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APPEAL NO. 08-1247

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUINTON BROWN, JASON GUY, RAMON ROANE, ALVIN SIMMONS, SHELDON SINGLETARY, GERALD WHITE, and JACOB RAVENELL, individually and on behalf of the class they seek to represent,

Plaintiffs-Appellants,

v.

NUCOR CORPORATION and NUCOR STEEL-BERKELEY,

Defendants-Appellees.

ORIGINAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants certifies that the following is a complete list of the trial judges; attorneys involved in the case; and all persons, associations of persons, firms, partnerships, and corporations having an interest in the outcome of this case:

1. Plaintiff-Appellants: Quinton Brown, Jason Guy, Ramon Roane, Alvin Simmons, Sheldon Singletary, Gerald White, and Jacob Ravenell, individually and on behalf of the class they seek to represent;

2. Richard D. Alaniz, Cary A. Farris, Terry E. Schraeder; David M. Minces, Marcus Roland Patton, and the attorneys working for or with the firm of Alaniz & Schraeder, LLP attorneys for the defendants-appellees;

3. Armand Derfner, D. Peters Wilborn, Jr., Aaron Tobias Polkey , and the attorneys working for or with the firm of Derfner, Altman & Wilborn, attorneys for the plaintiffs-appellants;

4. E. Duncan Getchell, Jr., and the attorneys working for or with the firm of McGuire Woods LLP, Attorneys for Defendant-Appelllee;

5. Honorable C. Weston Houck, United States District Judge;

6. Honorable George C. Kosko, United States Magistrate Judge;

7. Nucor Corporation, Defendant-Appellee;

8. Nucor Steel Berkeley, Defendant-Appellee;

9. Robert L. Wiggins, Jr., Ann K. Wiggins, Susan G. Donahue, and the attorneys working for or with the firm of Wiggins, Childs, Quinn and Pantazis, LLC, Attorneys for Plaintiff-Appellant;

10. John S. Wilkerson, III, Nosizi Ralephata, and the attorneys working for or with the firm of Turner, Padget, Graham & Laney, P.A. attorneys for the defendants-appellees.

Of Counsel

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I. STATEMENT OF JURISDICTION

Jurisdiction rests on this Court's order granting permission to appeal.

II. STATEMENT OF ISSUES

1. Was it error or an abuse of discretion to deny certification of a class of approximately 100 African-American employees who were: (a) found to be subject to "plant-wide racist acts potentially experienced by every African-American employee working at the plant" (JA8998); and (b) found to be subject to a "plant-wide promotion procedure allowing primarily white managers and supervisors to rely on subjective criteria to select candidates [that] is probative of a plant-wide employment practice discriminating against African-American employees" (JA9102)?

2. Was it error or an abuse of discretion to reduce the statistical significance of the disparate impact and pattern-or-practice evidence by: (a) refusing to consider promotions for which Nucor had destroyed its application records; and (b) refusing to consider alternative applicant benchmarks that this Court has previously held to be proper and that the district court found "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant" (JA8985)?

3. Was it error or an abuse of discretion to require production of only 45 of the several hundred promotions that were subject to the challenged subjective promotion procedure?

4. Was it error or an abuse of discretion to require the plaintiffs to prove the merits of a disparate impact or pattern-or-practice claim at the class certification stage of the case?

5. Was it error or an abuse of discretion to hold that plaintiffs seeking to enjoin a pattern-or-practice of racial discrimination or disparate impact are not adequate class representatives if they also seek instatement into the promotion that they were denied because of such pattern or impact?

III. STATEMENT OF CASE

This case involves a single steel manufacturing plant in Huger, South Carolina, near Charleston. Seven African-American employees brought suit seeking to redress disparate impact and a pattern-or-practice of racial discrimination on behalf of themselves and a putative class of approximately 100 other black employees. JA43. Sixteen witnesses' declarations described a racially hostile work environment and subjective promotion procedure throughout the entire plant. JA993-1124,1807-1888; JA8537-8560.

The district court found that "plaintiffs have presented plant-wide racist acts potentially experienced by every African-American employee . . . which include: (1) racist e-mails; (2) display of the confederate flag; and (3) racist remarks over the plant radio." JA8988-8989. The court also found that "Nucor's plant-wide promotion

procedure allowing primarily white managers and supervisors to rely on subjective criteria to select candidates for promotions is evidence probative of a plant-wide employment practice discriminating against African-American employees." JA9102.

These twin findings of a "plant-wide" hostile environment and promotion procedure were held not to be enough to support certification of a class because: (1) there was additional racial hostility that created a second hostile environment at the department level (JA8988-8989,9100-9101); and (2) although the court found that plaintiffs' experts had shown significant racial disparities in promotions that "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant" (JA8985), the court preferred to consider only those promotions for which Nucor had not destroyed its application records rather than consider all the promotions at issue by using an alternative applicant benchmark for the missing applications. JA8985. The court found that statistical significance fell from -2.54 standard deviations to -1.48 deviations when it eliminated the promotions for which Nucor had destroyed its application records. JA8985.[1] After eliminating promotions and statistical

[1] The test of statistical significance was further hampered when the court limited discovery to just 45 of the several hundred promotions that were subject to the subjective promotion procedure that was found to exist. JA486-487,399-400,408-409,1161,1171. Nucor was allowed to handpick those 45 promotions, and to exclude production of promotions in the very same jobs made by the same Department Managers who refused to promote the named plaintiffs. JA399-400,408-409,1161,1171.

significance in this manner, the court denied class certification because, in its opinion, plaintiffs' statistical evidence had not proven a conclusive case of disparate impact or pattern-or-practice discrimination on the merits. JA8981-8988,9103.

IV. STATEMENT OF FACTS

A. Size And Organization Of The Berkeley Plant

Nucor Steel Berkeley is a small plant with six Department Managers who report to the plant's General Manager, Ladd Hall. JA8538-8560,1126-1127. The six departments are melting, hot mill, cold mill, beam mill, shipping and maintenance. JA8539. The melting, shipping and maintenance departments work in tandem with the employees of the other three departments to melt, form, finish and ship steel products to customers. JA8539-8540. A plant-wide centralized posting and bidding procedure for promotions is controlled by a central personnel department at the plant; and employees are allowed to bid for promotions in any of the six departments, not just their own. JA8977. The plant's General Manager must approve and sign all Change of Status forms that effectuate promotions (JA477-478) and is in charge of any race discrimination or harassment investigations or initiatives. JA1126-1127.

