for overestimating the impact of an employees' expression of willingness to relocate in CAR, and generally reiterates concerns regarding the validity of CAR as a measure of female interest in promotion, noting that Dr. Ward provides no empirical analysis of promotions prior to CAR.[193]

Dr. Lundquist's rebuttal report provides an analysis of Dr. Ward's statistical findings with respect to compensation, noting at the outset that none of Sterling's experts offers an opinion regarding gender differences

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[189] Lanier Rebuttal Report at 8, n. 3.

[190] *Id.* ¶9.

[191] *Id.* ¶¶2(d); 12.

[192] *Id.* ¶2(f) and Tables B3 to B15.

[193] *Id.* ¶¶26-31,

in pay prior to the WRG period. Most importantly, Dr. Lundquist points out that Dr. Ward failed to control for store sales volume, *i.e.*, opportunity to sell, when analyzing the relationship between experience and sales productivity.[194] Dr. Lundquist reanalyzed Dr. Ward's data using a hierarchical regression analysis.[195] She concluded that, controlling for store volume, "the previous experience variable in the WRG with the most predictive power was jewelry Personal Sales volume, uniquely accounting for approximately 3% of the variance in annualized sales (squared semi-partial correlation of 0.028) for full-time employees and 1% for part-time employees."[196] Two other statistically significant WRG variables (non-jewelry personal sales volume for full-time employees and other management-jewelry volume for part-time employees) "were much less useful, each uniquely accounting for 0.1% of the variance in predicted sales performance."[197] She found that "Store Management experience and volumes do not predict sales performance and Other Management volume only predicts a very small percent of the variance in sales performance and only for part-time employees."[198] She concluded that management experience has "minimal" value in predicting success as a sales associate, and should not have been credited

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[194] Lundquist Rebuttal Report at 15-16; Dr. Lundquist also faults Dr. Ward for failing to separately analyze full-time and part-time employees. *Id.* at 17-18.

[195] *Id.* at 17-20.

[196] *Id.* at 20 and Table 2.

[197] *Id.*

[198] *Id.*

in setting starting pay rates.[199] Dr. Lundquist also examined the pattern of gender differences for all of the experience and volume variables in the WRG. She found statistically significant gender differences in variables that are not predictive of job performance, *e.g.*, store management experience, which would disproportionately credit men for experience that is not predictive of success on the job.[200]

Dr. Lundquist also analyzed the reliability of the WRG process for setting starting salaries. She concluded that DMs failed to follow company guidelines for almost 24% of hires in the WRG timeframe.[201] Dr. Lundquist also examined the extent to which the DMs' entry of experience data into the WRG was consistent with her coders' entry of experience data, finding statistically significant differences in the coding of sales experience.[202] Dr. Lundquist also found inconsistencies in the verification of sales volume.[203] Dr. Lundquist concluded that DMs "may have been manipulating their WRG entries to obtain the desired wage rate."[204] Dr. Lundquist further noted that men are more likely to have two or more WRG records then women, which she views as evidence that DMs are "shopping" for wages more frequently for men than for women.[205] Dr. Lundquist concludes that the exceptions to guidelines and inconsistencies in the implementation of Sterling's WRG process "undoubtedly

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[199] *Id.* at 19.
[200] *Id.* at 21-22.
[201] *Id.* at 24-25.
[202] *Id.* at 26-27.
[203] *Id.* at 27-28.
[204] *Id.* at 27.
[205] *Id.* at 25-26.

compromised the accuracy and job-relatedness of the company's starting pay decisions."[206]

Dr. Lundquist notes that Sterling's experts portray Sterling's processes as "formulaic" and "objective" without any investigation of their actual use, and that none of Sterling's experts can testify as to the consistency and reliability of the information entered into the WRG.[207] Dr. Lundquist points out that Dr. Dunleavy's statement that the WRG process is "unequivocally" valid ignores the professional requirements for establishing validity, and that Dr. Dunleavy admitted that he did not attempt to review the job descriptions for the key positions in this case.[208]

Overall, Dr. Lundquist concludes that Sterling's experts have not presented evidence supporting the job relatedness of the WRG.

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[206] *Id.* at 28. Dr. Lundquist does not provide an analysis of whether the coding and verification inconsistencies adversely affected women.

[207] *Id.* at 3, 6, 7, 29-30 (Dunleavy testified that he did not examine and has no opinion about whether the actual compensation practices, *i.e*, the information gathered and entered into the WRG, were implemented in a reliable or consistent manner, and that contrary to the statement in his report that the WRG was subject to internal audit, he was unable to identify any evidence that Sterling actually conducted internal audits of the WRG process; Dr. Stockdale testified that assessing the reliability of the information input to the WRG was outside the scope of her assignment; Dr. Ward testified that he did not study how managers code the inputs to the WRG).

[208] *Id.* at 9-14 (*citing* SIOP Principles, and noting that Dr. Dunleavy relies on the correlations of Dr. Ward for evidence of validity "without meeting the basic requirements for research and documentation of validity evidence").

Appendix N

With respect to Sterling's critique of her applicant coding study, Dr. Lundquist contends that "the methods and principles used to code applications in this matter are regularly used by Industrial/Organizational Psychologists to evaluate applicants' training and experience in both research and practice."[209] She notes that the coding procedure used in her study was similar to the Minimum Qualifications and Training & Evaluation assessments used routinely by employers to screen and evaluate applicants, and that the methods and principles used in her study are also consistent with the research methodology known as content analysis.[210] With respect to Dr. Ward's argument that Dr. Lundquist should have computed intraclass correlations (ICCs) by experience category, rather than across all categories of coded experience, Dr. Lundquist explains that Dr. Ward's approach is contrary to her objective to represent the level of consistency in coders' overall judgments regarding the entirety of the applicants' experience as reflected on the application form, since it is Sterling's judgment across the various experience items that leads to an overall decision about an applicant's starting pay.[211] She notes that Dr. Dunleavy reviewed her single measure ICCs and conceded that they were more than sufficient to indicate the reliability of the coding study.[212] She further notes that Dr. Ward's suggested alternative (matched inter-coder values) is unsupported in either the research literature or professional practice, and observes that

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[209] *Id.* at 31.

[210] *Id.* at 31-32 (citing authorities).

[211] *Id.* at 32.

[212] *Id.* at 33.

Dr. Stockdale uses ICCs to establish the consistency of her coders in content analyzing comments on Sterling's employee surveys.[213]

In response to the new analyses conducted by Dr. Lundquist, Sterling has submitted a declaration by Dr. Ward.[214] With respect to the asserted flaws in his conclusion that WRG inputs are statistically important predictors of subsequent sales, Dr. Ward contends that "each and every statistical objection made by Dr. Lundquist is invalid."[215] With respect to Dr. Ward's asserted failure to control for store volume or "opportunity to sell," Dr. Ward argues that Dr. Lundquist's use of store volume "violates fundamental assumptions used in regression analysis," and fails to answer the question of whether new employees with more of the WRG inputs sell more than new employees with fewer of those inputs within the same store.[216] Dr. Ward evaluated the impact of the WRG inputs within stores, concluding that the WRG inputs, including manager experience, remain statistically important predictors of subsequent sales.[217]

Moreover, Dr. Ward contends that Dr. Lundquist's own regression shows that "prior store manager experience" and "other manager prior experience" are statistically significant predictors of subsequent sales. Specifically, Dr. Ward points out that Dr. Lundquist's claim that management experience factors are not

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[213] *Id.* at 33-34.

[214] Declaration of Michael P. Ward, dated February 14, 2014 (Ward Declaration) (Exhibit 3 to Sterling's Reply in Support of its Motion to Strike the Report and Testimony of Dr. Lundquist.)

[215] Ward Declaration ¶3.

[216] *Id.* ¶¶9-10.

[217] *Id.* ¶¶28-32.

statistically significant in explaining sales of full-time Sales Associates is based upon Dr. Lundquist's adoption of a higher standard for statistical significance than she uses in her prior reports: instead of two standard deviations, or a probability of less than 5%, Dr. Lundquist requires a probability of below 0.01. Using two standard deviations, Dr. Lundquist's analysis shows that both the "other management" and "store management" experience variables are statistically significant for full-time Sales Associates (standard deviations of 2.45 and 2.19, respectively).[218] Dr. Ward also faults Dr. Lundquist's use of "hierarchical regression," because by simply reversing the order of inclusion of the variables, the conclusion Dr. Lundquist attempts to draw about their relative importance changes completely (*e.g.*, if store manager experience is introduced first, it becomes statistically significant).[219]

With respect to Dr. Lundquist's claim that Sterling's use of the WRG was inconsistent and that almost 24% of the hires were subject to "exceptions," Dr. Ward concludes that "this finding results almost entirely from Dr. Lundquist's lack of understanding of Sterling's policy and data practices," and that correcting the errors in her analysis reduces the "exception" rate to 3.5%.[220] Moreover, Dr. Ward finds that these exceptions *advantaged* women by twelve cents per hour relative to men (statistically insignificant).[221] With respect to Dr. Lundquist's finding that men are more likely to have two or more WRG records then women (which she interprets as evidence

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[218] *Id.* ¶¶11-14.
[219] *Id.* ¶¶18-20.
[220] *Id.* ¶4.
[221] *Id.*

that DMs are "shopping" for wages more frequently for men than for women), Dr. Ward found that this was explained entirely by the fact that men are more likely to be full-time and that men and women who are hired as full-time employees are equally likely to have two or more WRG records.[222]

Finally, Dr. Ward contends that his suggested method of verifying coder reliability by using match rates is in fact supported by I/O psychology research.[223]

Human Resources

The opinions of Dr. Lundquist and Dr. Outtz regarding the inadequacies of Sterling's Human Resources department are addressed by Sterling's expert, Dr. Stockdale.

Dr. Stockdale reviewed Sterling's policies, complaint investigation procedures and training programs and concluded that they are "consistent with advice provided by scholars and expert agencies such as the EEOC and OCR [U.S. Department of Education Office of Civil Rights]."[224] Dr. Stockdale asserts that Dr. Outtz "dismisses or ignores evidence that Sterling engages in strong human resource practices to curtail and to effectively respond to complaints of discrimination and harassment," including its training program for managers.[225] Dr. Stockdale reviewed 46 specific complaints of unwanted sex-related behavior, as well as the workload of Regional HR Specialists and concluded that "Sterling

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[222] *Id.* ¶5.

[223] *Id.* ¶8 (citing authority).

[224] Stockdale Report at 9, 53-60.

[225] *Id.* at 8, 59.

devotes adequate resources to manage complaints of unwanted sex-related behavior," and that Sterling's HR employees follow prescribed procedures in conducting investigations.[226]

Dr. Stockdale's report with respect to HR is addressed in Dr. Outtz's rebuttal report.

With respect to Sterling's policies prohibiting sexual harassment and fraternization between managers and subordinate employees, Dr. Outtz asserts that "the mere existence of such policies does not in and of itself diminish the likelihood of Unwanted Sex-Related Behavior," noting that Dr. Stockdale "points out in her published research that zero tolerance policies come across as tough sounding but may mask an inability to get to the root cause of sexual harassment or promote healthy workplaces," but that she made no attempt to determine the effectiveness of the procedures used by Sterling.[227] He contends, moreover, that the presence of such policies at Sterling "has not been shown to have had an appreciable effect on curbing Unwanted Sex-Related Behavior or its effects on other employees in the workplace."[228]

Dr. Outtz notes that Dr. Stockdale's opinion that Sterling's complaint investigation process is "systematic and comprehensive" is based on a review of a sample of sexual harassment investigations selected and provided

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[226] *Id.* at 9, 53-64 and Table E-1. Dr. Stockdale asserts that Dr. Outtz "follows no known scientific practice to arrive at his conclusion" that Sterling devotes inadequate resources to handling complaints of unwanted sex-based behavior and other "Level 3" complaints, which Dr. Outtz based on the "sheer volume of calls coming in and going out of that office." *Id.* 61, 62-63.

[227] Outtz Rebuttal Report at 7-8.

[228] *Id.* at 7.

by Sterling's counsel, that Dr. Stockdale had "no idea how many complaints were investigated at Sterling, or how representative [the sample was] of the universe of employee complaints," that Dr. Stockdale reviewed none of Claimants' declarations,[229] and that Dr. Stockdale testified she had made no attempt to determine the effectiveness of Sterling's investigative procedures.[230]

Gender-Negative Culture

The expert evidence of gender-negative culture presented by Dr. Outtz is addressed primarily by Dr. Stockdale. Sterling's critique also relies upon Dr. Outtz's deposition testimony.

Dr. Stockdale contends that Dr. Outtz's opinion that Sterling maintains an organizational culture that demeans and devalues women is not based on an accepted scientific method for measuring such a culture or climate.[231] Dr. Stockdale asserts that "[t]he scientifically appropriate method for assessing the psychological climate of a work environment is to use validated survey measures and sound survey research methods for collecting data from employees on their climate perceptions," such as the Organizational Tolerance for Sexual Harassment lnventory.[232] In particular, Dr. Stockdale states that the process by which Dr. Outtz arrived at his conclusion that "notwithstanding the presence of women in management and policies prohibiting sex discrimination and fraternization, an organizational climate, such

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[229] *Id.* at 12.

[230] *Id.* at 8.

[231] Stockdale Report at 8, 42, 45-49.

[232] *Id.* at 45-47.

as that at Sterling, facilitates Unwanted Sex-Related Behavior"[233] "does not represent any scientific process that has ever been published in the scientific literature, presented at professional conferences, or used by practitioners of which I am aware."[234]

Dr. Stockdale specifically criticizes Dr. Outtz's reliance on Claimants' declarations[235] and his failure to consider employee opinion surveys conducted by Sterling from 2004 through 2008; based upon Dr. Stockdale's analysis, the quantitative and qualitative data from these surveys "provides no evidence to substantiate a claim that Sterling perpetuates a climate hostile or demeaning towards women."[236]

Dr. Stockdale faults Dr. Outtz's analysis of role modeling for failing to credit the positive role modeling emphasis communicated by Sterling executives through training material and other corporate communications.[237] She further asserts that Dr. Outtz has misrepresented the literature on the "trickle-down" theory of modelling because the studies relied upon by Dr. Outtz are confined to supervisors and their immediate subordinates.[238]

Finally, Dr. Stockdale maintains that Dr. Outtz's

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[233] Outtz Report at 29.

[234] Stockdale Report at 52.

[235] *Id.* at 49 (Dr. Outtz relied on selective declarations prepared by Complainants' attorneys of putative class members; he has "taken the worst examples of workplace mistreatment and generalized this to the whole company without any scientific basis for doing so").

[236] *Id.* at 8, 50-52.

[237] *Id.* at 8, 43-44.

[238] *Id.* at 8, 44-45.

conclusion that a gender-negative cultural climate causes or results in discretionary pay and promotion decisions that adversely affect women has no basis in scientific literature.[239]

Sterling also argues that Dr. Outtz's deposition testimony fails to establish a causal connection between the alleged gender-negative corporate culture and the pay and promotion decisions at issue in this case.

Specifically, Sterling cites the following testimony from Dr. Outtz's deposition:

> Q. So you cannot answer the question and you were not asked to answer the question of whether the supposed culture at Sterling affected 100 percent, 50 percent, 30 percent or 10 percent of the starting pay decisions at Sterling?
> A. I was not asked to put a number on that and I did not address putting a number on that. What I have testified to is by virtue of this policy that was company-wide, I concluded that it was a factor in wherever these decision were made and, as you say, there were — how many thousands of them did you say were made?
> Q. Thousands and thousands.
> A. Within those thousands and thousands, if they considered that policy and used that factor which disadvantaged women, then it influenced their decision, and since they had discretion could have caused them to give lower pay to women.

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[239] *Id.* at 9, 65-66.

> Q. And the same with promotions, you cannot answer and you were not asked to answer whether this culture that you found at Sterling affected 5 percent, 50 percent, 90 percent, 100 percent of the promotions made during the class period?
>
> A. I wasn't asked that question.[240]

Dr. Outtz testified that he was not asked to address how many male or female managers at Sterling were affected by the culture he found at Sterling,[241] and testified that the culture at Sterling can, but also may not influence compensation decisions.[242]

Dr. Outtz further testified:

> A. You keep asking me about quantifying things. The kinds of phenomenon [sic] that are at issue and I was asked an opinion about in this case typically are not quantifiable, nor is it required to quantify them as to the exact number of people who did something. That's not knowable. At the end of the day one can measure—I wasn't asked to do this, but one can measure the effect of whatever this phenomenon is on differences in compensation or pay or whatever. That becomes the question where there is some quantity. But in my opinion quantifying how many of these managers actually thought about this or how many of

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[240] Deposition of Dr. James Laurence Outtz (August 28, 2013) (Exhibit 1 to Sterling's Outtz *Daubert* Motion) (Outtz Dep.) at 57:24 – 159:3.

[241] *Id.* at 159:10-21

[242] *Id.* at 229:12-15.