The plant was constructed and went into operation ten to twelve years ago in the mid-to-late 1990's. JA334. There are 611 employees, of whom 71 (11.6%) are African-American. JA8539. African-Americans were hired through local political

efforts when the plant first opened, but have been unable to advance since then. JA8539,993-1125,8538-8560,1154-1171.

B. The Court Found That A Subjective Promotion Procedure Was Used Throughout The Plant

Nucor utilizes the same subjective promotion procedure throughout the Berkeley plant. JA9102, 8978. The district court specifically found "a plant-wide promotion procedure allowing primarily white managers and supervisors to rely on subjective criteria to select candidates for promotions." JA9102. It also found that this was "evidence probative of a plant-wide employment practice discriminating against African-American employees." JA9102. The court determined that Nucor "allows department managers to create their own promotion procedures" and that "[t]estimony from four department managers and one supervisor reveal the following similarities in each department's promotion procedures: . . . decision makers rely on subjective criteria, such as attitude, teamwork, and willingness to learn, to select applicants [and] an objective system to evaluate applicants for jobs is lacking." JA8978. The court also found that in order to promote someone "the supervisor, the department manager, *and the general manager* must approve a written change of status and then submit the change of status form to the personnel office." JA477-478 (emphasis added).

The evidence supports the finding of a "plant-wide practice discriminating against African-American employees." JA9102. The evidence showed reliance on

subjective opinions of who to promote throughout the plant (JA1721-1722,1725-1762) expert testimony that such subjectivity unnecessarily "facilitates injecting individual bias into the process" (JA1523), direct and anecdotal evidence of openly expressed racial bias by department managers and supervisors who were allowed to rely on nothing more than their subjective opinions in making promotions (*see* pp. 9-12 *infra*), a pervasive culture of racial hostility that existed plant-wide (*see* pp. 9-12, 14-20 *infra*), and statistics that showed black promotion applicants were selected only 36.2% as often as would be expected in the absence of subjective racial bias (JA1162). The district court found there are at least "23 similar positions throughout the six production departments in addition to the jobs bid on by the plaintiffs." JA477-478; JA486-487.

Plant-Wide Subjectivity: Nucor has a plant-wide promotion policy in its Employee Handbook, but the plant's General Manager and Department Managers testified that they were not required to follow that policy or any other defined criteria in making promotions. JA1721-1722,1725-1762; *see also* JA993-1124. The plant's General Manager submitted an affidavit stating that "each department manager is given the opportunity to choose their own methods of determining hiring, promotions and training." JA1129. Department managers and supervisors testified that they did not follow the criteria listed on the job postings for promotion (JA1727-1728,1739-

1740,1787), that they cannot really say what criteria were followed (JA1725-1728,1734,1753,1760), and that what they considered was all just "in their heads" or "gut feelings" of whom to promote. JA1736,1742,1758; JA1516,1520.

The district court found that the Department Manager decides who to promote with input from his supervisors. JA477; *see also* JA1781,1766-1780. Employees were allowed to bid for promotions in any department throughout the plant, as the court found below. JA8977,1785,1790.

Expert Evidence: An expert in industrial promotion procedures, Dr. Michael Buckley, examined Nucor's promotion procedure and found that Department Managers "repeatedly indicated that they do not adhere to the written policy" on promotions, were "unable to provide detailed description of the . . . procedures they used and the procedures used by their subordinate managers", and admitted that they relied upon "'gut feelings' . . . in a number of different selection contexts." JA1516,1520,1736,1742,1758.[2]

Dr. Buckley testified that Nucor makes promotions through "the subjective combination of factors that are themselves often subjective in nature." JA1515. He found that "[t]his is not a competent selection system" and that the "[l]ack of structure

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[2] Dr. Buckley is an Industrial and Organizational Psychologist and the J. C. Penney Chair in Business Management at the University of Oklahoma. JA1527.

in an interview facilitates injecting individual bias into the process." JA1515,1523. He also determined that such a subjective promotion process was unnecessary because "[t]here are a number of traditional alternatives that could have been considered by Nucor", including "development of a structured interview" that asks "the same set of questions" and "ensures more of a uniform, consistent, and fair approach" to making promotions. JA1523.

Plaintiffs' experts also determined from Nucor's records, policies and depositions that "the selection procedure for hiring and promotion have these same basic features throughout the Company regardless of department." JA1157; *see also* JA1513-1548. Fifteen declarations were submitted from class members describing how Nucor's subjective promotion procedure was used to deny them promotions and to generally preclude black employees from being promoted throughout the plant. JA993-1124. The district court found that the named plaintiffs were denied promotions in four of the six departments of the plant. JA477-478,486-488. Additional evidence from eight other class members described their similar experiences in all six production departments.[3]

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[3] Jacob Ravenell worked both in the melt shop and beam mill (JA1029-1037); Ramon Roane worked in both the hot mill and the beam mill (JA93-1007); Sheldon Singletary worked in the hot mill (JA1049-1050); Gerald White worked in the roll shop (JA1039-1040); Quinton Brown worked in melting and the beam mill (JA1009); Jason Guy worked in the cold mill and beam mill (JA1061); Gerald White worked in the

***Direct And Anecdotal Evidence Of Actual Racial Bias*:** Plaintiffs proved not just a subjective promotion process, but actual subjective racial bias that was openly expressed by department managers and supervisors. JA993-1125,1073-1076,1807-1842,1843-1888; *see also* JA993-1072,1077-1124,8538-8560. The evidence showed that the same department managers and supervisors who were not required to follow any set criteria in making promotions had also been allowed to foster a culture of racial hostility throughout the plant. JA993-1071. The district court's finding of a "plant-wide subjective promotion procedure" was supplemented by a second finding of "plant-wide racist acts potentially experienced by every African-American employee." JA8988.

For example, a Caucasian employee, Walter Cook, testified that both white supervisors and co-workers "frequently" called black employees "nigger", "bologna lips", "yard ape", "porch monkey" and similar racial insults. JA1809-1841,1074-1076.