> them actually intended to do so or which ones intended to do so based on this phenomenon is not something that is quantifiable typically in my profession, no attempt would be made to quantify it nor would it be relevant to try to quantify it.[243]

Finally, Dr. Outtz testified:

> Q. So, in other words, someone has to tell me what's causing supposed disparities and you are not the guy who can tell me that, right?
> A. I'm not the guy who can tell you anything, number one. And number two, what I have testified to is that someone would look at the ultimate effect of this in terms of differences by gender. That would typically be a statistician. In my profession in the social sciences for any phenomenon, even in the research, the researcher is not going to then parse out which individuals in their minds did certain things. That's not really knowable, nor is it relevant, needed to be known.[244]

In his rebuttal report, Dr. Outtz reiterates his opinion that the evidence in the record of behavior and comments about women and women employees attributed to executives and senior managers at Sterling is "sufficient to have established workplace norms for guiding the behavior of managers elsewhere in the organizational hierarchy."[245] He points out that Dr. Stockdale has published an article on sexual harassment that

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[243] *Id.* at 266:15 – 267:10.

[244] *Id.* at 268:10-24.

[245] Rebuttal Report at 3-4

acknowledges the influence of behavior by leaders of an organization on those in lower positions, and that she acknowledged in her deposition that leaders are role models whose actions have a guiding influence on members of an organization.[246] Dr. Outtz notes that Dr. Stockdale's evidence of positive behavior consists solely of training materials and written policies--which she herself has concluded do not, by themselves, have an appreciable effect on curbing unwanted sex-related behavior-- and that in forming her opinions, Dr. Stockdale failed to interview a single Sterling manager or employee, and did not review any of the Claimants' declarations.[247] Dr. Outtz also asserts that the employee surveys analyzed by Dr. Stockdale "provided no information about sexual harassment and were not formulated to elicit the kind of information normally sought in instruments accepted as appropriate measures of identifying workplace tolerance for sexual harassment."[248]

With respect to Dr. Stockdale's critique of his methodology, Dr. Outtz states that the examination of the declarations provided by Claimants and by Sterling, the deposition transcripts of Sterling upper management, review of Sterling's policies and procedures, and application of relevant literature in I/O psychology to the evidence "are methods that I commonly and have seen used by I/O psychologists who have served as expert witnesses in the cases in which I have been involved over the past 30 years."[249]

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[246] *Id.* at 2-3.

[247] *Id.* at 4-5.

[248] *Id.* at 13.

[249] *Id.* at 12. Dr. Outtz does not reference any professional

Finally, Dr. Outtz concludes that "[i]t is more likely than not that the Unwanted Sex Related Behavior that demeans and devalues women is modeled from Sterling's executives down, influenced pay and promotion decisions to women's detriment at Sterling and would be consistent with any gender disparities in pay and promotion at Sterling."[250]

DAUBERT MOTIONS

Rule 702 of the Federal Rules of Evidence governs admission of expert testimony and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The admissibility of expert evidence is governed by the Supreme Court's decision in *Daubert*,[251] which requires that trial courts conduct a "rigorous" analysis of both the relevance and reliability of proposed expert

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literature supporting his methodology or provide citations to cases in which his methodology has been accepted.

[250] *Id.* at 9.

[251] 509 US 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 US 137 (1999).

testimony before admitting or considering such testimony. In *Wal-Mart Stores, Inc. v. Dukes (Wal-Mart)*, the Supreme Court suggested that a *Daubert* analysis of proffered expert testimony is appropriate at the class certification stage,[252] and since that decision, courts in the Second Circuit have concluded that a *Daubert* analysis is required.[253]

Daubert requires the court to make "a preliminary assessment of whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[254] The *Daubert* inquiry has been described as "flexible," and *Daubert* gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact.[255] When considering motions to exclude expert testimony, courts must bear in mind that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky, but admissible evidence," not exclusion of expert testimony via *Daubert* motions.[256] In view of liberal thrust of Federal Rules of Evidence and the presumption

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[252] 131 S.Ct. 2541, 2553-54 (2011).

[253] *See, e.g., Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y 2012); *Floyd v. City of New York*, 283 F.R.D. 153, 166-67 (S.D.N.Y. 2012).

[254] *Daubert*, 509 U.S. at 592-93.

[255] *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256 (2d Cir. 2002).

[256] *Daubert* 509 U.S. at 596.

of admissibility of expert testimony, doubts about usefulness of expert testimony should be resolved in favor of admissibility,[257] and only serious flaws in reasoning or methodology will warrant exclusion.[258] Generally, "[d]isputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility of his testimony."[259] At the same time, however, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered,"[260] and "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony."[261] Where the judge is the trier or fact, a court has greater flexibility in satisfying its gatekeeping function.[262]

Dr. Lanier

Sterling does not object to the acceptance of Dr. Lanier as a qualified expert in labor economics. Sterling's *Daubert* motion to exclude Dr. Lanier's reports and testimony is based primarily on its contentions that

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[257] *Canino v. H.R.P., Inc.*, 105 F. Supp. 2d 21, 28 (N.D.N.Y. 2000).

[258] *EEOC v. Bloomberg L.P.* 2010 U.S. Dist. LEXIS 92511 at *17 (S.D.N.Y. August 31, 2010).

[259] *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995).

[260] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

[261] *Amorgianos*, 303 F.3d at 266.

[262] *See, e.g., Bank of N.Y. Mellon Trust Co. v. Solstice ABS CBO II, Ltd.*, 910 F.Supp.2d 629, 639 (S.D.N.Y. 2012).

Dr. Lanier's report incorrectly applied his statistical methodology, incorporated false factual assumptions, and relied on an incomplete and inaccurate database created by Claimants' expert Dr. Lundquist.[263]

Sterling first faults Dr. Lanier's analysis because it "fails to control for significant non-discriminatory factors that account for the purported disparity he observed, namely applicants' sales productivity in their prior jobs, or, in the case of a manager, the sales volume of the store they managed."[264]

Second, Sterling faults Dr. Lanier's analysis because he relied on Dr. Lundquist's "seriously flawed" database (addressed in Sterling's motion to exclude the report and testimony of Dr. Lundquist), in particular Dr. Lundquist's failure to consider prior sales volume.[265]

Third, Sterling contends that Dr. Lanier's analysis of starting pay and first year sales should be excluded because of its flawed methodology. Sterling asserts that Dr. Lanier "erroneously ran the regression in reverse, thus arriving at meaningless and unsupported conclusions."[266]

Fourth, Sterling contends that Dr. Lanier's promotion analyses are unreliable, essentially because he excludes a majority of promotions that took place at Sterling during the relevant time period, based upon concerns regarding the validity of CAR, as well as other asserted methodological errors that are detailed in Dr. Ward's

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[263] Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. Louis Lanier (Sterling's Lanier *Daubert* Motion) at 1.

[264] *Id.* at 8.

[265] *Id.* at 12.

[266] *Id.* at 14.

report—in which Dr. Ward concludes (based upon CAR data) that women interested in and available for promotion have been promoted at the same rate as men.[267]

Fifth, Sterling contends that Dr. Lanier's "doubts" regarding CAR are unfounded and not grounded in any scientific analysis.[268] Sterling notes that the source of Dr. Lanier's concern is reflected in his Table 13, which shows that 42.3 percent of promotions took place within one month of the candidate registering in CAR, which suggested to Dr. Lanier that promoted individuals might have been selected for management and then instructed to register in CAR, and thus that CAR does not reveal true interest in promotion. Sterling points out that Dr. Lanier did not examine the effect of this phenomenon on women, but that an analysis conducted by Dr. Ward shows that there were significantly more women than men who were promoted within short time periods after registration.[269]

Sixth, Sterling contends that Dr. Lanier's merit pay analyses are incorrect and rely on faulty assumptions.[270] Sterling contends that Dr. Lanier incorrectly calculated average merit pay, and that, properly calculated, women sales associates receive higher merit pay as compared to men, which is consistent with Dr. Lanier's finding that women receive, on average, higher performance ratings. Sterling further contends that Dr. Lanier's analyses failed to account for an important characteristic of Sterling's merit pay system, the "percent to pay"

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[267] *Id.* at 19-21.

[268] *Id.* at 21-23.

[269] *Id.* at 23.

[270] *Id.* at 24.

benchmark, which acts as a cap on pay for higher paid sales associates even if they meet their goal.[271]

Finally, Sterling asserts that Dr. Lanier's Table 15, which analyzes base pay and promotions by region and by district, is irrelevant because it fails to control for any significant non-discriminatory variables, including the prior experience in the Lundquist database.[272]

Claimants oppose Sterling's motion, relying in part on the rebuttal report of Dr. Lanier, which includes the results of additional statistical studies conducted by him that are described above.

With respect to Dr. Lanier's failure to consider prior sales volume, Claimants note that there is no prior sales volume data for 2003 to 2008, and that there is only prior sales volume data for 2009-2012 for about 29% of employees, and that the reliability of WRG inputs is questionable.[273] In any event, Dr. Lanier analyzed the relationship between the WRG generated wage rates and actual sales volume (Table 9), finding that women were paid less than men who had the same level of sales, or the same ratio of sales to sales goal, indicating that the WRG is a poor predictor of productivity.[274] Claimants further contend that Dr. Lanier properly relied on Dr. Lundquist's applicant study, for which Dr. Lundquist used appropriate coding methodology and which permitted Dr. Lanier to consider separately the impact of prior jewelry sales experience and prior non jewelry sales

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[271] *Id.* at 25.

[272] *Id.* at 26.

[273] Opposition to Motion to Strike Expert Report of Dr. Louis Lanier (Claimants' Lanier *Daubert* Response) at 5-8.

[274] *Id.* at 8.

experience. Claimants assert that Sterling's characterization of Dr. Lanier's analysis in Table 9 as a "reverse regression" is "simply incorrect," and that it is in fact Dr. Ward who conducted a reverse regression.[275] With respect to Dr. Lanier's promotion analysis, Claimants argue that Dr. Lanier properly excluded individuals with missing evaluation data to ensure he was comparing similarly situated individuals.[276] Nonetheless, Dr. Lanier re-ran his promotion analyses including the omitted individuals and obtained results similar to his original report.[277] With respect to CAR, Claimants note that Dr. Lanier reasonably considered evidence that cast doubt on the reliability of CAR as an accurate measure of interest in promotion, *e.g.*, patterns of registration suggesting that employees were first selected for promotion and then told to register in CAR to make the promotion permissible.[278] With respect to Dr. Lanier's merit pay analysis, Claimants note that although Drs. Lanier and Ward used a different methodology to exclude from consideration individuals who were not eligible for a merit increase, they reached the same conclusion: there are no statistically significant differences with respect to merit increases, if performance evaluations are considered.[279]

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[275] Claimants' Lanier *Daubert* Response at 9-11.

[276] *Id.* at 12.

[277] *Id.* at 13.

[278] *Id.* at 13-14.

[279] Claimants also state that Dr. Lanier re-ran his primary analyses, taking Dr. Ward's critiques into account and reached the same conclusions. Claimants' Lanier *Daubert* Response at 15-16. However, Sterling points out that there is no revised version of that analysis in Dr. Lanier's Rebuttal Report. Sterling Jewelers

Finally, Claimants contend that Sterling has not shown that correction of any of the other purported errors in Dr. Lanier's report would yield different results.[280]

In reply, Sterling argues that Dr. Lanier's rebuttal report concedes that his initial starting pay analysis failed to control for a significant non-discriminatory factor affecting pay (personal jewelry sales volume), and that by using WRG data in his rebuttal analysis, Dr. Lanier has acknowledged the insufficiency of the data used in his initial analysis.[281] Sterling argues that Dr. Lanier's revised starting pay analysis is unreliable because he disregarded all of the WRG components other than personal jewelry sales volume, in particular prior managerial experience, which Dr. Ward shows is highly correlated and predictive of future sales.[282] Sterling continues to maintain that Dr. Lanier's analysis of starting pay and sales (Lanier Report, Table 9) uses a flawed methodology leading to unreliable results.[283]

With respect to merit pay, Sterling contends that its criticisms of Dr. Lanier's initial report "stand unrebutted," and that Dr. Lanier's rebuttal analysis, which concludes that merit pay increases do not result in equal overall pay for equally productive men and women, confuses employee performance ratings with employee sales.[284]

Inc.'s Reply Memorandum in Support of Its Motion to Exclude the Reports and Testimony of Dr. Louis Lanier (Sterling's Lanier *Daubert* Reply) at 13, n.44.

[280] Claimants' Lanier *Daubert* Response at 16-17.

[281] Sterling's Lanier *Daubert* Reply at 18-19.

[282] Id at 7-8.

[283] *Id.* at 9-11.

[284] *Id.* at 14-15.

With respect to promotions, Sterling asserts that Dr. Lanier has abandoned his initial promotions analysis thereby conceding that the analysis lacked probative value, and that Dr. Lanier fails to identify any scientific basis for his "doubts" regarding CAR.[285] Sterling contends that there is no evidence that women are discouraged from expressing their interest in promotion through CAR, and that the fact that women comprise 73 percent of Sales Associates and 72 percent of Assistant Managers "belies the notion that women are somehow discouraged from promotion."[286]

Applying the general principles governing *Daubert* motions set forth above, I find that none of the deficiencies asserted by Sterling requires the exclusion of Dr. Lanier's reports or testimony. Reliability "is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced," and statisticians are afforded substantial latitude in employing regression analysis, including the choice of variable to include.[287] I find that each of Sterling's criticisms goes to the probative value rather than admissibility of Dr. Lanier's report and testimony, and that Sterling's critique is best addressed through cross-examination rather than exclusion. Sterling's motion to exclude the reports and testimony or Dr. Lanier is therefore denied.

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[285] *Id.* at 19-20.

[286] *Id.* at 20.

[287] *Manpower, Inc. v. Insurance Company of Pennsylvania*, 732 F.3d 796, 806-809 (7th Cir. 2013).

Appendix N

Dr. Lundquist

Sterling does not object to the acceptance of Dr. Lundquist as a qualified expert in Industrial/Organizational Psychology and Psychometrics. Sterling's *Daubert* motion to exclude Dr. Lundquist's reports and testimony faults her methodology and conclusions on multiple grounds, many of which are set forth above.

With respect to Dr. Lundquist's initial report, Sterling first contends that Dr. Lundquist's coding study is fundamentally flawed and unreliable. At the outset, Sterling faults Dr. Lundquist's failure to use WRG data (available after July 2009), as opposed to job applications, which frequently contain ambiguous or vague information with respect to prior experience. Sterling contends that Dr. Lundquist's coders had to use default rules and their personal judgments about the applicant's prior experience, and that the WRG data is more reliable because DMs had the opportunity to clarify such information in an interview or other follow-up. Sterling also faults Dr. Lundquist's failure to measure or test the accuracy of the coding against actual known results (*e.g.*, by interviewing a representative sample of applicants), and asserts that the methodology used by Dr. Lundquist to test consistency of coding among the coders was highly flawed and resulted in a misleading assessment of coder reliability (providing examples of inaccuracies and inconsistent coding by Dr. Lundquist's team).[288] Sterling

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[288] Sterling's Motion to Exclude the Report and Testimony of Dr. Kathleen Lundquist (Sterling's Lundquist *Daubert* Motion) at 18-25. Sterling cites several cases in which courts have excluded expert testimony based upon unreliable coding. *Id.* at 22-25. I find that these cases are distinguishable for substantially the reasons

further faults Dr. Lundquist's failure to account for prior sales volume (available from the WRG data, but not job applications), which she concedes is a reasonable factor for Sterling to consider, and which Dr. Ward determined is statistically the most important determinative factor for starting base pay.[289]

Sterling next contends that Dr. Lundquist's opinions about the job-relatedness of various prior experience factors, particularly prior management experience, are unreliable. Sterling faults Dr. Lundquist's failure to perform a job analysis, her failure to analyze all of the relevant and available O*NET data, her failure to perform any empirical or statistical study to determine job-relatedness, and the inclusion of "sales support" as a job-related factor, which Sterling argues includes important elements of managerial experience. Sterling also points out that Dr. Lundquist's conclusions are contradicted by Dr. Ward's statistical analyses, which show that prior managerial experience is highly correlated with sales at a statistically significant level, and that

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set forth in Claimants' Opposition to Motion to Strike Expert Report of Dr. Kathleen Lundquist (Claimants' Lundquist *Daubert* Response) at 27-28.

[289] Sterling's Lundquist *Daubert* Motion at 13. Dr. Lundquist did not consider prior sales volume in her initial report because she concluded that prior sales volume was not consistently documented and verified by Sterling's DMs. Dr. Ward notes that Dr. Lundquist did not analyze the WRG data to test this opinion. Dr. Ward analyzed 7,000 applications reporting prior sales volume and determined that this factor was consistently verified by Sterling's managers and that there is ample documentation in the WRG database to confirm the legitimacy of this verification process. *Id.* at 13, n.47.

Dr. Lundquist's customer service fields are not related to the sales productivity of Sterling employees, and that the five-year experience cap is not adverse to women.[290]

In rebuttal, Dr. Lundquist asserts that the methods and principles used to code applications in her applicant study "are regularly used by Industrial/Organizational Psychologists to evaluate applicants' training and experience in both research and practice."[291] Dr. Lundquist provides a detailed explanation of her approach to testing inter-coder consistency, as well as a critique of Dr. Ward's suggested approach,[292] noting that Dr. Ward is concededly not an expert on coding, and that Sterling's expert Dr. Stockdale used the same technique in her report to assess the reliability of the coding of employee survey comments.[293]

With respect to Sterling's critique of Dr. Lundquist's failure to use WRG data, Dr. Lundquist conducted several additional studies, using a hierarchical multiple regression, in which she analyzes the same WRG data used by Dr. Ward (including prior experience and prior

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[290] *Id.* at 29. Sterling also argues that Dr. Lundquist's opinions improperly encroach on factual determinations reserved for the arbitrator and lack a scientific basis. Specifically, Sterling contends that Dr. Lundquist makes improper lay findings of fact and credibility determinations regarding Sterling's HR Department without any purported scientific basis, and that Dr. Lundquist makes improper lay findings of fact and unreasonable extrapolations regarding Sterling's Career Advancement Registry. This argument is rejected for substantially the reasons set forth in Claimants' Lundquist Dauber Response at 29-34.

[291] Lundquist Rebuttal Report at 31 (citing authorities).

[292] *Id.* at 31-34.

[293] *Id.* at 40-41.

sales volume).[294] Dr. Lundquist also controlled for store volume, which she contends that Dr. Ward improperly failed to consider. She concludes in her rebuttal report that "other management" and "store management" are not predictive of annual sales and should not have been used in the WRG. With respect to prior sales volume, she concludes that only "personal sales jewelry volume" and "personal non-jewelry sales volume" had statistically significant relationships with the performance of full-time Sales Associates and that the variable with the most predictive power was "personal sales jewelry volume."[295] Dr. Lundquist found significant gender differences in variables that are not predictive of job performance, which would cause compensation to be affected differentially for men and women on the basis of invalid experience factors.[296]

In reply, Sterling identifies numerous asserted flaws in Dr. Lundquist's analysis of WRG data. Sterling asserts that (1) in order to show that the correlation of managerial experience variables with future sales is not statistically significant, Dr. Lundquist "moves the goal post" as to what counts for statistical significance;[297] (2)

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[294] Dr. Lundquist continues to contend that the WRG data are not reliable due to inconsistent inputs and because the DMs' failure to follow WRG procedures, which compromised the accuracy and job-relatedness of the company's starting pay decisions. Lundquist Rebuttal Report at 3-4; 23-30.

[295] *Id.* at 17-20.

[296] *Id.* at 21.

[297] Sterling Jewelers Inc.'s Reply to Claimants' Response to Sterling's Motion to Exclude the Report and Testimony of Dr. Kathleen Lundquist (Sterling's Lundquist *Daubert* Reply) at 11. In her initial report, Dr. Lundquist used two standard deviations as

Dr. Lundquist's use of store volume as a control measure violates the basic tenets of statistical regression analysis; (3) Dr. Lundquist's use of "hierarchical regression" is misleading because it produces different results depending on the order of variables; and (4) Dr. Lundquist provides no valid rationale for examining full-time and part-time employees separately.[298]

Overall, Sterling raises a number of significant questions regarding Dr. Lundquist's approach and conclusions that may well diminish the probative value of Dr.

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the standard for statistical significance. "Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 [5%] that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance." *Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (citations omitted). In her rebuttal report, Dr. Lundquist uses a standard deviation value corresponding to the likelihood that the same or greater differential would occur by chance less than 1% of the time (1 out of 100) with respect to her conclusion that managerial experience does not predict future sales. Sterling's Lundquist *Daubert* Reply at 11. Dr. Lundquist's rationale for using a different measure was that the sample size in this case was very large. Lundquist Rebuttal Report at 21, n.1 1; Sterling's Lundquist *Daubert* Reply, Exhibit 4 (Lundquist Dep. II at 153:15-23).

[298] Sterling's Lundquist *Daubert* Reply at 15. Sterling also faults Dr. Lundquist's assessment of the reliability or consistency of WRG inputs, which Sterling contends is based on misunderstandings of company policy and speculation and cannot assist the arbitrator because Dr. Lundquist fails to identify any deviation from procedure or inconsistency that disadvantaged female applicants. *Id.* at 16-20. This critique raises some issues that may well affect the probative value of Dr. Lundquist's conclusions, but which do not warrant exclusion of her testimony.

Lundquist's testimony. I find, however, that Sterling's criticism of Dr. Lundquist's application of recognized methodologies (application coding and regression analysis) clearly goes to the weight to be given to Dr. Lundquist's opinions, as opposed to their admissibility. *McCullock*, 61 F.3d at 1044.

Dr. Outtz

Sterling contends that Dr. Outtz's report and testimony should be excluded because (1) his opinions and conclusions cannot assist the trier of fact; (2) he is not qualified to offer the types of opinions and testimony he has put forth; and (3) his analysis is "wholly unreliable."[299]

Sterling asserts that Dr. Outtz's opinions and conclusions cannot assist the trier of fact because he cannot testify that the modeling he describes impacted any pay or promotion decision at Sterling, and because he cannot establish a link between alleged sexual harassment and pay or promotion decisions. Specifically, Sterling argues that Dr. Outtz's inability to quantify the impact of the allegedly gender-negative culture at Sterling requires exclusion of his report and testimony based upon the ruling in *Wal-Mart* with respect to the testimony of sociologist Dr. William Bielby, which the Court found was not sufficient, by itself, to establish commonality, because Dr. Bielby could not say what percentage of employment decisions was determined by stereotyped thinking.[300] Here, however, Claimants do not rely solely on the testimony of Dr. Outtz. Moreover, following *Wal-Mart*, similar

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[299] Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. James Outtz (Sterling's Outtz *Daubert* Motion) at 2.

[300] *Wal-Mart*, 131 S.Ct. at 2553-54.

testimony was found to be relevant in *Ellis v. Costco*, by providing support for the claim that Costco operated under a common, companywide promotion system.[301] I therefore find that Dr. Outtz's testimony may be of assistance to the trier of fact, and that his inability to link the allegedly gender-negative culture to specific pay or promotion decisions goes to the probative value rather than the admissibility of his opinions.

Sterling asserts that Dr. Outtz has "no expertise in the fields of gender discrimination, workplace behavior, workplace norms, modeling of workplace behavior, or the effects of workplace behavior on tangible employment decisions such as pay or promotion."[302] Specifically, Sterling notes that Dr. Outtz has never published any works pertaining to sexual harassment, and that prior to his retention in this case, Dr. Outtz had "never been asked to address whether manager or executive behavior established workplace norms that guided behavior elsewhere in the company."[303]

An expert must stay within the reasonable confines of his subject area, and cannot render expert opinion on an entirely different field or discipline.[304] At the same time, "[l]iberality and flexibility in evaluating qualifications should be the rule; the proposed expert should not be required to satisfy an overly narrow test of his own

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[301] 2012 U.S. Dist. LEXIS 13718 at *89 (N.D. Ca. September 25, 2012).

[302] Sterling's Outtz *Daubert* Motion at 13.

[303] *Id.* at 14.

[304] *Lappe v. Am. Honda Motor Co., Inc.*, 857 F.Supp. 222, 227 (N.D.N.Y. 1994), *aff'd sub nom., Lappe v. Honda Motor Co. Ltd. of Japan*, 101 F.3d 682 (2d Cir. 1996).

qualifications," and a lack of specialization affects the weight of the opinion, not its admissibility.[305] Dr. Outtz received his Ph.D. in Industrial/Organizational Psychology from the University of Maryland in 1976, and is a "Fellow" of the Society for Industrial and Organizational Psychology (SIOP), the American Psychological Association, and the American Educational Research Association. He has been qualified as an expert in ten cases involving gender discrimination claims and over 60 cases involving discrimination claims, including in the case of *Velez v. Novartis*, a class action gender discrimination case brought in the Southern District of New York by female sales associates involving disparate pay, failure to promote, and sexual harassment claims; in that case the court found Dr. Outtz qualified as an expert in the "field of employment practices and procedures relating to hiring, development, evaluation and promotion of employees.[306] Additionally, Dr. Outtz has provided expert opinions on organizational culture and modeling of behavior by executives and managers in several cases, including *McReynolds v. Merrill, Lynch, Fenner, Pierce and Smith* and *Gutierrez v Johnson & Johnson*.[307] Based upon these credentials and this experience, I find that Dr. Outtz's report and testimony in this case fall within the "reasonable confines" of his expertise, and that any deficiencies in his qualifications

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[305] *Id.*; *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 457, 458-458 (law does not require a narrow specialty; objections to qualifications go to the weight not the admissibility of expert's testimony, and are more properly explored on cross-examination).

[306] *Velez v. Novartis*, 2010 US Dist. LEXIS 95010 at *19 (S.D.N.Y. February 25, 2010).

[307] Outtz Report at Appendix 2; Outtz Rebuttal Report at 11.

go to the probative value and not the admissibility of his expert opinion.

Finally, Sterling asserts that Dr. Outtz's opinions and testimony should be excluded because they are unreliable. Sterling contends that Dr. Outtz drew unsupported inferences from insufficient sampling, failed to apply any scientific methodology to his analysis, and ignored non-conforming evidence that contradicted his theory, and that his modeling theory is not supported by any scientific literature.[308]

Sterling notes that the declarations of 193 female declarants that form the cornerstone of Dr. Outtz's opinions and conclusions represent 0.44 percent of the entire putative class of 44,000 women. In addition, Sterling asserts that Dr. Outtz did not apply any recognized methodology (scientific or otherwise) to his examination of the declarations—all of which he found to be credible, without using any methodology to verify their accuracy. Moreover, in selecting the ten declarants that he interviewed, Dr. Outtz picked those who presented the strongest evidence in favor of Claimants.[309]

Sterling further contends that Dr. Outtz's testimony and report are unreliable because he ignored evidence in the record that failed to fit his theory. As noted above, Dr. Outtz discounted the relevance of a 2006 third-party employee satisfaction survey because it did not specifically address sexual harassment. Sterling contends, however, that the survey reflects positive attitudes on items that would have captured concerns about a hostile or demeaning work environment conducted by a

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[308] Sterling's Outtz *Daubert* Motion at 14-15.

[309] *Id.* at 15-19.

third-party vendor. Sterling also faults Dr. Outtz for not requesting other employee satisfaction surveys. Sterling also criticizes Dr. Outtz's failure to acknowledge the effect of women in managerial positions on his conclusion that managers model unwanted sex-related behavior at higher managerial levels, given that 43.2 percent of DMs and 32.4 percent of VPROs were women, and noting that Dr. Outtz conceded at his deposition that women would be less likely than men to model unwanted sex-related behavior.[310]

Sterling also argues the Dr. Outtz drew unsupported inferences regarding Sterling's HR function and failed to apply any scientific methodology to his analysis. With respect to Dr. Outtz's conclusion that Sterling was unresponsive to sexual harassment complaints, Sterling notes that Dr. Outtz relied on nine declarations out of a putative class of 44,D00 women, and admitted that he did not review any of the documents produced in this matter that reflect Sterling's investigations of complaints or the discipline that occurred following those investigations.[311]

In sum, Sterling contends that Dr. Outtz's conclusions are based on a flawed analysis because no survey was conducted, no random sampling of the Sterling employee population was performed to assess their perceptions of the organizational climate, and no systematic sampling of company records was conducted to examine how the company handles sexual harassment grievances, conducts training or otherwise monitors compliance with its policies on sexual harassment and discrimination.[312]

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[310] *Id.* at 19-23.

[311] *Id.* at 25-26.

[312] *Id.* at 27.

Sterling further asserts that the scientific literature on which Dr. Outtz relies does not support his theory of modeling. Sterling notes that critical to Dr. Outtz's theory is his contention that alleged unwanted sex-related behavior occurs at the highest levels of the company and permeates down through multiple levels in the organization throughout the relevant period. Sterling points out that the studies to which Dr. Outtz cites focus exclusively on the relationships between supervisors and subordinates who deal directly with each other, and that none of the studies concludes that the behavior of leaders influenced the climate toward an entire class of employees. Moreover, Sterling asserts that none of the studies deals with unwanted sex-related behavior, and thus that no study establishes any connection between unwanted sex-related behavior and pay and promotion decisions. According to Sterling, there is no scientific study establishing that a culture that is tolerant of sexual harassment or of gender inequity generally causes discrimination in pay or promotion.[313]

In response to Sterling's critique, Claimants challenge Sterling's characterization of the record on numerous points. For example, Claimants deny that Dr. Outtz relied almost exclusively on Claimants' declarations in forming his opinions, pointing out that Dr. Outtz also reviewed the deposition transcripts of fourteen Sterling executives, numerous internal Sterling documents, and approximately 600 declarations of employees on behalf of Sterling.[314] Claimants argue that Sterling has pro-

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[313] *Id.* at 27-30.

[314] Response in Opposition to Sterling Jewelers Inc.'s Motion to Exclude the Report and Testimony of Dr. James Outtz (Claimants'

vided no authority for its contention that Dr. Outtz was required to conduct any random or statistical sampling because he reviewed and analyzed all of Claimants' declarations, and point out that Dr. Outtz verified the accuracy of the declarations by assessing the extent to which the declarants provided first-hand accounts, the degree of detail contained in the declarations and by comparing the information provided with the testimony of Sterling's witnesses.[315] Claimants point out that Dr. Outtz addressed the effect of women in managerial positions at length in his initial report.[316] With respect to Sterling's complaint that Dr. Outtz failed to request additional employee satisfaction surveys, Claimants point out that the 2006 survey (which Dr. Outtz reviewed) was the only survey for which there was data on gender.[317] With respect to Dr. Outtz's failure to systematically assess Sterling's investigation of sexual harassment complaints, Claimants note that Sterling successfully moved to preclude discovery of this evidence.[318] Finally, Claimants dispute Sterling's characterization of the studies relied upon by Dr. Outtz, pointing out that he in fact cites to scientific literature that shows that the prevalence of unwanted sex-related behavior, together with the climate and culture that facilitate it, derogates and devalues women, and citing cases permitting expert testimony similar to that offered by Dr. Outtz.[319]

Outtz *Daubert* Response) at 10-11.

[315] *Id.* at 11-12.

[316] *Id.* at 19.

[317] *Id.* at 18-19.

[318] *Id.* at 5.

[319] *Id.* at 20-21.

Claimants acknowledge that Dr. Outtz's opinions may in some respects be considered a "new theory," but argue that Rule 702 permits the admissibility of new theories provided they are based on reliable methodology.[320]

On balance, I find that Sterling has raised some significant concerns regarding Dr. Outtz's methodology and the reliability of Dr. Outtz's report and testimony. However, as Claimants' response demonstrates, certain aspects of the record, and Sterling's characterization of Dr. Outtz's opinions are sharply disputed. Under these circumstances, and applying the general principles governing *Daubert* motions set forth above, I find that the deficiencies identified by Sterling go to the probative value rather than the admissibility of Dr. Outtz's report and testimony.

For all of the above reasons, Sterling's motion to exclude the report and testimony of Dr. Outtz is denied.

Dr. Stockdale

Claimants do not challenge Dr. Stockdale's qualifications as an expert in I/O Psychology. They assert, however, that her report and testimony should be excluded because they cannot assist the trier of fact and because her opinions and conclusions are unreliable.

Claimants contend that Dr. Stockdale's opinions on gender role socialization are irrelevant because the statistics she cites in her report are not related to the demographics at Sterling or the positions at issue in this case (noting that the literature pertains largely to top management positions in unrelated fields).[321] Claimants

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[320] *Id.* at 21, n. 103.

[321] Claimants' Motion to Strike the Report and Testimony of Dr. Margaret Stockdale (Claimants' Stockdale *Daubert* Motion) at 3-6.

also fault Dr. Stockdale's reliance on documents selected by Sterling's counsel without conducting any independent analyses.[322] For example, Dr. Stockdale did not interview any Sterling managers and did not investigate or attempt to determine how Sterling's policies and procedures are implemented *in practice*.[323] Nor did Dr. Stockdale review any of Claimants' declarations.[324] Claimants further fault Dr. Stockdale for simply accepting the conclusions of Sterling's other experts, including the assertion that the algorithm elements of the WRG are "job relevant," and "that gender differences in starting pay are fully accounted for by gender differences in prior experience, particularly management experience."[325] Dr. Stockdale acknowledged that she did not have detailed knowledge of the wage engine, which was used for much of the class period prior to the introduction of the WRG.[326] Claimants further assert that the professional literature on which Dr. Stockdale relies does not support her opinions, and that her own prior work conflicts with her critique of Dr. Outtz's modeling analysis.[327]

Finally, Claimants contend that Dr. Stockdale's methodologies are unreliable, citing her reliance on 46 investigation files selected by counsel, rather than a random sample of the full universe of investigation files, and noting that her conclusion that Sterling's personnel procedures were "routinely followed" is inconsistent

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[322] *Id.* at 7.
[323] *Id.* at 8.
[324] *Id.*
[325] *Id.* at 7.
[326] *Id.* at 9.
[327] *Id.* at 11-15.

with a Sterling memo (not reviewed by Dr. Stockdale) in which a consultant concluded that Sterling's HR employees "may have taken a less than robust approach to the internal investigation process."[328]

In response, Sterling states that it "has not offered Dr. Stockdale's report as a comprehensive study of its pay and promotion practices," but to "identify deficiencies in the opinions and testimony of Dr. Outtz."[329] Sterling nonetheless proceeds to argue for the admissibility of all of Dr. Stockdale's opinions. However, based upon the limited purpose for which Sterling offers Dr. Stockdale, I find that Opinions Nos. 3, 5, and 6,[330] which broadly endorse Sterling's pay and promotion practices, should be excluded. This addresses a number of Claimants' objections. I find that Dr. Stockdale's critique of Dr. Outtz's modeling theory may assist the trier of fact and is reliable and therefore admissible, as is her critique of Dr. Outtz's conclusions regarding Sterling's HR Department. The other deficiencies in her critique of Dr. Outtz identified by Claimants, including her reliance on limited data, go to the weight rather than the admissibility of her testimony. Similarly, the asserted deficiencies in Dr. Stockdale's application of gender socialization theory with respect to female interest in promotions go to the probative value rather than to the admissibility of her conclusions.