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bloom yard and the roll shop (JA1039-1040); Alvin Simmons worked in the beam mill (JA1021). Aaron Butts worked in melting and sought promotions in that department and the beam mill (JA1083-1086); Earl Ravenall worked in melting and sought promotions in the hot mill, cold mill and melting (JA1109-1114); Jerry Nick worked and sought promotions in the hot mill (JA1087-1094); Bernard Beaufort worked in shipping and sought promotions there and in the beam mill (JA1115-1120); Byron Turner worked in maintenance (JA1120-1121); Robyn Spann was an employee of both the administrative department and the beam mill and sought promotions in the cold mill and the beam mill (JA1101-1108); John Singletary was a cold mill employee (JA5661-5788); and Ken Hubbard worked and sought promotions in the beam mill (JA1095-1099).

Cook testified that such racial slurs occurred "every day" by "multiple white supervisors and co-workers" and were so voluminous that they "could fill half of this room up with paperwork." JA1074-1075,1809-1822. Cook "heard multiple white supervisors and white co-workers use racial slurs." JA1074-1075.

A white supervisor, Scott Clark, testified that his Department Manager, Paul Ferguson, said he would never have a black supervisor. JA1885-1886,996. Ferguson also said "You know, that black bastard will never move up as long as I'm manager", referring to one of the named plaintiffs, Ray Roane, who was a candidate for promotion to supervisor. JA996,1885-1886. There had never been a black supervisor at the Berkeley plant at this point, and that remained true until after the EEOC Charges that led to this lawsuit were filed. JA998. Ferguson also wore a Confederate Flag emblem on his hardhat (JA1070).

Gary Henderson wore a shirt "with a large Confederate flag" throughout the plant as a supervisor. JA1097,1013,1001-1002, 1080-1081,1075. The evidence showed that Henderson "used racial slurs on many occasions" as a supervisor, such as in 2003 when he said, "The damn niggers have been in here messing with my computer and copier machine, I can't keep paper in here because the damn niggers", that there "wasn't any way that nigger could have run that many bars out of the furnace" and that he was "glad the damn nigger got fired." JA1075,1809-1817,1001. Henderson's co-

supervisor, Scott Clark, testified that Henderson also called black employees "DAN", which meant "dumb ass nigger." JA1882-1884,1013-1014. Henderson's use of the acronym "DAN" as a supervisor led to subordinates also using that term and even broadcasting it over the plant radio. *Id.* JA1054-1055. Quinton Brown testified that for several months he didn't know why he was being greeted as Dan when his name was Quinton, and that this continued until someone finally told him that it was an acronym for "dumb ass nigger." JA1013-1014. Henderson also called other black employees a "nigger" or a "damn nigger", along with other racially derogatory terms. JA1820-1822,1001,1080-1081.

Other white employees have also confirmed that white supervisors openly expressed racial bias against black employees. *See* JA1074,1882-1884,1808-1842. Walter Cook "heard multiple white supervisors and white co-workers use racial slurs," including supervisor Paul Nowlin who "used the word nigger so frequently [that] it was part of his everyday language." JA1074,1809-1817,1820-1822,1088. Supervisor Lou Witzleb "used racial slurs on many occasions", such as when he said, "Damn niggers think that they come out here and bring their religious beliefs with them", and also, "I tell you what, we're fixing to have less blacks, we're going to do some thinning out in here." JA1075,1823-1824. Aaron LaCompete, who had supervisory duties as a Leadman, referred to Gerald White "as a nigger on more than one occasion." JA1075-

1076. Other Leadmen with supervisory duties, like Steve Morris, also routinely used racial slurs like "nigger, damn nigger, yard ape, and bologna lips", as did numerous white co-workers who followed their example, like Jim Mutispaugh, Eric Pleasant, Bob Reeves, Roger Rogers, Brian Reilly, Stevie Morris, William Jackson, Chad Funderburk, Dole Hopper, and Jamie Johns. JA1075-1076,1825-1840. For example, when white employee, Chad Funderburk, was repeatedly late for work or would not show up at all, his Leadman, Stevie Morris, said he "was worse than a damn nigger." JA1076. Another supervisor, Sean Hudson, called black employees "boy." JA1010. Jim Mutispaugh said in reference to Ray Roane's promotion application that they would "do everything that they could to make sure that nigger didn't get the job." JA1074-1075. Another white employee, Thomas Prim, confirmed that racial slurs frequently occurred, but did not want to name who had used them. JA1891-1894.

Statistical Evidence: Plaintiffs' experts showed that black employees were 19.24% of the persons who applied for promotion to the jobs Nucor deemed "similarly situated", but were only 7.94% of the persons promoted to such jobs — a difference that "is statistically significant at -2.54 standard deviations from what would be expected if race were neutral in the selection process." JA1162.[4] The evidence also

[4] Plaintiffs' statistical analysis eliminated all non-racial factors that were capable of separation for analysis, like training, discipline and bidding frequency, as possible causes or explanations through a logistic regression. JA1164-1167. *See e.g. Bazemore*

showed that black applicants for promotion to such jobs were selected only 36.2% as often as white applicants for the same job postings, far less than the 80% disparity necessary to establish disparate impact. JA1162; 29 C.F.R. §1607.4D The difference between black employees promoted to those jobs (7.9%) and their availability in the qualified workforce (38.2%) was shown to be -4.94 standard deviations, corresponding to greater than a 99% confidence level. JA1163-1164; JA1154,1501-1513,1213-1500. Plaintiffs' experts further showed that African-Americans comprised more than 38% of the industrial craft and operative employees in the surrounding workforce, but only 13% at Nucor — a difference of "more than -11.00 standard deviations . . fewer . . . than one would expect." JA1158-1159. The district court found that plaintiffs' experts' calculations "may have been reasonable and the statistics based thereon may be relevant to prove discrimination at the plant", but it preferred to limit the analysis to just 2001-2003 because Nucor had not maintained "actual data" on applicant rates for the part of the liability period before 2001. JA8985. This artificially reduced the promotion disparity from -2.54 to -1.48 standard deviations and is one of the issues in this appeal. JA8985.

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v. Friday, 478 U.S. 385, 399-404 (1986) (using and explaining regression analysis). Nucor's statistical expert, Dr. Welch, was unable to come forward with any other regression factors or qualifications that might cause or explain the disparity in African-Americans' rate of promotion or explain it on non-racial grounds for the pre-lawsuit time period (1999-2003).

C. Department Managers And Supervisors Fostered A Racially Hostile Work Environment Throughout The Plant

Although the district court found that "plaintiffs have presented plant-wide racist acts potentially experienced by every African-American employee working at the plant" (JA8988), it denied class certification because *additional* racial hostility also occurred at the department level. JA8988-8989. In the court's view, this combination of a "plant-wide" hostile environment supplemented by additional racial hostility at the department level created "separate 'environments.'" JA8989.

The evidence did not support that belief. Fourteen witnesses attested in their declarations that the confederate flag "was allowed to be displayed throughout the plant in a racially offensive manner", and that "racist e-mails also occurred throughout the plant", as did the comments on the "plant radio." JA1001,1013,1024-1025,1116-1117,1033-1034,1043-1044,1053-1055,1065-1071,1081,1097,1103,1112-1113,1122-1124,5661-5757.

Plaintiffs also submitted substantial other evidence showing that class members simultaneously experienced both the racial hostility found to exist plant-wide and additional hostility of a similar nature that occurred in each department. JA993-1124, 1807-1888,8537-8560. Such racial hostility was not experienced as separate plant-wide and department-wide components, but as part of a single work environment. *Id.*

Plaintiffs' declarations went into great detail in showing that the departments are not independent from one other and are part of the same continuous "environment" in many respects, both physically and in the production process. JA8539-8543,8551-8555. Plaintiffs' declarations attest that "[t]he Beam Mill Department does not have its own physical facilities separate from other production departments, but works in the same area of the plant as employees from the Maintenance and Shipping Departments, and adjacent to the employees in the Melting Department, Hot Mill Department and Cold Mill Department." JA8545,8557. Just as racial slurs or insults occurring in one department were communicated plant-wide via the plant radio and e-mail system, and by display of the confederate flag, the same type of racial slurs or insults were shown to have been communicated from one department or another by word of mouth. JA993-1124,8537-8560.

The evidence showed that racial slurs and insults were commonplace throughout the plant floor, including nigger, DAN (dumb ass nigger), nigger rigged, black gorilla, monkey, black bastard, Sambo, boy, blackie, grease monkey, "you people" and "wigger" (acronym for white nigger). JA993-1124, 8537-8560,1809-1817, 1820-1822,1882-1888. Walter Cook testified that the use of the word "nigger" or epithets such as "bologna lips", "yard ape", "porch monkey" in reference to black employees were commonplace at Nucor Berkeley. JA1837-1840. Gorilla or monkey

noises were also broadcast on the plant radio in response to black employees' communications. JA1002. The litany of racial hostility across the plant is summarized in eighteen declarations and several depositions. JA945-955,8511-8524,2061-5758.

An example of such plant-wide environment is the testimony of one witness who described racial hostility that had been reported to Nucor by more than 50 African-American employees spread across all six departments of the plant. JA1001-1002, JA1003-1004,8546; *see also* JA8511-8524.

> 27. * * * African Americans reported offensive comments and actions referencing the Ku Klux Klan, including a comment made in reference to an African American employee that it was time to "break out the cross and hood," an African American employee being confronted by a white employee with a white sheet over his head with eyes cut out in the form of a KKK hood, and another African American employee reporting that a white co-worker put a white hood over his head and lifted a burning rag in the air then called out the employee's name on the radio, and a large hangman noose was hung prominently in the furnace area. White employees, including white supervisors, have called African Americans racially offensive names, including references to African Americans as "niggers," "boy," "DAN" (meaning "dumb ass nigger"), "you people," "blackie," "dumb black person," and "grease monkey." Racially offensive comments have been widely heard in the plant, including a comment by a white supervisor upon seeing African Americans standing outside his office, "I've got three monkeys sitting outside my office;" a white supervisor saying to another white employee, "Quit playing that nigger music;" a comment by a white employee, "Send all of the blacks back" and "I ain't got no use for them;" and a white employee yelling at African American employees, "Y'all fucking people are lazy asses." African Americans reported racially offensive graffiti being displayed on the walls of the plant, including the bathroom walls, including the word "nigger" and "Nucor Steel–Niggers go home." Offense was taken to Confederate flags seen on vehicles and bumper

> stickers, on clothes, on hard hats, on T-shirts, on lockers. E-mails with racially offensive content was send to African Americans at Nucor-Berkeley, including an e-mail asking for votes against politicians who have done things for "niggers, spics, and jews," an e-mail depicting a robotic golf caddy with the joke that it wasn't painted black or it would show up for work late and steal the golf clubs; an e-mail showing a black man with a rope around his neck; swastikas and Dixie flags depicted on e-mails, an e-mail with a black woman with the word "stupid" written on her; and an e-mail depicting a cross burning and a black man being dragged.

JA1003-1004; *see also* JA8546.

The evidence also showed that confederate flags, which Nucor admits it knew to be racially offensive, were sold in the company store with Nucor's logo, worn by supervisors, and otherwise displayed throughout the plant. JA1013,1104-1105,1066,1070. Supervisors and department managers wore the confederate flag emblem at work. *Id.* and JA1097. Nucor's officials, including the Plant Manager, admitted that they knew the confederate flag was racially offensive to African-Americans. JA1799-1800; JA1803-1804 ("some people see it as a reference to slavery"); JA1804a-1804b. The General Manager, Ladd Hall, testified that there is no policy against use of Confederate flag in the plant. JA1801. Confederate flags appeared on hard hats, belt buckles, tool boxes, on license plates, as well as on T-shirts and bandanas sold by Nucor in its company store, some with "Nucor-Berkeley" embroidered on the Confederate flag." *Id.* Supervisors, like Sean Hudson, Chris Anderson, Gary Henderson and Paul "Sarge" Flowers, and supervising Leadmen, like

Stevie Morris, also wore the Confederate flag on their hardhats while supervising black employees, or prominently displayed the flag in their offices. JA1013,1104-1105,1066. Another Leadman, Jamie Johns, was seen waving a Confederate flag on Nucor's premises, laughing at plaintiff Quinton Brown as he did it. JA1013. White co-workers followed the lead of their supervisors and leadmen by wearing Confederate flag emblems on their hardhats and lunch boxes in the plant, and on their vehicles in the plant parking lot. *Id.* Other racial emblems proliferated throughout the plant, such as a hangman's noose held up to a black employee who was told "This is for you." JA1002.