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[328] *Id*. at 15-17 (citing Exhibit 8 to Claimants' Stockdale *Daubert* Motion).

[329] Sterling Jewelers Inc.'s Opposition to Claimants' Motion to Strike the Report and Testimony of Dr. Margaret Stockdale (Sterling's Stockdale *Daubert* Response) at 2.

[330] Stockdale Report at 7-8.

Applying the general principles governing *Daubert* motions set forth above, I find that the deficiencies asserted Claimants go to the probative value rather than the admissibility of Dr. Stockdale's report and testimony, except that Opinions 3, 5 and 6 are excluded.

For all of the above reasons, Sterling's motion to exclude the report and testimony of Dr. Stockdale is granted in part and denied in part.

Drs. Dunleavy and Sady

Claimants contend that the report of Drs. Dunleavy and Sady and the testimony of Dr. Dunleavy should be excluded under *Daubert*. Claimants challenge the qualifications of these proposed experts and argue that their report and testimony are unreliable.

Drs. Dunleavy and Sady each have an M.A. and Ph.D. in Industrial/Organizational Psychology. Neither has testified as an expert before.

Dr. Sady received his Ph.D. in 2012. He is an adjunct professor at University of Maryland, Baltimore County, where he teaches statistics. He has presented a number of papers on employment-related topics to various professional meetings, but appears not to have published any scholarly work in peer-reviewed journals, and has no discernible specialization. Based upon his limited experience and relative lack of expertise in the subjects of his report, I find that Dr. Sady is not sufficiently qualified to testify as an expert in this matter.

By contrast, Dr. Dunleavy received his Ph.D. in 2004 and has published extensively, with a concentration in the area of selection procedures, validation, and adverse impact. Dr. Dunleavy has also served on several committees relating to his field, including the SIOP Professional

Practice Committee and the SIOP task force responsible for discussing contemporary selection practices with the EEOC. I therefore find that Dr. Dunleavy is qualified to testify with respect to job-relatedness and the reliability of selection processes, which are subjects clearly within the "reasonable confines" of his expertise.

Claimants contend that the opinions and conclusions contained in the report with respect to the WRG are inadmissible based upon Dr. Dunleavy's lack of knowledge about the development and implementation of the WRG, and the failure to use any scientific or independent methodology for assessing the reliability or job-relatedness of the WRG.[331]

Claimants point out that at his deposition, Dr. Dunleavy did not know how Sterling developed the WRG, how Sterling decided on the factors to include in the WRG, how Sterling's DMs calculated years of experience, or how Sterling managers count retail sales experience.[332] Although the report claims that "productivity metrics"

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[331] Claimants' Motion to Exclude the Report and Testimony of Drs. Eric Dunleavy and Kayo Sady (Claimants' Dunleavy/Sady *Daubert* Motion) at 1, 4-8. Claimants also maintain that the experts' opinions on job-relatedness of prior management experience based upon O*NET and research literature are unreliable because they are "completely divorced from the facts of this case," noting that Drs. Dunleavy and Sady did not review the job descriptions for the positions at issue in this case. Reply in Support of Claimants' Motion to Exclude the Report and Testimony of Drs. Eric Dunleavy and Kayo Sady (Claimants' Dunleavy/Sady *Daubert* Reply) at 5. The debate between the experts regarding which O*NET data are relevant is plainly a matter for cross-examination and not a basis for exclusion.

[332] Claimants' Dunleavy/Sady *Daubert* Motion at 4-5.

entered into the WRG were required to be verified and were "subject to internal audit," Dr. Dunleavy admitted in his deposition that he does not know whether Sterling ever conducted any verification or internal audits of the WRG inputs, and does not know what kind of documentation was required in order to prove prior sales volume.[333] Claimants further note that Dr. Dunleavy concededly did not examine whether Sterling's compensation procedures were implemented in a reliable manner, and did not recall whether he reviewed an internal Sterling document (listed on Appendix A to his report) reporting that out of 65 new hires processed through the WRG, only 25 were processed properly.[334] These asserted deficiencies are troubling, and may well limit the probative value of Dr. Dunleavy's opinions regarding reliability. I find, however, that they are best addressed by cross-examination as opposed to exclusion.

Claimants also fault Drs. Dunleavy and Sady for relying on Dr. Ward's analysis to support their conclusions, without independently verifying his work or conducting independent studies.[335] I disagree. Although Dr. Dunleavy observes that his conclusions are confirmed by Dr. Ward's studies, Dr. Dunleavy's analysis of job-relatedness and reliability is based primarily on his interpretation of O*NET data, and application of the scientific literature on HR process structure, and does not "merely parrot" Dr. Ward's conclusions.[336] Nor is this

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[333] *Id.* at 6.

[334] *Id.* at 8, 10.

[335] *Id.* at 7.

[336] *Cf Eberli v. Cirrus Design Corp.*, 615 F.Supp.2d 1357, 1364 (S.D. Fla. 2009).

a situation in which an expert has done no more than repeat information provided by a party.[337]

For all of the above reasons, Claimants' motion to strike the report and testimony of Dr. Dunleavy is denied; the motion to strike any testimony by Dr. Sady is granted.

CLASS CERTIFICATION ANALYSIS: TITLE VII

I turn first to whether Claimants have met the requirements for class certification with respect to their claims under Title VII.[338]

Claimants' Theories of Liability

As noted above, Claimants assert two theories of liability under Title VII: disparate impact and pattern and practice disparate treatment.

Disparate Impact

Disparate impact claims "involve 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."[339] Proof of discriminatory motive or intent is

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[337] *Cf. Auther v. Oshkosh Corp.*, 2013 U.S. Dist. LEXIS 132600 at *9-14 (W.D.N.Y. September 16, 2013) and *Arista Records LLC v. Usenet com, Inc.*, 608 F.Supp.2d 409, 424-426 (S.D.N.Y. 2009).

[338] Because class certification of Claimants' EPA claims raises a number of distinct issues, the request for class certification of EPA claims is discussed separately at pp. 113-115.

[339] *Int'l Bhd. of Teamsters v. United States (Teamsters)*, 431 U.S. 324, 335 n.15 (1977).

not required.[340] "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive may in operation be functionally equivalent to intentional discrimination"[341] "[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases."[342]

The following description of the proof typically presented in disparate impact cases is closely adapted from the decision of the Second Circuit in *Robinson v. Metro-North Commuter R.R.*[343]

Disparate impact claims involve three stages of proof. The first is the *prima facie* showing of disparate impact. It requires plaintiffs to establish by a preponderance of the evidence that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. To

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[340] *Id.*

[341] *Watson v. Fort Worth Bank & Trust (Watson)*, 487 U.S. 977, 997 (1988).

[342] *Watson*, 487 U.S. at 991; *Wal-Mart*, 131 S.Ct. at 2254. The Court held in *Watson* that "disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson*, 487 U.S. at 990. "If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VIP's proscription against discriminatory actions should not apply." *Watson*, 487 U.S. at 990-991 (internal citation omitted).

[343] 267 F.3d 147 (2d Cir. 2001) (internal citations omitted).

make this showing, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two. Allegations solely of a bottom line racial imbalance in the work force are insufficient.

Statistical proof almost always occupies center stage in a *prima facie* showing of a disparate impact claim. Statistical proof can alone make out a *prima facie* case. The statistics must reveal that the disparity is substantial or significant and the statistics must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity. Moreover, a plaintiff must show that each individual challenged employment practice has a significantly disparate impact.

If the plaintiffs succeed in their *prima facie* showing, the burden of persuasion then shifts to the employer to demonstrate one of two things. The first option is to challenge the plaintiffs' statistical proof. This may be done by introducing evidence to show that either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity. To successfully contest the plaintiffs' statistical evidence, however, the employer has to convince the factfinder that its numerical picture is more accurate, valid, or reliable than the plaintiffs' evidence. If the employer is able to do so, it prevails and the case ends.

Assuming the employer is unable to successfully contest the plaintiffs' statistics, a second route is for the employer to demonstrate that the challenged practice or policy is job related for the position in question and consistent with business necessity. If the employer fails to demonstrate a business justification for the policy or

practice, then the plaintiffs prevail. If the employer succeeds in establishing a business justification, however, the disparate impact claim proceeds to a third stage. At this third stage, the burden of persuasion shifts back to the plaintiffs to establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect.

Should the plaintiffs succeed in establishing a Title VII disparate impact violation, the court may order declaratory and prospective class-wide injunctive relief. However, in order for an employee to obtain individual relief (*e.g.*, back pay), an individual inquiry is generally required in which each class member must show that he or she was among those adversely affected by the challenged policy or practice. If this showing is made, the class member is entitled to individual relief unless the employer in turn can establish by a preponderance of the evidence that a legitimate nondiscriminatory reason existed for the particular adverse action.

Disparate Treatment

Disparate treatment occurs "when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiffs' race, color, religion, sex, or national origin."[344] In a disparate treatment case, "the plaintiff is required to prove that the defendant had a discriminatory intent or motive."[345] One method of proving disparate treatment is to show that an employer engaged in a pattern and practice of

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[344] *Watson*, 487 U.S. at 985-86.

[345] *Id.* at 986.

discrimination. Pattern-or-practice disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals. To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's "standard operating procedure."[346]

The following description of the proof typically presented in disparate treatment cases is closely adapted from the decision of the Second Circuit in *Robinson*.[347]

Generally, a pattern-or-practice suit is divided into two phases: liability and remedial. At the liability stage, the plaintiffs must produce sufficient evidence to establish a *prima facie* case of a policy, pattern, or practice of intentional discrimination against the protected group. Plaintiffs have typically depended upon two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination. If the plaintiffs satisfy this *prima facie* requirement, the burden of production then shifts to the employer to defeat plaintiffs' *prima facie* case by demonstrating that the plaintiffs' proof is either inaccurate or insignificant.

Three basic avenues of attack are open to the defendant challenging the plaintiffs' statistics, namely assault on the source, accuracy, or probative force. The defendant

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[346] *Teamsters*, 431 U.S. at 336.

[347] 267 F.3d 147 (2d Cir. 2001) (internal citations omitted).

can present its own statistical summary treatment of the protected class and try to convince the fact finder that these numbers present a more accurate, complete, or relevant picture than the plaintiffs' statistical showing. Or the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination.

Once the defendant introduces evidence satisfying this burden of production, the trier of fact then must consider the evidence introduced by both sides to determine whether the plaintiffs have established by a preponderance of the evidence that the defendant engaged in a pattern or practice of intentional discrimination. Should the plaintiffs prove a pattern or practice of discrimination, the court may proceed to fashion class-wide declaratory and/or injunctive relief. If individual relief such as back pay, front pay, or compensatory recovery is sought in addition to class-wide equitable relief, the court must conduct a "remedial" phase. Class members enter this second phase with a presumption in their favor that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The effect of the presumption from the liability stage is to substantially lessen each class member's evidentiary burden relative to that which would be required if the employee were proceeding separately with an individual disparate treatment claim under the framework established in *McDonnell Douglas Corp. v. Green*.[348] Rather than having to make out a *prima facie* case of discrimination and

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[348] 411 U.S. 792 (1973).

prove that the employer's asserted business justification is merely a pretext for discrimination, a class member at the remedial stage of a pattern-or-practice claim need only show that he or she suffered an adverse employment decision and therefore was a potential victim of the proved class-wide discrimination. The burden of persuasion then shifts to the employer to demonstrate that the individual was subjected to the adverse employment decision for lawful reasons. If the employer is unable to establish a lawful reason for an adverse employment action, the employee is entitled to individualized equitable relief, which may include back pay and front pay. Class members who seek compensatory damages in addition to individualized equitable relief must then prove that the discrimination caused them emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or other nonpecuniary losses.

Requirements of Rule 23 and Supplementary Rules 4(a) and 4(b)

Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable; AAA Supplementary Rule 4(a)(1) requires that "the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable." Sterling acknowledges that Claimants have met the requirement of numerosity.

Commonality

Rule 23(a)(2) and AAA Supplementary Rule 4(a)(2) require that "there are questions of law or fact common to the class."

Appendix N

The Supreme Court's recent decision in *Wal-Mart*[349] sets forth the standards for proof of commonality in employment discrimination cases.

In *Wal-Mart*, plaintiffs sought certification of a class comprising a million and a half current and former female employees of Wal-Mart, asserting violation of Title VII with respect to pay and promotion, based upon disparate impact and disparate treatment, seeking injunctive and declaratory relief, back pay and punitive damages. The Court held that because plaintiffs had failed to provide "convincing proof of a companywide discriminatory pay and promotion policy," they had not established the existence of any common question.[350] As set forth in the Court's opinion, the *Wal-Mart* plaintiffs alleged that local managers exercised discretion over pay and promotions "disproportionately in favor of men, leading to an unlawful disparate impact on female employees," and that "because Wal-Mart is aware of this effect, its refusal to cabin its manager's authority amounts to disparate treatment."[351] According to the Court, plaintiffs claimed that "the discrimination to which they have been subjected is common to all Wal-Mart's female employees," and that the basic theory of plaintiffs' case is that "a strong and uniform `corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice."[352]

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[349] 131 S.Ct. 2541 (2011).

[350] *Id.* at 2556-2557.

[351] *Id.* at 2548.

[352] *Id. (emphasis in original).*

Appendix N

The Court described pay and promotion decisionmaking at Wal-Mart as follows:

> Pay and promotion decisions at Wal-Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.
>
> Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal-Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—e.g., assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.[353]

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[353] *Id.* at 2547 (internal citations omitted).

Appendix N

According to the Court, with respect to the commonality requirement, plaintiffs "relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal-Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination.[354] The Court noted that plaintiffs "do not allege that Wal-Mart has any express corporate policy against the advancement of women."[355] The Court held that commonality requires plaintiffs to demonstrate that class members have "suffered the same injury."[356] "Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. 'What matters to class certification * * * is not the raising of common "questions"—even in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.

Dissimilarities within the proposed class are what have the potential to impede the generation of common

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[354] *Id.* at 2549.

[355] *Id.* at 2548.

[356] *Id.* at 2551 (*quoting General Telephone Co. of Southwest v. Falcon (Falcon)*, 457 U.S. 147, 157 (1982)).

answers'."[357] The Court noted that in resolving an individual's Title VII claim, "the crux of the inquiry is 'the reason for a particular employment decision'."[358] The Court therefore held that in order to meet the commonality requirement, plaintiffs must provide some "glue" holding together the reasons for the multiple employment decisions at issue, so that an "examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[359]

The Court held that its opinion in *General Telephone Co. of Southwest v. Falcon* (*Falcon*)[360] "describes how the commonality issue must be approached,"[361] noting

> the conceptually "wide gap" between an individual claim and the existence of a class of persons who have suffered the same injury as that individual. The *Falcon* Court suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Second, "[s]ignificant proof that

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[357] *Id.* (*quoting* Nagreda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U.L.Rev. 97, 131-132 (2009)).

[358] *Id.* at 2552 (*quoting Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

[359] *Id.* at 2552, 2556 (internal quotation marks omitted) (emphasis in original).

[360] 457 U.S. 147 (1982).

[361] *Id.* at 2553.

> an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."

Id. (internal citations omitted).[362]

In *Wal-Mart*, the Court found that "[t]he first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard."[363] With respect to the second manner of bridging the gap, the Court held that significant proof that Wal-Mart operated under a general policy of discrimination "is entirely absent."[364] Noting that Wal-Mart's announced policy forbids sex discrimination, and that "the company imposes penalties for denials of equal employment opportunity," the Court found that the only evidence of a "general policy of discrimination" produced by plaintiffs was the testimony of their sociological expert, Dr. Bielby.[365] The Court found Dr. Bielby's testimony "worlds away" from "significant proof" that Wal-Mart "operated under a general policy of discrimination."[366] The Court observed that Dr. Bielby

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[362] *Id.*

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.* at 2554.

could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and "could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking"—which the Court found to be "the essential question on which [plaintiffs'] theory of commonality depends."[367] The Court concluded that "[t]he only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters," which "on its face" is "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business—on that we have said 'should itself raise no inference of discriminatory conduct'."[368] The Court acknowledged that "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory.[369] The Court noted, however, that:

> [T]he recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select

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[367] *Id.* at 2553-2554.