Such racial hostility was particularly threatening and offensive because black employees are a small percentage of the workforce and often have to work as the only African-American on a crew in isolated areas of the plant at night when there is little management or supervision on duty. JA4300-4301.

The evidence also shows that black employees at Nucor-Berkeley have been continuously exposed to racially offensive statements throughout the plant, such as supervisors saying "niggers aren't smart enough" to break production records; hearing work referred to as "nigger rigged"; being told that the term "wigger" means "white nigger"; being told there is nothing wrong with the word "nigger," that "niggers" and white women shouldn't mix, and that there were "niggers" everywhere at Myrtle

Beach; having the dialect used by African Americans ridiculed; hearing jokes that racially stereotype African-Americans, such as associating black people with chicken, collard greens and watermelon; hearing the restaurant "Red Lobster" called "Black Lobster" because too many black people eat there; being told that white co-workers do not like to go to the movies if there will be African Americans in the audience; hearing shovels used by black employees called "coon spoon"; hearing that black kids break-dance because the spinning trains them for stealing hubcaps; hearing white employees refer to using the restroom as "dropping some of these ugly brown kids off at the pool"; being told that the four girls killed in the church bombing in Birmingham, Alabama, shouldn't have been in the church in the first place. JA993-1121,1899-5788.

Plaintiffs and class members testify that supervisors' and co-workers' statements like these were not isolated instances, and that they have heard similar statements broadcast across the plant radio, which is a walkie-talkie everyone uses to communicate in the plaint, including all levels of management. *Id.* Statements were broadcast over the plant radio referring to black employees as "DAN" ("dumb ass nigger"); broadcasting "Dixie" and "High Cotton"; broadcasting gorilla or monkey sounds whenever an African American used the radio; broadcasting the sound of a toilet flushing with the words "Good-bye, Gerald," referring to his feces as Gerald White, a named plaintiff in this case; broadcasting "Look down there, do you see

those monkeys crossing over down there?" in reference to two black employees. *Id.* Racial graffiti was also plastered across Nucor's walls and on equipment and other surfaces, including "nigger go home," "white power," "nigger," "niggers go back to Africa," "KKK," "Sambo," "Blacks like to eat chicken all the time," and a defaced magazine cover with Tiger Woods' picture on it with the words "nigger" and "suck this" on the cover with drawing of a penis superimposed near Woods' head. *Id.* A white employee, Walter Cook also confirmed that "racist graffiti was frequent, open, and obvious to those who used the bathroom", including words such as "nig," "nigger," "niggers,""blackie" and "KKK" on the breakroom and bathroom walls. JA1841.

V. SUMMARY OF ARGUMENT

Hostile Environment: Numerous courts have held that class certification of racial hostile environment claims is appropriate because they involve a common question of whether there is a "severe or pervasive" pattern of conduct that would be "objectively hostile or abusive" to a "reasonable person." Nucor's principal defense also involves common issues of fact and law: (1) whether it has a policy against racial hostility or harassment; (2) whether such policy was "effectively enforced" or disfunctional; and (3) whether Nucor promptly took remedial action once it knew or should have known of such hostility.

The district court erred in denying certification of such a class once it found that "plaintiffs have presented plant-wide racist acts potentially experienced by every African-American employee working at the plant." JA8988-8994. Merely because class members may have also experienced *additional* racial hostility in their department did not create two different work environments, one plant-wide and the other departmental. Well-established precedent prohibits segmenting a hostile environment into individual components or incidents. "The total work environment" is required to be treated as a single claim. This Court has held that a common core of racial harassment satisfies Rule 23 "despite the presence of individual fact questions." *Holsey v. Armour & Co.*, 743 F.2d 199, 216-217 (4th Cir. 1984). Both plant-wide and department racial hostility were part of a common "systemic policy of tolerance by the company." *EEOC v. Burlington Medical Supplies, Inc.*, 536 F. Supp. 2d 647, 660 (E.D. Va. 2008). Requiring that *every* manifestation of a hostile environment be experienced in the same way by *every* class member would be tantamount to holding that such claims can never be certified on a classwide basis. Class certification is necessary in order for the Court to be able to enjoin or otherwise redress a plant-wide pattern-or-practice of racial hostility.

Promotions: The district court also erred in denying class certification once it found that "Nucor's plant-wide promotion procedure allowing primarily white

managers and supervisors to rely on subjective criteria to select candidates for promotions is evidence probative of a plant-wide practice discriminating against African-American employees." JA9102. Numerous courts have held that such subjective criteria present a common question of law and fact that may be challenged on classwide disparate impact grounds or as a pattern-or-practice of disparate treatment.

A subjective promotion procedure is not too individualized for class certification. The Supreme Court has held that a pattern-or-practice claim looks to the practice or the pattern itself, not individualized promotion decisions. Plaintiffs did not rely on the mere existence of a subjective promotion procedure, but presented a combination of statistical, anecdotal and direct evidence showing that Nucor's subjective promotion procedure is racially discriminatory throughout the plant. The denial of class certification would leave the plaintiffs with no means of changing the pattern-or-practice of racial bias in which they work. *Lowery v. Circuit City, Inc.*,158 F.3d 742, 759 (4th Cir. 1998)(Class certification required in order to challenge pattern-or-practice).

The district court found that black applicants were promoted only 36.2% as often as would be expected in the absence of subjective racial bias, but erroneously reduced the statistical significance of such disparity from -2.54 standard deviations to

-1.48 deviations by eliminating all promotions for which Nucor had destroyed its application records rather than applying the alternative applicant benchmarks approved by this Court and the Supreme Court when application records are not available. The district court found that these alternative applicant benchmarks "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant", but it still elected to eliminate all promotions for which Nucor destroyed its applications because "[s]tatistics based on actual data is more probative than statistics based on assumptions." JA8981. This created an impossible standard to meet because the "actual data" on applicants had been destroyed.

The error in eliminating promotions that had missing application records compounded a related error that allowed Nucor to handpick 45 promotions and to withhold several hundred similar promotions that were subject to the same department managers and subjective promotion procedure. JA399-400,408-409,1161,1171. Many of the promotions allowed to be withheld were in the very same jobs that Nucor produced as "similarly situated" to the named plaintiffs. *Id.* Plaintiffs' statistician showed that there was no coherent basis for distinguishing the promotions Nucor produced from those it withheld. *Id.* This two-step elimination of relevant promotions left too small a number to permit any true test of statistical significance.

The district court went too far into the merits in finding that the "assumptions"

necessary for the statisticians to estimate the missing applicant rates "diminishes the probative value" of the statistics. JA 8981,9102. "Diminishes" does not mean "eliminates," and these were the best statistics available in light of Nucor's destruction of its application records. Rejecting the clear statistical evidence of a disparity shown by the best available means was, in fact, to decide the merits of who is likely to prevail at trial, which is improper. The district court's role is limited to deciding whether there is a common *triable* issue of fact, not to decide the merits of such issue or who should prevail at trial.

The district court also erred in concluding that the named plaintiffs' interests might become "antagonistic" if they request instatement into jobs that other class members might seek. JA8992. Most courts have recognized that such potential competition among employees is a normal feature of employment discrimination suits of all types and exists in individual suits. This Circuit has held that the named plaintiffs' interest in proving and enjoining a pattern-or-practice of promotion discrimination assures adequate representation. *Brown v. Eckerd Drugs, Inc.*, 663 F.2d 1268, 1275-1277 (4th Cir. 1981). Moreover, each named plaintiff bid only on promotion vacancies that were not sought by other class members. JA7203-7860. There were a sufficient number of vacancies to allow each class member making a claim at Stage II to be awarded one of the multiple vacancies that occurred in the job

they sought.

ARGUMENT

I. STANDARD OF REVIEW

Denial of class certification is reviewed for abuse of discretion. "An error of law constitutes an abuse of discretion." *A Helping Hand LLC v. Baltimore County, Maryland*, 515 F.3d 356, 370 (4th Cir. 2008); *College Loan Corp. v. SLM, Corp.*, 396 F.2d 588, 595 (4th Cir. 2005); *Koon v. United States*, 518 U.S. 81, 100 (1996). Discretion to deny class certification "must be exercised within the framework of Rule 23." *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

II. DISCUSSION OF ISSUES

A. A Racially Hostile Environment Presents Common Questions Of Fact And Law That Are Appropriate For Certification As A Class

Class certification of racial hostile environment claims is appropriate because they involve a common question of whether there is a "severe or pervasive" pattern of conduct that would be "objectively hostile or abusive" to a "reasonable person." *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 361 n.2, 362 (D. Md. 2004); *Burlington Medical,* 536 F. Supp. 2d at 656-658; *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.,* 990 F.Supp. 1059, 1070, 1074 (C.D. Ill.1998); *BreMiller v. Cleveland Psychiatric Inst.,* 195 F.R.D. 1, 21, 33 (N.D. Ohio 2000);

Warnell v. Ford Motor Co., 189 F.R.D. 383 (N.D. Ill. 1999); *Smith v. Nike Retail Services, Inc.*, 2006 WL 715788 *5 (N.D. Ill. 2006); *Markham v. White,* 171 F.R.D. 217, 222 (N.D. Ill.1997); *Employees Committee v. Eastman Kodak Co.*, 407 F. Supp. 423, 431 (W.D. N.Y. 2005); *see also Allen v. International Truck & Engine Corp.*, 358 F.3d 469, 471-472 (7th Cir. 2004); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1299-1300 (8th Cir. 1999) (applying pattern or practice standards to certification of class hostile environment claims).

The district court found that such a common hostile environment exists throughout the plant at issue in this case: "plaintiffs have presented *plant-wide* racist acts potentially experienced by every African-American employee working at the plant when the acts occurred." JA8988-8995 (emphasis added). The "plant-wide racist acts" found to be common to all class members "include: (1) racist e-mails, (2) display of the confederate flag, and (3) racist remarks over the plant radio." *Id.* at JA8988-8989. Class certification was denied, however, because some class members may have also experienced *additional* racial hostility in their department. *Id.*

The district court erred as a matter of law in subdividing plaintiffs' work environment into separate "plant-wide" and "department" components. "The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of . . . liability." *National Railroad Passenger Corp. v. Morgan*, 536 U.S.

101, 115, 116, 118 (2002). A hostile environment class action strikes at the pattern or practice itself, not individual or isolated instances of racial hostility. *Id.* The Supreme Court has recently reiterated that "the actionable wrong is the environment, not the individual acts that, taken together, create the environment." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2175 (2007). "Under the totality of the circumstances analysis the district court should not carve the environment into a series of discrete incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment thereby created may exceed the sum of the individual episodes." *Mitsubishi,* 990 F.Supp. at 1074; *see also Morgan*, 536 U.S. at 116-118, 120 ("Such claims are based on the cumulative effect of individual acts. * * * In determining whether an actionable hostile work environment claim exists, we look to 'all the circumstances'. . . ."); *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745, 753 (4th Cir. 1996) ("we must examine the totality of the circumstances"); *Newsome*, 219 F.R.D. at 362. Courts must "view the conduct with[ ] an eye for its cumulative effect." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008); *Burlington Medical,* 536 F. Supp. 2d at 660; *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810-11 (7th Cir.2001).

Both plant-wide and department racial hostility were part of a common

"systemic policy of tolerance by the company." *Burlington Medical*, 536 F.Supp.2d at 660.

> The individual claimant is, therefore, not only a victim of the individual acts of discrimination perpetrated by the harasser within the plant, but she is also the victim of a systemic policy of tolerance by the company. It is this systemic policy, together with the individual acts of harassment, for which the employer is liable in Phase II, because it is the policy which makes the perpetration of the individual conduct possible.

Id. (quoting in part, *Mitsubishi*, 990 F. Supp. at 1081).[5] Such "systemic tolerance" at Nucor came from the plant's General Manager, Ladd Hall, who admitted that it was his responsibility to investigate and respond to racial harassment or discrimination. JA1127. Systemic tolerance was shown by the fact that nothing was ever done about the multitude of racially hostile incidents reported by the putative class. JA1003-1004,1015-1016,1044-1045,1054-1056,1070,1105-1106,1111-1112,1123-1124,8537-

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[5] Nucor's principal defense to plaintiffs' hostile environment claim is that Hall took appropriate action as Plant Manager to redress such hostility in the manner required by the *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). That defense involves the following common issues of fact and law: (1) whether it has a policy against racial hostility or harassment; (2) whether such policy was "effectively enforced" or disfunctional; and (3) whether Nucor promptly took remedial action once it knew or should have known of such hostility. *See e.g. Sunbelt Rentals*, 521 F.3d at 319-320; *White v. BFI Waste Services, Inc.*, 375 F.3d 288, 299-300 (4th Cir. 2004); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001); *Spriggs v. Diamond Auto Glass*,242 F.3d 179, 188 (4th Cir. 2001); *Howard v. Winter,* 446 F.3d 559, 565 (4th Cir.2006).