[368] *Id.* at 2554 (*quoting Watson*, 487 U.S. at 990).

[369] *Id.* (*citing Watson*, 487 U.S. at 990-991).

> sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements * * *. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.[370]

The Court held that the *Wal-Mart* plaintiffs "have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected."[371] The Court observed that "[i]t is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[372] The Court held that plaintiffs' statistical and anecdotal evidence "falls well short" of showing a common mode of exercising discretion.[373]

With respect to plaintiffs' statistical evidence, the Court observed that:

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[370] *Id.* (internal citations omitted).

[371] *Id.* at 2554-2555.

[372] *Id.* at 2555.

[373] *Id.*

> "[I]information about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform store-by-store disparity upon which the plaintiffs' theory of commonality depends.[374]

The Court further held that even if plaintiffs' statistical proof established a pay or promotion disparity in all of Wal-Mart's stores, "that would still not demonstrate that commonality of issue exists."[375] The Court observed that "[s]ome managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex neutral, performance-based criteria—whose nature and effects will differ from store to store."[376] The Court noted that in *Watson*, "the plurality opinion conditioned its holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is *not enough*," and that the plaintiff "must begin by identifying the specific employment practice that is challenged."[377] The Court

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[374] *Id.* (internal citations omitted).

[375] *Id.*

[376] *Id.* at 2555.

[377] *Id.* (*quoting Watson*, 487 U.S. at 994 and *citing Wards Cove Packing Co. v. Atonio*, 490 U.S. 645, 656 (1989)).

held that "other than the bare existence of delegated discretion," the *Wal-Mart* plaintiffs had "identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[378] Finally, the Court held that plaintiffs' anecdotal evidence "suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory." The Court noted that plaintiffs filed just one affidavit for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. "More than half of these reports are concentrated in only six States * * *; half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal-Mart's operations at all."[379] In sum, the Court concluded that because plaintiffs provided "no convincing proof of a companywide discriminatory pay and promotion policy, * * * they have not established the existence of any common question."[380]

Application of Wal-Mart to This Case

Sterling argues that "Claimants' Motion contains all of the deficiencies identified by the Supreme Court in *Wal-Mart*, and thus fails to demonstrate the requisite commonality to bind this proposed class together."[381] I disagree.

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[378] *Id.* at 2555-2556.

[379] *Id.* at 2556.

[380] *Id.* at 2556-2557.

[381] Sterling Opp. Memo at 7 and Sterling Exhibit 1 (Chart Comparing Allegations and Class Theories between *Wal-Mart Stores, Inc. v. Dukes* and *Jock, et al. v. Sterling Jewelers Inc.*).

This case may be distinguished from *Wal-Mart* in several significant respects. Most importantly, as opposed to alleging the "bare existence of delegated discretion," Claimants have identified specific uniform companywide pay and promotion policies and procedures, for each of which Claimants have proffered expert testimony that, if persuasive, demonstrates a statistically significant adverse impact on women. All of the pay and promotion decisions at issue in this arbitration were made pursuant to these specified policies and procedures. In addition, Claimants' statistical evidence shows disparities at the district or regional level at which pay and promotion decisions are made, as opposed to reliance on national statistics.

At the same time, to the extent Claimants allege a general policy of discrimination or contend that pay and promotion disparities were caused by a the exercise of discretion "tainted" by a "corporate culture" of gender bias, Claimants' proof suffers from several of the deficiencies identified in *Wal-Mart*.

Specifically, with respect to individual instances of alleged discrimination, Claimants have submitted statements from less than one-half of 1% of the proposed class. Over half of Claimants' declarations are clustered in eight states; there are five or fewer declarants in thirteen states and no declarants in fifteen states. Moreover, like Dr. Bielby, Claimants' expert Dr. Outtz could not quantify the causal effect of a gender-biased corporate culture on pay and promotion decisions at Sterling.

For the reasons set forth below, I find that Claimants' have demonstrated commonality with respect to their claims for declaratory and injunctive relief based upon

a theory of disparate impact, but have failed to demonstrate commonality with respect to their claims of disparate treatment.

Disparate Impact

With respect to disparate impact, the central questions are whether the specific policies and procedures identified by Claimants have a significant disparate impact, i.e., whether there are significant disparities that have been caused by the challenged policies and procedures, and if so, whether the challenged policies and procedures are job-related for the position in question and consistent with business necessity. Classwide adjudication of these questions will produce answers common to the class that are "apt to drive the resolution of the litigation" with respect to all class members, even though individual issues may remain to be resolved in "remedial" proceedings.

Following *Wal-Mart*, courts have grappled with satisfaction of the commonality requirement in the context of employment policies and practices that permit or delegate the exercise of discretion in employment decisions, several of which have found requisite commonality in the context of a claim of disparate impact.

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (*McReynolds*),[382] the Seventh Circuit reversed an order denying class certification with respect to certain employment practices alleged to have an adverse impact on 700 African-American brokers.[383] In

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[382] 672 F.3d 482 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 338 (2012).

[383] The plaintiffs in *McReynolds* initially sought class certification pursuant to Rule 23(b)(3) based upon both disparate impact

that case the Court found that Merrill Lynch employs 15,000 brokers working in 600 branch offices, supervised by branch managers and 135 "Complex Directors." The company has a "teaming" policy that permits brokers in the same office to form teams. The teams are formed by brokers, and once formed a team decides whom to admit as a new member. Complex Directors and branch-office managers do not select the team's members. The company also has a policy regarding "account distributions," which are transfers of customers' accounts when a broker leaves Merrill Lynch and his clients' accounts must be transferred to other brokers. Accounts are transferred within a branch office, and the brokers in that office compete for the accounts. The company establishes criteria for deciding who will win the competition, including the competing brokers' records of revenue generated for the company and of the number and investments of clients retained.

The Court noted that Complex Directors and branch managers have a measure of discretion to veto teams and to supplement the company's criteria for distributions, and that "to the extent these regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is

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and disparate treatment. The district court denied certification on both theories prior to the decision in *Wal-Mart*. Following *Wal-Mart*, plaintiffs renewed their request for class certification based solely upon disparate impact, which was again denied. Plaintiffs appealed this denial to the Seventh Circuit, and in oral argument effectively withdrew their request for class certification pursuant to Rule 26(b)(3), and sought certification based upon Rule 26(b)(2) and Rule 23(c)(4). *McReynolds*, 672 F.3d at 483-484.

indeed like *Wal-Mart*. But the exercise of that discretion is influenced by the two company-wide policies at issue: authorization to brokers, rather than managers to form and staff teams; and basing account distributions on the past success of the brokers who are competing for the transfers." The Court observed that "team participation and account distribution can affect a broker's compensation, as well as a broker's performance evaluation, which under company policy influences the broker's pay and promotion. The plaintiffs argue that these company-wide policies exacerbate racial discrimination by brokers."[384]

The Court held that whether the teaming policy and its "spiral effect" on account distribution causes racial discrimination and is not justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination.[385] The Court observed that in the absence of a company-wide policy on teaming and account distribution but "instead delegation to local management of the decision whether to allow teaming and the criteria for account distribution, there would be racial discrimination by brokers or local managers like the discrimination alleged in *Wal-Mart*. But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect * * * of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis."[386]

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[384] *McReynolds*, 672 F.3d at 489.

[385] *Id.* at 489-490.

[386] *Id.* at 490.

Notably, while the policies at issue in *McReynolds* permitted the exercise of discretion, which plaintiffs contended contributed to discrimination, the Seventh Circuit found dispositive that the discretion was exercised "within a framework established by the company."[387] This framework distinguished the case from the delegation of discretion challenged in *Wal-Mart*. The policies at issue in *McReynolds*, one which permitted brokers to form teams pursuant to criteria of their choice and the other which permitted the allocation of departing brokers' accounts pursuant to criteria of the remaining brokers' choice, constituted discrete personnel policies that permitted those administering them broad discretion in how to implement them.[388] The Seventh Circuit concluded that challenges to these policies presented questions about their adverse effect that could generate answers common to the class.[389] The Court therefore found that "[t]he practices challenged in this case present a pair of issues that can most efficiently be determined on a class-wide basis" and certified a class pursuant to Rule 23(b)(2) and Rule 24(c), which provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues."[390]

The Court observed that:

> "Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had

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[387] *Id.* at 488.

[388] *Id.* at 488-489.

[389] *Id.* at 490-491.

[390] *Id* at 491.

> been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful."[391]

In *Ellis v. Costco* (*Costco*),[392] the U.S. District Court for the Northern District of California certified a class of 700 employees challenging certain policies and practices with respect to promotion, finding that plaintiffs had satisfied the commonality requirement under both pattern or practice and disparate impact theories of liability. The challenged promotion policies in Costco included a promotion-from-within preference, a practice against posting management job vacancies, and the absence of a formal application process for promotions to assistant general manager and general manager positions.[393] Importantly, with respect to disparate impact, the *Costco* court noted that "[b]ecause the question under this theory is whether [d]efendant's policies and practices have a discriminatory impact on the [c]lass as a whole without regard to intent, the Dukes-identified problem of decentralized and discretionary individual managers'

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[391] *Id.* at 490-491.

[392] *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012), *appeal dismissed*, 657 F.3d 970 (9th Cir. 2013).

[393] *See id.* at 511.

decisions presents less of a hurdle to certification if the plaintiffs identify *specific companywide employment practices* responsible for the disparate impact."[394] Like *McReynolds*, the *Costco* court found that the exercise of discretion in decisions made pursuant to discrete company policies satisfied the commonality requirement of Rule 23.[395]

I find that Claimants have satisfied the commonality requirement for their Title VII claims challenging Sterling's compensation and promotion policies under a disparate impact theory of liability with respect to declaratory and injunctive relief. Claimants challenge discrete employment policies to which all members of the proposed class have been subject, and which Claimants' expert evidence demonstrates have resulted in significant pay and promotion disparities adverse to women. Claimants challenge: 1) the use of certain prior experience criteria, including prior management experience and non-jewelry sales volume, in setting starting pay rates for Sales Associates; 2) Sterling's policy for awarding merit increases as a percentage of base pay; and 3) Sterling's Succession Planning process. As in *McReynolds*, to the extent decisionmakers exercise some discretion in the implementation of these policies, they do so "within a framework established by the company."[396] And like the plaintiffs in *McReynolds*, Claimants'

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[394] *Id.* at 531 (*citing Wal-Mart*, 131 S. Ct. at 2554) (emphasis in original).

[395] *Id.* at 518; *See also Moore v. Napolitano*, No. 00-953(RWR/DAR), 2013 WL 659111, at *14-15 (D.D.C. Feb. 25, 2013); *Calibuso v. Bank of America, Corp.*, 893 F. Supp.2d 374, 390 (E.D.N.Y. 2012).

[396] *McReynolds*, 672 F.3d at 488.

challenge presents questions regarding adverse effect that will be addressed by class-wide proof regarding the lawfulness of the identified policies and procedures which could generate answers common to the class. Specifically, both Claimants and Sterling will offer statistical evidence regarding whether the challenged policies and procedures have an adverse effect on women—including whether CAR is the appropriate labor pool with respect to promotion-- and statistical and other expert evidence regarding whether the prior experience factors and promotional system challenged by Claimants are job-related. The answers to these questions will determine whether Claimants are entitled to class-wide declaratory and injunctive relief "in one stroke"—notwithstanding the need for further proceedings to adjudicate individual claims for monetary damages.

It is unnecessary to address the commonality requirement with respect to monetary relief, because, for the reasons set forth below, Claimants cannot meet the predominance, superiority and manageability requirements of AAA Supplementary Rule 4(b) or Rule 23(b)(3).

Disparate Treatment

The requirement of proof of intent and problem of decentralized and individualized exercise of discretion identified in *Wal-Mart* present substantial hurdles for the establishment of commonality for a large nationwide class based upon disparate treatment. As noted above, in order to meet the commonality requirement for their Title VII claims alleging a pattern or practice of discrimination in the compensation and promotion decisions, Claimants must provide "significant proof" that Sterling

"operated under a general policy of discrimination."[397]

The *Wal-Mart* Court provided scant guidance as to what constitutes "significant proof," apart from its apparent acknowledgment that the evidence adduced in *Teamsters* satisfied this standard. It did, however, state definitively what was *not* sufficient.

With respect to statistical evidence, the Court held that even if plaintiffs' statistical proof established a pay or promotion disparity in *all* of Wal-Mart's stores, "that would still not demonstrate that commonality of issue exists."[398] With respect to anecdotal evidence of discrimination, the Court held that one affidavit for every 12,500 class members, relating to only some 235 out of Wal-Mart's 3,400 stores, and concentrated in only six states was insufficient "to raise any inference that all the individual, discretionary personnel decisions are discriminatory."[399] With respect to evidence of a corporate culture that rendered the exercise of discretion "vulnerable" to gender discrimination, the Court held that Dr. Bielby's testimony was insufficient to prove that Wal-Mart "operated under a general policy of discrimination,"[400] because he was unable to answer the "essential question" of causation, i.e., to provide the necessary "glue" to establish that the common reason for pay and promotion disparities was intentional gender discrimination.[401]

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[397] *Wal-Mart*, 131 S.Ct. at 2553.

[398] *Id.*

[399] *Id.* at 2556.

[400] *Id.* at 2554.

[401] *Id.* at 2553-2554.; *see EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 U.S. Dist. LEX1S 92511, at *53-54 (S.D.N.Y.

Claimants contend that the evidence in this case may be distinguished from that offered in *Wal-Mart* in several respects.

First, in contrast to the nation-wide statistics offered in *Wal-Mart*, Claimants' statistical evidence of the widespread nature of the disparities in compensation and promotion is provided at levels of the Company consistent with the levels at which the decisions were made.

Second, Claimants have offered evidence that bias, stereotyping and sexually demeaning conduct occurs among those managers and executives responsible for setting pay and making promotions, including examples of bias and stereotyping in the highest ranks of the company. Claimants note that the *Costco* court found this type of evidence sufficient to support a finding of commonality for the pattern or practice claims in that case, based in part on expert testimony that "Costco's culture fosters and reinforces stereotyped thinking, which allows gender bias to infuse from the top down."[402]

Third, Claimants' have offered evidence that Sterling continued to use employment practices that it knew had a disparate impact on women,[403] as well as evidence of deficiencies in Sterling's HR function.

I find that while the evidence in this case may be

Aug. 31, 2010) (where expert was unable to conclude that employer's managers were intentionally stereotyping female employees, testimony would not support EEOC's allegations that intentional discrimination had occurred).

[402] *Costco*, 285 F.R.D. at 520.

[403] *See United States v. City of New York*, 2013 WL 1955782, *14 (2d Cir. May 14, 2013) (intent can be inferred from continued use of employment practices known to have a disparate impact).

in some respects stronger that the evidence presented in *Wal-Mart*, it fails to provide significant proof that Sterling operated under a general policy of discrimination.

The critical element in Claimants' claim of intentional discrimination is the existence and influence of a corporate culture demeaning to women. The lynchpin in Claimants' proof of this element is the proposed expert testimony of Dr. Outtz. Simply put, without this testimony, Claimants cannot provide the necessary "glue" to establish that the common reason for pay and promotion disparities is intentional gender discrimination.

As noted above, Dr. Outtz cannot answer the "essential question" of what percent of the employment decisions at Sterling are determined by a gender-discriminatory corporate culture. At best, Dr. Outtz demonstrates that the sexual misbehavior and biased remarks by Sterling's executives is *capable* of influencing the managers who make the compensation and promotion decisions challenged by Claimants. More importantly, however, I find that Dr. Outtz's conclusions are not supported by a reliable methodology that is recognized and accepted in the scientific or professional literature in his field, and therefore lack sufficient probative value to establish commonality.

As set forth above, Dr. Outtz's opinion that there is a corporate culture at Sterling that is demeaning to women is based in significant part on his review of declarations provided by Claimants' counsel. Dr. Outtz did not utilize any recognized methodology to determine whether these declarants constituted a representative sample of current and former Sterling employees. Dr. Outtz apparently read approximately 600 declarations provided by

Sterling that reflect a very different view of Sterling's corporate culture with respect to the treatment of women. His decision to disregard this evidence, without any explanation, at a minimum calls his objectivity into question. None of the professional literature relied upon by Dr. Outtz supports his conclusion that "modelling" of improper sexual behavior by male corporate executives caused hundreds of lower level managers to intentionally discriminate against women in thousands of pay and promotion decisions. Moreover, Dr. Outtz's opinion that corporate culture at Sterling influenced pay and promotion decisions despite significant representation of women in management positions, which is based on a handful of declarations regarding alleged tolerance of sexual misconduct by Sterling's HR department, and unsupported conclusions regarding enforcement of Sterling's sex discrimination and harassment policies, is neither scientific nor credible.

For the above reasons, I find that Claimants have failed to provide "convincing proof of a companywide discriminatory pay and promotion policy" and have therefore not established the existence of any common question" with respect to their claims of disparate treatment.[404]

Typicality

Rule 23(a)(3) and AAA Supplementary Rule 4(a)(3) require that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."