8560.

The putative class in this case necessarily experienced their work environment *as a whole* regardless of whether part of it was communicated by word of mouth across departments rather than over the plant-wide radio and e-mail system. The class is a relatively small group of black employees working in the confined space of a single plant. JA8537-8560. Racial slurs or insults occurring in one department or area of the plant quickly became known to everyone else regardless of their work station. JA993-1124,8537-8560. Employees from various departments routinely work side-by-side in the same physical area without walls or other boundaries separating them. JA8537-8560. The named plaintiffs themselves worked in 5 of the 6 production departments at various times, and other witnesses testified from all six of such departments about the common hostile environment they experienced plant-wide and departmentally.[6]

This Court has held that a common core of racial harassment satisfies Rule 23 "despite the presence of individual fact questions." *Holsey.*, 743 F.2d at 216-217 ("We cannot accept Armour's contention that harassment and retaliation claims are not susceptible of class treatment because they are too individualized. * * * Despite the

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[6] Four witnesses worked in the melt shop department (Jacob Ravenell, Brown, Butts and Earl Ravenell); three witnesses worked in the hot mill (Sheldon Singletary, Jerry Nick and Roane); two witnesses worked in the cold mill department (John Singletary and Jason Guy); six witnesses worked in the beam mill (Simmons, White, Brown, Guy, Roane, Spann); and one witness each worked in the shipping department and maintenance department (Beaufort and Turner). JA993-1124,8537-8560.

presence of individual factual questions, the commonality criterion of Rule 23(a) is satisfied by the common question presented."); *see also Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417,427-428 (4th Cir. 2003) ("But Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification."); *Burlington Medical,* 536 F. Supp. 2d at 656 ("The Fourth Circuit has already rejected a similar argument that racial 'harassment and retaliation claims are not susceptible of class treatment because they are too individualized,'"); *Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 102 (4th Cir. 1979) ("A person . . . in one department of a single facility may represent . . . other departments of the same facility.").

"Obviously, a single, unitary policy of disparate treatment might not injure every affected person in exactly the same manner or degree." *International Woodworkers v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269-1270 (4th Cir. 1981). Numerous courts have held that a pattern- or-practice hostile environment claim seeks to redress "the total work environment" and does not require that each class member experience *every* manifestation of racial hostility occurring in that environment:

> The class-wide liability phase of a pattern or practice hostile environment claim merely requires objective proof of a hostile work environment; claims based on individual experiences are resolved in the remedial phase of the trial. * * * UTD's argument that different employees experienced varying degrees of hostility does not vitiate the propriety of

> class treatment.
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> Hostile environment claims require plaintiffs to demonstrate that the "landscape of the total work environment" was hostile towards the class. Evidence of the subjective experiences of each class member is not necessary to support class-wide liability. . . .
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> * * *
>
> Factual differences between class members' experiences do not preclude certification if the class members share the same legal theory.

Newsome, 219 F.R.D. at 361 n.2, 362; *Burlington Medical,* 536 F. Supp. 2d at 660; *see also Mitsubishi,* 990 F.Supp. at 1070, 1074, 1081 ("The landscape of the total work environment, rather than the subjective experiences of each individual claimant, is the focus for establishing a pattern or practice of . . . harassment which is severe and pervasive"); *BreMiller,* 195 F.R.D. at 21, 33 ("[C]ourts have found Rule 23(a)'s commonality provision to be satisfied even in the face of challenges by defendants that such claims require highly individualized treatment."); *Smith*, 2006 WL 715788 *5; *Markham v. White,* 171 F.R.D. 217, 222 (N.D. Ill. 1997); *Employees Committee*, 407 F. Supp. at 431.

The generally held view in this Circuit is that "[t]he commonality prerequisite does not require that all questions of law or fact be common to all putative class members. Common questions do not need to predominate, but must exist. A class action will not fail solely because there are factual differences among members of the

putative class." *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 486 (N.C. 2003); *see also Holsey,* 743 F.2d at 216-217 (same); *Woodworkers*, 659 F.2d. at 1269-1270 ("Rule 23 does not require precise, mirror-image identity respecting the injuries caused by a single practice or policy at a single facility."); *Lilly v. Harris-Teeter Supermarket*, 720 F2d 326, 333 (4th Cir. 1983)(class members not required to have "suffered discrimination in precisely the same employment practice", noting that the Supreme Court in *Falcon* "rejected those cases that had interpreted its decision . . . as requiring that the class representative necessarily have suffered discrimination in precisely the same employment practice as did all the other members of the class."); *Brown,* 663 F.2d at 1275; *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, *3 (D.C. C. 2002); *Hunter v. American Gen. Life & Accident Ins. Co.*, 2004 WL 5231631 *5 (D.S.C. 2004).

The Seventh Circuit has explained why trial of a hostile environment claim as a class action makes better sense than individual trials:

> It is hard to see why management of a class . . . would be any more difficult than management of a suit with 27 individual plaintiffs seeking both legal and equitable relief. In either event, a jury trial must be held, and factual matters bearing on both damages and injunctive relief must be presented to that body. Even if the judge were to hold 27 separate damages trials, each of the 27 plaintiffs would be entitled to present evidence about the plant-wide

> environment in order to show entitlement to an injunction. The district judge did not explain how even one trial, with 27 plaintiffs, could be easier to manage than a class proceeding; and if the judge contemplated 27 trials, then a class proceeding looks even better by comparison. What is more, handling equitable issues on a class-wide basis would solve a problem sure to bedevil individual proceedings: How is it feasible to draft and enforce an injunction that will bear on these 27 plaintiffs alone, and *not* on the other 323 black employees? Unless it is possible to prepare such relief--and we do not see how it could be, or why a court should try--then the equitable aspects of the litigation are class-wide whether the judge certifies a class action or not. (The need for, if not inevitability of, class-wide treatment when injunctive relief is at stake is what Rule 23(b)(2) is about.).

Allen, 358 F.3d at 471. The Supreme Court has recognized that the purpose of Rule 23 "might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 881 (1984); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-361 (1977).