"The commonality and typicality requirements tend to merge into one another, so that similar considerations

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[404] *Wal-Mart*, 131 S.Ct. at 2556-2557.

animate analysis of Rules 23(a)(2) and (3)."[405] The typicality requirement is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[406] Typicality is not defeated by "minor variations in the fact patterns underlying individual claims," as long as the wrong is alleged to have occurred in the same general-fashion.[407] The purpose of the typicality requirement is "to ensure that a class representative has 'the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions.'"[408] "The primary criterion for determining typicality is the forthrightness and vigor with which the representative party can be expected to assert the interests of the members of the class."[409] A claim may be asserted on behalf of a class as long as at least one of the named claimants has been subject

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[405] *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (*citing Falcon*, 457 U.S. at 157 n. 13).

[406] *Robinson*, 267 F.3d at 155 (internal citation omitted).

[407] *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *see also Caridad*, 191 F.3d at 293 (the typicality requirement "does not require that the factual background of each named plaintiffs claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class").

[408] *In re NYSE*, 260 F.R.D. 55, 2009 WL 1683349, at *15 (*quoting In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119, 126 (S.D.N.Y. 1997)).

[409] *Latino Officers Ass'n v. City of New York*, 209 F.R.D. 79, 89-90 (S.D.N.Y. 2002) (internal citation and quotation marks omitted).

to each of the practices from which the proposed class seeks relief.[410]

Sterling asserts that Claimants cannot satisfy the typicality requirement because their claims are subject to "unique" defenses. Essentially, Sterling argues that it will show that the Named Claimants were not disfavored or were disfavored for individual reasons unrelated to gender, such as job performance and individual prior experience. It is well-established that typicality is absent where the named plaintiffs are "'subject to unique defenses which threaten to become the focus of the litigation.'"[411] However, the unique defenses doctrine is limited to cases in which a full defense is available against an individual plaintiffs' action and "those unique defenses threaten to become focus of the litigation."[412] A class representative need not prove that "she is immune from any possible defense."[413] Instead, she must establish "that she is not subject to a defense that is not "typical" of the defenses defendant may raise against other members of the proposed class.[414]

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[410] *Charrons v. Pinnacle Group NY LLC*, 269 F.R.D.221, 233 (S.D.N.Y. 2010).

[411] *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59 (2d Cir. 2000).

[412] *Id.* at 59 (*citing Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

[413] *See Casida v. Sears Holding Corp.*, 2012 U.S. Dist. LEX1S 111599 (E.D. Cal. August 8, 2012), at *38 (*quoting Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

[414] *See id.* at *39-40 (*quoting Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), and *citing Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984-85 (9th Cir. 2011)).

Appendix N

As set forth above, and explained in more detail below, I have determined that this case may proceed as a class action solely with respect to Claimants' disparate impact claims for declaratory and injunctive relief, based upon Rule 23(b)(2) and Rule 23(c)(4).

The well-established principle that "[t]ypicality is determined by the nature of the claims brought by the class representatives, not by the particular fact patterns from which they arose," is "particularly true with respect to * * * (b)(2) certification."[415] This is because "where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them * * * [there is] no need for *individualized* determinations of the propriety of injunctive relief."[416]

Here, there can be no question that the Named Claimants' claims of disparate impact arise from the same course of conduct as the claims of the class: Sterling's companywide pay and promotion policies. Sterling's defenses to the issues certified will be common to all members of the proposed class, *i.e.*, that the challenged policies and procedures do not have an adverse impact and/or are job-related. If Claimants succeed with respect to the certified claims, the "unique defenses"

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[415] *Brown v. Kelly*, 244 F.R.D. 222, 232 (S.D.N.Y. 2007).

[416] *Id.* (emphasis in original; internal quotations and citation omitted); *accord Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (noting that "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims," and that "[a]ctions requesting declaratory and injunctive relief to remedy conduct directed at the class clearly fit this mold").

identified by Sterling will be litigated in subsequent proceedings. There is therefore no danger that individual defenses will become the focus of this class arbitration.[417]

I therefore find that Claimants have met the typicality requirements of Rule 23(a)(3)and AAA Supplementary Rule 4(a)(3) with respect to their disparate impact claims for declaratory and injunctive relief.

Adequacy

Rule 23(a)(4) and AAA Supplementary Rule 4(a)(4) require that the named representatives "will fairly and adequately protect the interests of the class." Rule 23(a)(4) is satisfied where the proposed class representatives (1) have an interest in "vigorously pursuing the claims of the class," and (2) do not have interests "antagonistic to the interests of other class members."[418]

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[417] In any event, courts have held that employers cannot defeat typicality by asserting fact-specific defenses that discrimination did not cause an adverse employment action. *See, e.g., Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 97 (S.D.N.Y. 2010) (defendants in Title VII cases cannot defeat typicality by claiming that unique factors other than discrimination explain the experiences of named plaintiffs); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 267-68 (S.D.N.Y. 2007) (claiming that something other than discrimination explains the named plaintiffs' experience" cannot defeat typicality because "[title question presented by each plaintiffs claim is undoubtedly typical of the class, whether or not defendants are eventually able to prove that the answer to that question is unique to each plaintiff"); *Costco*, 285 F.R.D. at 534-35 (unique defenses did not defeat typicality because they were either specific examples of defenses typical to the entire class or "merely alternative explanations for alleged discrimination" and not likely to become a "major focus" of the litigation, especially when compared to the common and typical class-wide issues.).

[418] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir.

Sterling asserts that Claimants have not satisfied the adequacy requirement because there are conflicts between Named Claimants and absent class members, and because Claimants have abandoned class claims for compensatory damages.

Sterling points out that the Named Claimants include individuals who supervised other putative class members. Specifically, Sterling asserts that decisions on pay and promotions are made on a collaborative basis between SMs and DMs, and that female SMs therefore played a role in the pay and promotion decisions challenged by Claimants. Sterling contends that supervisors cannot adequately represent those they supervise.[419] Sterling further observes that some Named Claimants no longer work for Sterling and that former employees cannot adequately represent current employees because they have no (or a lessened) interest in injunctive relief for the class.[420]

2006); *Baffa*, 222 F.3d at 60.

[419] *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011) (inadequate class representatives found where the named plaintiffs "have authority within the company with regard to the compensation of some, and maybe many, of the unnamed class members and, as worrisome, over male employees in the same job categories as the class members").

420 *See Slader v. Pearle Vision, Inc.*, No. 00 Civ. 2797 (JSR), 2000 U.S. Dist. LEXIS 16453, at *2 (S.D.N.Y. Nov. 14, 2000) (class representatives inadequate where the relief they seek conflicts with relief sought by others in the class because "a former employee's primary interest necessarily centers on recovering back pay, while a current employee may well be far more interested in obtaining injunctive relief").

Neither of these objections has merit. In this case, Claimants contend that all of the members of putative class have been similarly harmed by Sterling's compensation and promotion systems. Both current and former employees have an interest in establishing the unlawfulness of Sterling's practices, which is a necessary predicate for injunctive relief as well as back pay. The fact that some class members hold different positions within a company does not create a class conflict,[421] and

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[421] *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 958-59 (9th Cir. 2003) (explaining that there was no "substantive issue" for a conflict of interest where several members of the class were supervised by other employee class members because the mere fact that the employees could have "potentially conflicting interests" was not sufficient to deny class certification); *Latino Officers Ass'n City of N.Y. v. City of New York*, 209 F.R.D. 79, 90 (S.D.N.Y. 2002) (finding no fundamental conflict in a class of police officers that had class representatives who were in supervisory and non-supervisory positions); *MO.C.H.A. Soc'y, Inc. v. City of Buffalo*, No. 98-CV-99C, 2008 WL 343011, at *5 (W.D.N.Y. Feb. 6, 2008) (holding that it was not necessary for each class member or representative to hold "identical" positions to be adequate class representatives). The adequacy requirement merely requires a showing that the class representatives were employees who suffered the same alleged discrimination as suffered by other class members. *See Velez*, 244 F.R.D. at 269 (quoting *Hnot v. Willis Grp. Holdings Ltd*, 228 F.R.D. 476, 485 (S.D.N.Y. 2005) ("Even if one female officer supervised another, it is still possible, as plaintiffs allege, that they all suffered from gender discrimination by the key decisionmakers."); *Hnot*, 228 F.R.D. at 486 ("If supervisory employees and supervisees all are subject to discrimination, all have an equal interest in remedying the discrimination, and the named plaintiffs can still be expected to litigate the case with ardor. A potential for conflict need not defeat class certification.").

in any event the record reflects that only DMs, VPROs, and DVPs had the actual authority to make the pay and promotion decisions at issue in this case. The interests of the Named Claimants are therefore not antagonistic to those of absent class members.

Claimants' First Amended Complaint expressly sought an award of compensatory damages for the class. However during the deposition of Claimant Dawn Souto-Coons, Claimants entered into a stipulation on the record (which the parties formalized in a signed Stipulation) stating that that none of the Named Claimants is seeking an award of compensatory damages in this Arbitration. Sterling suggests that the abandonment of their compensatory damages claims was a strategic decision to avoid cross-examination on these claims and/or to enhance the chances of certification of a nationwide class, which was made more difficult by the intervening *Wal-Mart* decision, especially with respect to monetary relief. Sterling argues that the failure to seek compensatory damages renders the Named Claimants inadequate representatives. As discussed below, I find that Claimants have not met the requirements for class certification with respect to monetary relief. It is therefore unnecessary to address Sterling's contention that Claimants have failed to satisfy the requirements of Rule 26(a)(4) based upon their failure to seek compensatory damages.

For the above reasons, I find that Claimants have satisfied the adequacy requirement of Rule 23(a)(4) and AAA Supplementary Rule 4(a)(4) with respect to their claims for declaratory and injunctive relief based upon disparate impact.

Appendix N

Adequacy of Counsel

AAA Supplementary Rule 4(a)(5) requires that "counsel selected to represent the class will fairly and adequately protect the interests of the class." Sterling does not challenge the adequacy of class counsel, which is a prominent, highly-experienced employment discrimination law firm that I find will fairly and adequately protect the interests of the class. I therefore find that Claimants have met the requirement of adequacy of counsel.

Similar Arbitration Clause

AAA Supplementary Rule 4(a)(6) requires that "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members." The parties have stipulated to satisfaction of this requirement.[422]

AAA Supplementary Rule 4(b)

AAA Supplementary Rule 4(b) provides that "[a]n arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy."

Because I have determined that Claimants have not met the commonality requirement of AAA Supplementary

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[422] *See* Stipulation Regarding Versions of RESOLVE Program Agreement (Feb. 14, 2013) (Claimants' Exhibit 104).

Rule 4(a) or Rule 23(a) with respect to their pattern and practice disparate treatment claim, I address the requirements of AAA Supplementary Rule 4(b) solely with respect to Claimants' disparate impact claim.

The predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation,"[423] and is intended to "ensure[] that the class will be certified only when it would 'achieve economies of time, effort and expense, and promote * * * uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[424]

I find that questions of law or fact common to class members predominate over any questions affecting only individual members with respect to those "Stage I" issues that pertain to Claimants' request for declaratory and injunctive relief. The proof pertaining to disparate impact—primarily expert statistical evidence, as well as fact and expert evidence pertaining to Sterling's operations and the job-relatedness of Sterling's pay and promotion criteria and practices—will indisputably be common to the class. Indeed, Sterling has not identified any individual issues with respect to the lawfulness of Sterling's compensation and promotion practices challenged by Claimants.

I find, however, that common questions do not predominate with respect to those "Stage II" issues that pertain to monetary relief. The facts pertaining to each Claimant's eligibility will vary depending on their

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[423] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[424] *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 104 (2d Cir. 2007) (*quoting Amchem*, 521 U.S at 615).

individual employment history, and the facts pertaining to similarly-situated males during their employment. These issues cannot be fairly adjudicated on a representative basis.[425]

With respect to the superiority requirement, the alternative method of adjudicating Claimants' disparate impact claims is through individual, single-Claimant arbitrations. With respect to Claimants' request for declaratory and injunctive relief, each arbitrator would be required to hear evidence and determine whether Sterling's compensation and promotion practices are lawful. The determination of this issue in a single proceeding is clearly more efficient. Moreover, a class arbitration will promote uniformity in decisions. A class arbitration is also superior because it provides for inclusion of members who would otherwise be unable to afford independent representation.[426] In addition, broad systemic remedies are generally not available in non-class cases.[427] I also note that traditional limitations on discovery in arbitration could preclude the development of company-wide evidence necessary to prove systemic discrimination. Finally, a class arbitration is superior to

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[425] Nor can Claimants meet the other requirements of AAA Supplementary Rule 4(b) and Rule 23(b)(3) with respect to monetary relief. Of course, in the event Claimants prevail in Stage I, it remains open to the Arbitrator to employ appropriate case management techniques to reduce the number of individualized hearings that may be required.

[426] *Amchem*, 521 U.S. at 617; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *United States v. City of New York*, 276 F.R.D 22, 49 (E.D.N.Y 2011).

[427] *See, e.g., Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

individual proceedings because without a class proceeding and the attendant class-wide notice, many putative class members would never know that Sterling may have engaged in unlawful employment practices.[428] I therefore find that the adjudication of Claimants' disparate impact claims with respect to declaratory and injunctive relief in a single arbitration is superior to individual arbitrations.

With respect to the specific matters set forth in AAA Supplementary Rule 4(b)(1)-(4), I find:

(1) The members of the proposed class are unlikely to have any interest in individually controlling the prosecution of Claimants' claims for declaratory and injunctive relief. To the extent a putative class member wishes to do so, she will be afforded an opportunity to opt out of the class arbitration.

(2) Apart from the EEOC action, there appear to be no other proceedings concerning this controversy already commenced by members of the class.

(3) No negative consequences to class members in concentrating the determination of Claimants' disparate impact claims for declaratory and injunctive relief in a single arbitral forum have been identified by counsel.

(4) There are no difficulties likely to be encountered in the management of a class arbitration of Claimants' disparate impact claims for declaratory and injunctive relief. Sterling's expressed concerns regarding manageability pertain solely to the adjudication of Claimants' entitlement to monetary relief; Sterling has not identified any difficulties that could be encountered in a class

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[428] *See, e.g., In re Nassau County Strip Search Cases (Nassau)*, 461 F.3d 219, 229 (2d Cir. 2006).

arbitration of Claimants' disparate impact claims for declaratory and injunctive relief.

Rule 23(c)(4)

As set forth above, Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." AAA Supplementary Rule 4 does not contain a provision comparable to Rule 23(c)(4). However, Supplementary Rule 4(a) provides that the arbitrator must consider not only the criteria enumerated in Supplementary Rule 4, but also, "any law or agreement of the parties the arbitrator determines applies to the arbitration." The AAA has stated that it intended its formulation of the Supplementary Rules to "hew closely to Federal Rule 23."[429] I therefore find that certification of a class arbitration with respect to particular issues is consistent with the AAA Supplementary Rules and applicable in this arbitration, as long as the requirements of Supplementary Rules 4(a) and 4(b) are satisfied.

Courts in the Second Circuit and elsewhere have used Rule 23(c)(4) to certify class claims for declaratory and injunctive relief in employment discrimination cases before and after the *Wal-Mart* decision, in order to efficiently manage complex litigation and narrow issues for adjudication.[430]

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[429] Brief for Am. Arbitration Ass'n as *Amicus Curiae* for Neither Party in *Stolt-Nielsen*, 129 S.Ct. 2703, 2009 WL 2896309, at * 17-18 (September 4, 2009).

[430] *See, e.g., Gulino v. Board of Education*, 555 Fed. Appx. 37 (2d Cir. 2014); *McReynolds*, 672 F.3d 482 (7th Cir. 2012); *Robinson*, 267 F.3d 147 (2d Cir. 2001); *Houser v. Pritzker*, No. 10 CV 3105-FM,

Sterling argues that issue certification "would not meaningfully advance any substantive outcome" and should be denied because an injunction would not provide "final relief" to all class members. I disagree. If Claimants are successful, a declaratory judgment will relieve all class members of the obligation to prove the unlawfulness of the challenged pay and promotion practices in individual arbitrations and current employees will benefit from the elimination of unlawful practices.[431]

As the Seventh Circuit observed in *McReynolds*,

> Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss he sustained—and remember that the class has 700

2014 WL 2967446 (S.D.N.Y. July 1, 2014); *see also Nassau*, 461 F.3d at 226-227 ("courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole does not satisfy Rule 23(b)(3)").

[431] Because of the potentially limited applicability of *res judicata* and collateral estoppel in arbitration, it is possible that every Claimant would be required to prove this element of liability in individual arbitrations. Of course, if Sterling successfully defends the challenged pay and promotion practices, thousands of individual arbitrations may be avoided.

> members. *But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful."*[432]

For the reasons set forth above, I find that Claimants' have satisfied the requirements of Supplementary Rules 4(a) and 4(b) with respect to their Title VII claims based upon a disparate impact theory of liability for purposes of declaratory and injunctive relief, and find that this arbitration may be appropriately maintained as a class arbitration with respect to the following issues:

(1) Whether Sterling's compensation practices have a disparate impact on women;
(2) Whether Sterling's promotion practices have a disparate impact on women, including whether CAR is an appropriate and reliable indicator of interest in promotion;
*(3) If Sterling's compensation practices have a dis-*parate impact on women, whether Sterling can establish that one of the statutory affirmative defenses justifies the disparity in pay; and
(4) If Sterling's promotional practices have a disparate impact on women, whether Sterling's practices were job-related for the position in question and justified by business necessity.

TITLE VII CLASS PERIOD

Title VII sets a 300-day limitation period for discrimination claims filed with a local agency. 42 U.S.C. § 2000e-5. For the claims alleging discrimination in compensation brought under Title VII, the class relies upon the EEOC charge of Named Claimant Laryssa

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[432] *McReynolds*, 672 F.3d at 490-491 (emphasis added).

Jock filed on May 18, 2005. Therefore, the starting point for class membership of women asserting compensation claims under Title VII begins July 22, 2004. For the claims alleging discrimination in promotions brought under Title VII, the class relies upon the EEOC charge of Named Claimant Dawn Souto-Coons, filed on October 3, 2005. The commencement of the class period for the promotion claims is therefore December 7, 2004.

As noted above, Claimants propose of a class period beginning on June 2, 2002. This proposal is based upon their claims under the EPA, which provides for a three-year statute of limitations for willful violations. See 29 U.S.C. § 255(a). Claimants contend that Jock's EEOC charge, which Sterling received on June 2, 2005, tolls the statute of limitations for the claims of the putative class under the EPA. Claimants further contend that because the EPA limitations period is broader the Title VII limitations period, the "appropriate" class period for both Title VII and EPA compensation claims is June 2, 2002 to the present.

For the reasons set forth below in the discussion of Claimants' EPA claims, I find that Jock's EEOC charge does not toll the statute of limitations for claims of the putative EPA class, and that Claimants' collective claims under the EPA must proceed on an "opt-in" basis. Moreover, Claimants have provided no authority for broadening the Title VII class period based upon the simultaneous assertion of EPA claims. I therefore find that the starting point of the class period for women asserting compensation claims under Title VII is July 22, 2004, and that the starting point of the class period for women asserting promotion claims under Title VII is December 7, 2004.

Appendix N

EQUAL PAY ACT

The EPA incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA") found in 29 U.S.C. § 216(b).[433] Accordingly, the EPA permits representative claimants to bring claims on behalf of similarly-situated persons. Section 216(b) requires that each potential plaintiff file a written consent to "opt in" to the action.[434]

In this case, Claimants have not sought to proceed in accordance with Section 216(b). Rather, they seek certification of an "opt-out" class in accordance with Fed. R. Civ. P 23 and AAA Supplementary Rules for Class Arbitrations. In addition, Claimants contend that Jock's EEOC charge tolls the statute of limitations for the claims of the putative class under the EPA. Claimants acknowledge that this approach has been uniformly rejected by the courts. They argue, however, that an opt-out EPA class and tolling is permitted here because this case is proceeding in arbitration under the AAA Supplementary Rules for class Arbitrations, which only

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[433] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56-57 (codified as amended at 29 U.S.C. § 206(d)). The EPA provides: "An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly-situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

[434] *Id.*; *see also Moore v. Publicis Groupe SA*, No. 11 Civ. 1279, 2012 WL 2574742, at *8-9 (S.D.N.Y. June 29, 2012).

provide for certification of an opt-out class.

Claimants rely on *Long John Silver's Rests., Inc. v. Cole* (*Long John Silver's*), in which the arbitrator permitted FLSA claims to proceed as an opt-out class, based upon his finding the by agreeing to arbitrate pursuant to the AAA rules, "the parties' contract * * * superseded the FLSA's procedural requirements."[435] The district court declined to vacate the arbitrator's decision. On appeal, the Fourth Circuit held that Congress intended that "the 'opt-in' procedure should apply in arbitration as in court proceedings," but did not expressly preclude waiver in the parties' agreement by adoption of an alternate procedure.[436] Because the arbitrator's interpretation of the arbitration agreement was subject to "extremely limited" judicial review, the Fourth Circuit affirmed the district court.[437] The decision in *Long John Silver's* is therefore limited to the arbitrator's interpretation of the parties' arbitration agreement in that case. The question presented here is whether Sterling, by electing AAA arbitration and the application of the AAA Rules, effectively waived its right to insist upon compliance with the "opt-in" requirement of Section 216(b).

All versions of the RESOLVE Arbitration Agreements provide that the "agreement shall be governed by and

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[435] 514 F.3d 345, 352-53 (4th Cir.), *cert. denied*, 555 U.S. 815 (2008). *See also Johnson v. Morton's Rest. Group, Inc.*, AAA No. 111600153105 (AAA 2007, Golick, Roberta, Arb.), at 19, n.28 (Claimants' Exhibit 5); *Bryant v. Joel Antunes, LLC*, AAA No. 1116001178305 (AAA 2007, Pratt, George C., Arb.), at 2 (Claimants' Exhibit 6).

[436] *Long John Silver's*, 514 F.3d at 351 (emphasis added).

[437] *Id.* at 349-52.

interpreted in accordance with the laws of Ohio." Ohio law generally provides that waiver is a voluntary relinquishment of a known right.[438] "As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy."[439] The party asserting a waiver must prove a clear, unequivocal, decisive act by the other party demonstrating a purpose to waive the known right.[440]

Notably, nothing in the AAA Supplemental Rules suggests that its procedures were intended to effect a waiver of statutory opt-in requirements. Under these circumstances, I find that Sterling's incorporation of the AAA Rules cannot constitute a voluntary and intentional waiver of the EPA requirement. Claimants' motion for certification of an opt-out EPA class is therefore denied, without prejudice to their right to seek certification of an opt-in EPA class.

STANDING

Sterling asserts that Claimants' motion for class certification must be denied on the ground that the Named Claimants have "no standing" to represent absent

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[438] *State ex rel. Board of County Commissioners of Athens County v. Board of Directors of the Gallia*, 75 Ohio St. 3d 611, 616 (1996); *see also Miller v. Lindsay-Green, Inc.*, 2005 Ohio 6366, 2005 Ohio App. LEXIS 5696 (Ohio Court of Appeals) (waiver is defined as a voluntary relinquishment of a known right with the intent to do so with full knowledge of all the facts).

[439] *Id.* (citations omitted.)

[440] *Miller v. Lindsay-Green, Inc.*, at P70.

class members, who, according to Sterling, have not consented to allow the arbitrator to determine whether the RESOLVE arbitration agreement authorizes class arbitration.

This argument is based solely upon the concurring opinion of Justice Alito in the Supreme Court's ruling in *Oxford Health Plans LLC v. Sutter*.[441] In *Sutter*, the parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he concluded that the arbitration clause unambiguously evinced an intention to allow class arbitration. Oxford moved to vacate the arbitrator's decision, on the ground that the arbitrator "exceeded his powers," relying upon the Supreme Court's decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*[442] Oxford's motion was denied by the District Court, which was affirmed by the Third Circuit. The Supreme Court affirmed the decision of the Third Circuit, holding that because the parties bargained for the arbitrator's construction of their agreement, the arbitral decision construing the contract must be upheld, regardless of whether the court disagreed with the arbitrator's contract interpretation.[443]

In his concurring opinion, Justice Alito noted that "absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't."[444] Justice Alito opined that "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to

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[441] 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring).

[442] 130 S. Ct. 1758 (2010).

[443] 133 S.Ct. at 2066.

[444] *Id.* at 2071

make that determination,"[445] and that "[c]lass arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'"[446] Justice Alito concluded that the distribution of opt-out notices "does not cure this fundamental flaw in the class arbitration proceeding in this case," and that "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used."[447]

I find that the consent/collateral attack concern expressed by Justice Alito (and by Sterling) has no application in this case because here the absent class members have clearly consented to the authority of the arbitrator to determine whether the RESOLVE arbitration agreement permits class arbitration. It is undisputed that each of the absent class members signed the RESOLVE arbitration agreement, which clearly provides for the application of the AAA Rules. The AAA Supplementary Rules for Class Arbitrations, which "apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ('AAA') where a party submits a dispute to arbitration on behalf of or against a class or purported

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[445] *Id.*

[446] *Id.* at 2072 (*quoting American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546-547 (1974)).

[447] *Id.* at 2071-2072 (emphasis in original).

class,"[448] provide that the arbitrator shall determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[449] Accordingly, by signing the RESOLVE arbitration agreement, each of the absent class members agreed that the arbitrator would determine whether the RESOLVE arbitration agreement permits class arbitration.[450] Sterling's "standing" objection is therefore rejected.

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[448] AAA Supplementary Rule 1.

[449] AAA Supplementary Rule 3.

[450] *See, e.g., Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 635-636 (5th Cir. 2012).

Appendix N

SUMMARY OF AWARD

For the reasons set forth above, I find that the adjudication of Claimants' Title VII disparate impact claims with respect to declaratory and injunctive relief may be maintained as a class action pursuant to AAA Supplementary Rule 4 and Rules 23(b)(2) and 23(c)(4). Claimants' motion for class certification of their Title VII disparate impact claims with respect to monetary damages pursuant to AAA Supplementary Rule 4 and Rule 23(b)(3) is denied. Claimants' motion for class certification of their Title VII disparate treatment claims is denied. Claimant's motion for certification of a Rule 23 "opt-out" class for their EPA claims is denied. Sterling's contention that the Named Claimants lack standing to represent absent class members in this proceeding is rejected. I find that the appropriate class period for Claimants' Title VII compensation claims is July 22, 2004, to the date of trial, and that the appropriate class period for Claimants' Title VII promotion claims is December 7, 2004, to the date of trial.

NOTICE

Counsel are requested to submit a proposed form of opt-out notice consistent with this Class Certification Award pursuant to AAA Supplementary Rules 5 and 6.

SO ORDERED:

KATHLEEN A. ROBERTS
ARBITRATOR
February 2, 2015

APPENDIX O — CLAUSE CONSTRUCTION AWARD OF ARBITRATOR OF THE AMERICAN ARBITRATION ASSOCIATION, DATED JUNE 1, 2009

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 11 160 00655 08

LARYSSA JOCK, CHRISTY MEIERDIERCKS, KELLY CONTRERAS, MARIA HOUSE, DENISE MADDOX, LISA MCCONNELL, GLORIA PAGAN, JUDY REED, LINDA RHODES, NINA SHAHMIRZADI, LEIGHLA MURPHY, DAWN SOUTO-COONS, AND MARIA WOLF, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Claimants,

AND STERLING JEWELERS, INC.,

Respondent.

CLAUSE CONSTRUCTION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named

parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

Claimants are current and former employees of Sterling Jewelers Inc. ("Sterling") alleging a company-wide pattern of practice of gender discrimination in pay and promotion decisions that violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000(e) et seq., and the Equal Pay Act, 29 U.S.C. Sec. 206. Pursuant to Rule 3 of the Supplementary Rules for Class Arbitration, Claimants seek a clause construction award finding that the Claimants' Class Complaint should be accepted and that they should be permitted, pursuant to Rules 4 and 5 of the Supplementary Rules, to apply for certification of their claims as they would under Title VII and the Equal Pay Act in a civil action . . . Sterling seeks a clause construction award that class claims are prohibited by the applicable arbitration agreements.

In 1998, Sterling introduced an employment dispute resolution program known as "RESOLVE." Since the introduction of the RESOLVE Program, new employees have been required to sign the Resolve Program Alternative Dispute Resolution Arbitration Agreement as a condition of their employment. This Agreement is the subject of the clause construction determination requested by the parties. Persons employed by Sterling at the time the program was implemented were not required to sign the Agreement, but were nonetheless bound by its terms as a condition of their continued employment. Each version of the Agreement requires Sterling employees to consent to its terms as a condition of hire or continued employment.

Appendix O

RESOLVE is a three-step program. The first step requires the employee to complete a written complaint, along with references to supporting evidence the employee may possess. Thereafter, Sterling makes a determination on the merits of the complaint. If the employee is dissatisfied with Sterling's determination, he or she may proceed to the second step in which the claim is referred to mediation or a panel of employees. Sterling is responsible for choosing whether the claim goes to mediation or the panel, and if mediation is chosen, Sterling alone selects the mediator. In the event the complaint is not resolved at this stage, the employee may proceed to the third step by requesting arbitration, which the RESOLVE Arbitration Agreement provides be conducted "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") as amended by the Sterling RESOLVE Program." "In the event of a conflict between the RESOLVE Program Arbitration Rules and the AAA Employment Dispute Resolution Rules, RESOLVE Program Arbitration Rules will control."

Each of the RESOLVE Program Arbitration Agreements provides that the claims asserted by the employee are governed by the law of the jurisdiction in which they arose; that "[e]ach eligible arbitrator must be licensed to practice law in the applicable state of dispute"; and that arbitrations must be conducted at a location "near where [the] Employee worked for Sterling," absent undue hardship as determined by the arbitrator.

All versions of the Agreement contain language that is identical or substantially similar to the following:
I hereby agree to utilize the Sterling RESOLVE Program

to pursue any dispute, claim, or controversy ("claim") against Sterling * * * regarding any alleged unlawful act regarding my employment or termination of my employment which could have otherwise been brought before an appropriate government or administrative agency or in a appropriate court, including, but not limited to, claims under * * * Title VII of the Civil Rights Act of 1964; The Civil Rights Act of 1991; * * * the Fair Labor Standard(s) Act; * * *. I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g. monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE Program.

* * * The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

Although the RESOLVE Program Arbitration Agreement has apparently been modified in some respects since the inception of the program, no version of the Agreement expressly prohibits the pursuit of class claims; indeed, there is no mention of class claims in any version of the Agreement.

All versions of the RESOLVE Arbitration Agreements provide that the "agreement shall be governed by and interpreted in accordance with the laws of Ohio."

The question of whether an arbitration agreement prohibits the pursuit of class claims, or "what kind of

arbitration proceeding the parties agreed to," is one of contract interpretation to be determined by the arbitrator. *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003); *Stolt-Nielsen SA v. Animal Feeds Int'l Corp.,* 548 F.3d 85 (2d Cir. 2008).

Although numerous courts and arbitrators have struggled with the question of whether class claims are permitted or prohibited by an agreement that does not expressly address the issue, the question has apparently not been addressed in any reported decision by an Ohio court.

Under Ohio law, contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *Skivolocki v. East Ohio Gas Co.,* 38 Ohio St. 2d 244, 247 (1974). "The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract." *Montgomery v. Bd. of Educ. of Liberty Township, Union Cty.,* 102 Ohio St. 189, 193 (1921).

Applying these principles, I find that the RESOLVE Arbitration Agreements do not prohibit class claims.

Sterling argues that RESOLVE's unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators establish that the parties never intended class arbitration of employee claims. Sterling further argues that ignoring the terms of RESOLVE that are inconsistent with class arbitration would "rewrite" the parties' Agreement.

I note at the outset that the very concept of intent is problematic in the context of a contract of adhesion. Because this contract was drafted by Sterling and was

not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed. Notably, Sterling acknowledges in its reply brief that it has deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition, despite numerous arbitral decisions that class claims are permitted in the absence of an express prohibition. Under these circumstances, construing the Agreement to contain a waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract. *Montgomery,* 102 Ohio St. at 193; *cf. Mastrobouno v. Shearson Lehman Hutton, Inc.,* 514 US 53, 64 (1995).

I further find that agreeing to a step process for individual claims does not manifest an intent to waive the right to participate in a collective action, where, as here, the Agreement expressly gives the Arbitrator the "power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction."[1]

CONCLUSION

The RESOLVE Arbitration Agreements cannot be construed to prohibit class arbitration.

Pursuant to Rule 3 of the Supplementary Rules for Class Arbitration, the Arbitrator retains jurisdiction, but these proceedings shall be stayed for 30 days to permit any Party the opportunity to move a court of

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[1] Arbitrators faced with agreements containing similar provisions have found them insufficient to reflect any mutual intent to preclude arbitration of class claims. *See* cases cited at pages 5-6 of Claimant's Clause Construction Response Brief.

competent jurisdiction to confirm or to vacate this Clause Construction Award. If all Parties inform the AAA in writing during the period of this stay that they do not intend to seek judicial review of this Clause Construction Award, or once the requisite time period expires without any party having informed the AAA that they have done so, this matter shall proceed, and the Parties are directed to promptly schedule a telephone conference with the Arbitrator. If any Party informs the AAA within the time period provided that it has sought judicial review, further proceedings may be stayed until the AAA is informed of the ruling of the Court.

SO ORDERED.

6/1/09
Date KATHLEEN A. ROBERTS

I, Kathleen A. Roberts, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Clause Construction Award of Arbitrator.

6/1/09
Date KATHLEEN A. ROBERTS

APPENDIX P — RESOLVE AGREEMENT OF LISA MCCONNELL

Sterling Jewelers Inc.
RESOLVE PROGRAM
Alternative Dispute Resolution
Arbitration Agreement

I hereby agree to utilize the Sterling RESOLVE Program to pursue any dispute, claim, or controversy ("claim") against Sterling, its predecessors, successors, affiliates, parent, subsidiaries, divisions, related companies, current and former directors, officers, shareholders, representatives, employees, insureds, members and servants regarding any alleged unlawful act regarding my employment or the termination of my employment which could have otherwise been brought before an appropriate government administrative agency or in an appropriate court including, but not limited to, claims under the Age Discrimination in Employment Act of 1967; The Older Workers Benefit Protection Act; Title VII of the Civil Rights Act of 1964; The Civil Rights Act of 1991; Sections 1981 through 1988 of Title 42 of the United States code; the Employee Retirement income Security Act of 1974; The Immigration Reform and Control Act; the Americans with Disabilities Act of 1990; The Fair Labor Standard Act; The Occupational Safety and Health Act; The Family and Medical Leave Act; any state Human Rights/Civil Rights Statutes; Minimum Wage Act; Equal Pay Law; any other federal, state or municipal civil or human rights law or any other municipal, state or federal law, regulation or ordinance; or any public policy, contract, tort or common law. I understand that by signing this Agreement I am waiving my right to

obtain any legal or equitable relief (e.g., monetary, injunctive or reinstatement) through any government agency or court, and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE Program. I retain the right to file a charge or complaint with governmental administrative agencies such as the National Labor Relations Board or the Equal Employment Opportunity Commission and to assist or cooperate with such agencies in their investigation or prosecution of charges, although I waive my right to any remedy or relief as a result of such charges or complaints brought by such governmental administrative agencies.

I agree to follow the multi-step process outlined in the RESOLVE Program which culminates in the use of arbitration. In this event the claim shall be arbitrated by one Arbitrator in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") as amended by the. Sterling RESOLVE Program. I understand that I will be required to pay the first $250 of the costs of commencing an arbitration with the AAA and that the remainder of these costs will be paid by Sterling. The decision or award of the Arbitrator shall be final and binding upon the parties. The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law. An arbitration award may be entered as a judgment or order in any court of competent jurisdiction. I agree that any relief or

recovery to which I am entitled from any claims arising out of my employment or cessation of employment shall be limited to that awarded by the Arbitrator.

I understand that this Agreement is being made under the provision of the Federal Arbitration Act (9 U.S.C., Section 1-14) and will be construed and governed accordingly.

I understand that a copy of the RESOLVE Program Guidelines and the AAA Employment Dispute Resolution Rules are available for my review.

I understand that neither the terms nor conditions described in the Agreement are intended to create a contract of employment for a specific duration of time. Since employment with Sterling is voluntarily entered into, I am free to resign at any time. Similarly, Sterling may terminate the employment relationship with me at any time.

This Agreement shall be governed by and shall be interpreted in accordance with the laws of the State of Ohio.

If for any reason this Agreement is declared unenforceable, I agree to waive any right I may have to a jury trial with respect to any dispute or claim against Sterling relating to my employment, my termination, or any terms and conditions of my employment with Sterling.

If any term or provision of this Agreement is declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, such term or provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

Appendix P

The terms of this Agreement cannot be orally modified. Sterling reserves the right to modify this Agreement, if done so in writing, and only by the Sterling Executive Committee and the employee.

I understand that I would not be or remain employed by Sterling absent of signing this Agreement. I have been advised of my right to consult with an attorney of my choice, at my expense, regarding this Agreement. My agreement to accept arbitration can be revoked any time within fourteen (14) days of my signing this Agreement. Such revocation must be made in writing. My revocation of this agreement will result in immediate separation from Sterling. I have had an opportunity to consider this Agreement and have decided to sign knowingly, voluntarily, and free from duress or coercion.

Lisa McConnell	6/20/01
Employee Signature	Date
Lisa McConnell	1642
Print Name	Store Number

APPENDIX Q — RESOLVE PROGRAM ARBITRATION RULES

Sterling Jewelers Inc. RESOLVE Program Arbitration Rules

JURISDICTION

The jurisdiction of the Arbitrator shall be limited to complaints regarding alleged unlawful activity relating to employment, which includes unlawful harassment or termination. The arbitrator shall determine whether the conduct complained of constitutes unlawful activity under applicable federal, state or local laws/statutes/common law where the dispute arose.

In reaching a decision, the arbitrator may not modify Company rules, policies and procedures.

ARBITRATOR SELECTION

The first list of available eligible, and neutral arbitrators shall contain nine (9) names. Each eligible arbitrator must be licensed to practice law in the applicable state of dispute. Each party strikes alternately a name until the arbitrator is chosen. The employee shall strike first. A second list may be requested.

BURDEN OF PROOF

The burden of proof shall be in accordance with applicable federal, state or local law/statutes/common law. The Federal Rules of Evidence shall apply.

COURT REPORTER — STENOGRAPHIC RECORD)

The request for a court reporter during deposition will be approved but must be paid for by the requesting party.

The Company will pay for the cost of a court reporter during arbitration, but the requesting party will be responsible for cost of the arbitration transcript.

INFORMATION EXCHANGE

At least 21 days prior to the arbitration hearing, the parties must submit to the arbitrator and each other a position brief, witness list with brief summary of subject testimony, and all potential hearing exhbits.

DISCOVERY

The parties may engage in any method of discovery as outlined in the Federal Rules of Civil Procedure (exclusive of Rule 26(a)). Such discovery includes discovery sufficient to arbitrate adequately a claim, including access to essential and relevant documents and witnesses. Discovery disputes are subject to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Discovery closes 75 calendar days prior to the hearing date unless a showing of good cause to the arbitrator. Any exhibits or witnesses not disclosed prior to the discovery deadline will be excluded from the hearing except upon a showing of good cause to the arbitrator.

DISPOSITIVE MOTIONS

On or before 70 calendar days prior to the hearing date, either party may file a dispositive motion with the arbitrator pursuant to the Federal Rules of Civil Procedure. The party opposing said Motion must file a response within 14 calendar days. The party filing the dispositive motion will then have 5 calendar days (excluding weekends and holidays) to file a reply. The arbitrator will then draft a written decision concerning whether

the motion disposes of the case. That decision will be sent to the parties at least 30 calendar days before the scheduled arbitration and will set forth the factual and legal bases for the decision.

WITNESSES

Except for good cause, witnesses shall be limited to (5) per party. Non-witnesses are barred from attendance at the arbitration. Witnesses can be sequestered.

FORM OF AWARD

The arbitrator shall submit to the parties a written award signed by the arbitrator within 30 calendar days of the close of arbitration. The award shall specify the elements of and basis for any award, along with a written opinion, which includes findings of fact and conclusions of law. Damages and the award of attorney fees are not restricted but are to be in compliance with applicable law. If the Arbitrator finds that an adverse employment action was lawful, the arbitrator shall have no authority to reduce the action, or to make decisions based upon alleged "unfairness."

ARBITRATOR FEES

Arbitrator fees are covered by the employer.

GENERAL PROVISIONS/AUTHORITY

The parties have the right to be represented by legal counsel. RESOLVE is subject to the Federal Arbitration Act and The National Rules for the Resolution of Employment Disputes of the American Arbitration Association. In the event of a conflict between the RESOLVE Program Arbitration Rules and the AAA Employment Dispute

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Resolution Rules, RESOLVE Program Arbitration Rules will control. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise, procedural questions, which grow out the dispute and bear on the final disposition, are also matters for the arbitrator. However, where a party already has initiated a judicial proceeding, a court may decide procedural questions that grow out of the dispute and bear on the final disposition of the matter (e.g., one (1) year for filing a claim).

APPENDIX R — RESOLVE GUIDELINES BROCHURE

THE RESOLVE PROGRAM
ALTERNATIVE DISPUTE RESOLUTION (ADR)

RESOLVE
1-800-394-4205

Sterling Jewelers Inc.

Appendix R

Sterling Jewelers Inc.

Sterling's success and momentum is due in part to the continuous improvements made within all facets of our business. As such, Sterling is pleased to offer a program designed to assist both the Company and you in resolving workplace misunderstandings, problems and/or disputes.

Workplace disputes occasionally occur and can lead to lawsuits. Lawsuits are disruptive, involve enormous expense, can take years to resolve and often result in disappointing outcomes.

For these reasons, the ***"RESOLVE" Program*** *was designed to provide a more efficient way to deal with workplace disputes* ***without going to court!*** *This program involves a multi-step approach for dealing with disagreements over employment actions that an employee believes and unlawful.*

This program has many benefits including:

- *a fast and economical process;*
- *opportunity for dispute review by a skilled* ***Mediator or Review Panel****;*
- *the ability to appeal to an outside* ***Arbitrator****; and*
- *provides all the remedies and awards otherwise available through the judicial system.*

One the following pages, you'll find a description of the program, how it works and how to use it.

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RESOLVE

ALTERNATIVE DISPUTE RESOLUTION (ADR)

PROGRAM HIGHLIGHTS

- Effective June 1, 1998
- Applicable to all employees.
- Provides employee with a fast, fair, private, inexpensive way to handle employment disputes that involve alleged unlawful actions.
- Involves **3 Steps:**

STEP 1

FILING A COMPLAINT:

An employee who believes he/she has been subjected to an unlawful employment action, harassment or termination must contact the **RESOLVE Program Administrator** and complete a RESOLVE Program Complaint Form.

The party must specify in the form how he/she has been subjected to an unlawful action and the specific relief sought. Unless prohibited by law, the claim form must be fully completed, postmarked and sent to the RESOLVE Program Administrator within one (1) year of the alleged unlawful action.

After an investigation, a response (answer) will be postmarked to the employee no later than 30 days after receipt of the complaint form.

If the employee is satisfied with the response, no further action is required.

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A written agreement containing the terms of any settlement will be signed by the parties who will be legally bound by the terms of the agreement.

If not satisfied by the outcome of **Step 1**, an employee may proceed to **Step 2**. An employee must request, fully complete and return a Step 2 appeal form which must be postmarked within 30 days of the response date of the **Step 1** determination. Upon receipt of the Step 2 appeal form, Sterling will notify the employee within 45 calendar days as to whether his or her claim is assigned to either mediation or the review panel.

STEP 2

APPEAL FOR FURTHER REVIEW

Step 2 allows the employee to appeal for further review if he/she is not satisfied with the outcome of **Step 1**.

In the **Step 2**, the case is assigned by the **RESOLVE Program Administrator** to:

- a skilled outside Mediator

or

- a 5-member Review Panel.

As in **Step 1**, if the employee is satisfied with the response, no further action is required.

If not satisfied by the outcome of **Step 2**, an employee may proceed to **Step 3.** An employee must request, fully complete and return a **Step 3** appeal form which must be postmarked within 30 days of the response date of the **Step 2 determination**.

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STEP 3

ARBITRATION

Step 3 allows the employee to file for neutral and binding **arbitration** if the employee is dissatisfied with the decision or proposed resolution in **Step 2**.

Step 3 involves a formal hearing where both the employee and the Company may utilize legal representation. This step utilizes a jointly selected outside/neutral arbitrator from the American Arbitration Association. This independent, not-for-profit agency was founded in 1926 and helps to resolve tens of thousands of disputes a year.

The arbitration will take place at a mutually convenient time and location near the site where the complaint arose and shall be governed by the Federal Arbitration Act, the substantive law of the jurisdiction where the complaint arose and the National Rules for Resolution of Employment Disputes of the American Arbitration Association and the RESOLVE Program Arbitration Rules.

*Specific rules for **Step 3** Arbitration will be provided upon request or at the time the employee invokes the **Step 3** process.*

The Company will pay for the Arbitrator's fees.

The Arbitrator will hear the case and render a decision. The Arbitrator can award all remedies available as provided by law. The decision of the Arbitrator will be final and binding upon the employee and the Company.

Arbitration is the final step. Neither party may file a lawsuit instead of using the RESOLVE Program or

accepting the Arbitrator's final decision

The Company prohibits any retaliation against you for using the program.

WHAT IS COVERED UNDER THE RESOLVE PROGRAM

The *RESOLVE* Program applies to <u>only</u> these types of claims:

- Discrimination or harassment on the basis of race, sex, religion, national origin, age, disability or other protected bases.
- Retaliation for filing a protected claim (such as Workers' Compensation) or exercising protected rights under any statute.
- Violations of federal, state, county, local or other government constitution, statute, or ordinance, regulation, public policy or common law affecting economic terms of employment.
- Personal injuries arising from an employment decision or action except those covered by Workers' Compensation.
- Breach of any express or implied contract; breach of a covenant of good faith and fair dealing, claims of wrongful termination or constructive discharge, or claims for incentives (such as bonuses).
- Embezzlement, theft, restitution, trade secrets/ propriety information, other willful misconduct.

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WHAT IS NOT COVERED

- Claims for Workers' Compensation benefits.
- Criminal charges.
- Claims for unemployment compensation benefits.
- Claims for employment decision/actions NOT related to discrimination, harassment or violations of any law.

QUESTIONS AND ANSWERS

If my dispute is covered, is it necessary that I use this program?

All employees are required to use the program to resolve applicable disputes.

If I am terminated, can I use the RESOLVE Program?

Yes, but only claims involving alleged unlawful actions are subject to the RESOLVE Program.

If I quit because I've been sexually harassed, do I have to use this program?

Absolutely. The RESOLVE Program covers harassment.

Do I need to file an administrative charge to initiate a claim with RESOLVE?

Although you retain the right to file such a charge, you do not need to file a charge to initiate a claim under RESOLVE. Further, if you do file a charge or any other action in any other forum, the time limitation contained

in RESOLVE will continue to run. In order to bring a claim under RESOLVE, you must request, complete, postmark and send a **Step 1** claim form within 1 year of the alleged unlawful activity regardless of any other types of actions you might file. Failure to do so, will result in an complete bar to your claim.

What is the first step? How do I get started with a claim?

Within one (1) year of any action, you must call 1-800-394-4205 to contact the **RESOLVE Program Administrator** and arrange to complete a RESOLVE Program Claim Form.

In Step 1, an Employee Relations Specialist will interview you and investigate your claim. The faster you call, the faster the resolution.

What if I don't like the outcome of Step 1?

Appeal to **Step 2** and the **RESOLVE Program Administrator** will assign your claim to either a **Mediator** or **Review Panel**. A skilled mediator will meet with you and a Company official to attempt to resolve a claim or your case will be assigned for review by a 5-member Review Panel.

Does Step 2 cost me money?

It shouldn't.

May I bring a lawyer to Mediation or the Review Panel?

If you so desire, you may bring an attorney with you for

mediation. The Review Panel is an internal function and personal appearances are not required.

How does the Review Panel work?

From a pool of trained panel members representing employees from all levels of Sterling, four (4) employees will be chosen by you to join an employment attorney to form a review panel to hear your case. The panel is specifically charged with reviewing evidence and rendering an impartial decision. The panel's decision will be binding on the Company.

OK, if Step 2 doesn't satisfy me, what do I do?

Contact the **RESOLVE Program Administrator**. You will be mailed an application for Arbitration.

The application must be fully completed and postmarked within 30 days of the response date of the Step 2 determination.

Through an elimination process, you and the Company agree on one Arbitrator who will conduct the hearing, listen to both sides and render a decision. This process will include witness testimony, production of evidence, etc. and is subject to The Federal Rules of Evidence. If the decision is in your favor, you may be awarded remedies which may include reinstatement, back-pay, damages, payment of reasonable attorney fees, or any other remedy that a court could provide. The Arbitrator's decision is final and binding on both the employee and the Company.

Do I need a lawyer for Step 3?

Bringing a lawyer is encouraged though not required. An arbitration hearing is similar to a court trial with a set of rules and procedures that must be followed. A Company lawyer normally will be present.

How are decisions communicated in Steps 2 and 3?

A written document examining the Claim and its merit or lack or merit will be provided to both the employee and the Company. If the decision is for the employee and the remedies are awarded, a claim settlement agreement may be required.

How long does it take to resolve a dispute using this program?

That depends on how may steps you take. However, even if you go all the way to arbitration, a decision can be reached in months rather than years, as through the judicial (court) system.

	Judicial System Courtroom	**ADR RESOLVE Program**
Average time to resolve the case.	Resolution can take years.	Resolution can be completed in **3-4 months or sooner.**
Typical **time spent** in case for personal testimony:	**1 to 4 weeks**	**1 to 3 days**

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Location of hearing:	**Wherever court is located.**	In a **location convenient to you.**
Rules and procedures:	**Very technical and varies** between courts. Cases can be dismissed before you've had a chance to present your case.	Simple process controlled by **minimal rules**. All proceedings are clearly outlined.
Cost:	**Multiple thousands of dollars.**	**Minimal cost, if any**, dependent upon steps taken.
Selection of personal judging the case:	**A judge who may not have employment law experience**. A possible jury (of unknown people) selected by the judge and lawyers.	In **Step 3 you and the Company select a skilled, experienced employment law Arbitrator**.
Decisions:	Decisions **can be appealed and overturned**.	Decisions is protected if for you. **The Company cannot appeal**.

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The RESOLVE Program became effective 6/11/98 and is a mandatory and binding Alternative Dispute Resolution (ADR) process applicable to all Sterling Jewelers Inc. employees.

The RESOLVE Program is subject to the Federal Arbitration Act.

The RESOLVE Program does not restrict potential remedies.

The RESOLVE Program does not alter the terms of employment as established within the Sterling Jewelers Inc. Employees handbook.

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