Requiring that *every* manifestation of a hostile environment be experienced in the same way by *every* class member would be tantamount to holding that such claims can never be certified on a class-wide basis. Injunctive relief against a pattern or practice cannot be obtained without class certification. *Lowery,* 158 F.3d at 759 ("[I]ndividuals do not have a private, non-class cause of action for pattern or practice discrimination."); *Allen*, 358 F.3d at 470-471. This Court has recognized that "[a]

common question is one that can be resolved for each class member in a single hearing, such as the question of whether an employer engaged in a pattern and practice of unlawful discrimination against a class of its employees." *Thorn v. Jefferson Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

The district court's belief that employees experience separate plant-wide and department environments was based on the mistaken assumption that an employee's work environment only includes racial hostilities that they witness in person: "it is irrelevant whether the customer heard the epithet for himself or whether he came to know through somebody else that such language is being used. In either case, a reasonable person would feel it to be a hostile environment." *Eddy v. Waffle House,* 482 F.3d 674, 678 (4th Cir. 2007); *see also Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) ("Although Diamond contends that conduct targeted at persons other than Spriggs cannot be considered, its position finds no support in the law. We are, after all, concerned with the "environment" of workplace hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor."); *Sunbelt Rentals,*521 F.3d at 317 (holding that employee could rely on harassment of others, including non-employee customers, as part of the proof of a hostile environment). This Court has previously quoted the Tenth Circuit's holding on this point with approval: "'Evidence of a general

work atmosphere therefore — as well as evidence of specific hostility directed toward the plaintiff — is an important factor in evaluating the claim.'" *Spriggs*, 242 F.3d at 184 (quoting *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987)).

B. The District Court Erred In Denying Class Certification Once It Found a Discriminatory Subjective Promotion Procedure That Was Common Throughout the Plant

1. Racially Subjective Promotion Procedures Satisfy The Standards For Class Certification

The district court erred in denying class certification once it found that "Nucor's plant-wide promotion procedure allowing primarily white managers and supervisors to rely on subjective criteria to select candidates for promotions is evidence probative of a plant-wide practice discriminating against African-American employees." JA9106. Such a finding of "plant-wide . . . subjective criteria" and a "plant-wide practice discriminating against African-American employees" satisfies the commonality and typicality requirement of Rule 23(a). *See e.g. Lilly*, 720 F.2d at 333 ("As to the commonality requirement, the complaint plainly alleged a practice of disparate treatment in the exercise of unbridled discretion, thus raising questions of law and fact common to all . . . black employees."); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir.1993) ("[C]ourts from around the country have found . . . 'subjective personnel processes that operate to discriminate [sufficient to] satisfy the commonality and typicality requirements of Rule 23(a).'"); *Dukes v. Wal-Mart*, 509 F.3d 1168, 1180 n.4,

1183-1184(9th Cir. 2007); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 286 (2d Cir.1999) ("delegation to supervisors, pursuant to company-wide policies, of discretionary authority without sufficient oversight ... gives rise to common questions of fact warranting certification of the proposed class."); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.1986); *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir.2003); *McReynolds v. Sodexho Marriott Services, Inc.*, 208 F.R.D. 428, 441-442 (D.C. 2002); *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir.1984); *McKnight v. Circuit City Stores*, 1996 WL 454994, **3-4 (E.D. Va. 1996).[7]

The Supreme Court has also noted that subjective practices may satisfy Rule 23's standard for class certification. *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). The Court subsequently held that subjective promotion procedures

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[7] Numerous district courts have also held that subjective selection criteria similar to those at issue here satisfy the commonality and typicality requirement of Rule 23(a)(2). *See e.g. Mathers v. Northshore Mining Co.*, 217 F.R.D. 474, 485 (D. Minn. 2003); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 613 (D. Minn. 2000); *Morgan v. United Parcel Service, Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996); *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 395 (D. Maine 1994); *Toney v. Rosewood Care Center, Inc. of Joliet*, 1999 WL 199249 * 7 (N.D. Ill. 1999); *Shores v. Publix Super Markets, Inc.*, 1996 WL 407850 * 6(M.D. Fla. 1996); *Adams v. Donnelley & Sons*, 2001 WL 336830 * 11 (N.D. Ill. 2001); *Latino Officers Association City of New York v. The City of New York*, 209 F.R.D. 79 (S.D. N.Y. 2002); *Warren v. Xerox Corp.*, 2004 WL 1562884 * 11 (E.D. N.Y. 2004); *McClain v. Lufkin Industries, Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999); *Jones v. Ford Motor Credit Co.*, 2005 WL 743213 * 8 (S.D. N.Y. 2005); *Anderson v. The Boeing Co.*, 222 F.R.D. 521, 537 (N.D. Ok. 2004); *Dukes*, 222 F.R.D. at 150.

can be challenged on disparate impact grounds or as a pattern-or-practice of disparate treatment. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988); *see also McClain*, 519 F.3d at 276 (same).

Rather than basing their claim on individualized promotion decisions, plaintiffs are challenging the subjective promotion procedure itself, seeking to enjoin and replace it with a more job-related and race-neutral selection process that is not so susceptible to the subjective racial bias that has been shown to exist. Such a claim is not embroiled in individualized promotion decisions in the manner assumed below, but is instead focused on the common question of whether disparate impact or a pattern-or-practice exists as a result of the plant-wide subjective promotion process found by the district court. *See Teamsters*, 431 U.S. at 360; *Cooper*, 467 U.S. at 876, 881.

Plaintiffs did not rely on the mere existence of a subjective promotion procedure, but presented a combination of statistical, anecdotal and direct evidence showing that such procedure was racially discriminatory throughout the plant. Plaintiffs presented evidence of:

- a common plant-wide promotion procedure
- expert evidence of excessive and unnecessary subjectivity
- evidence of a plant-wide environment or culture that fostered and condoned racial hostility
- direct evidence of subjective racial bias by managers and supervisors
- anecdotal evidence of racial stereotyping throughout the plant
- statistical evidence of disparate impact and a pattern-or-practice of

racial bias in promotions

JA-993-1548,1807-1896,8537-8560.

Promotion decisions were made by just six Department Managers and the plant's General Manager, all of whom testified that they were not required to follow *any* set policy or criteria and were permitted to decide for themselves what to consider and who to promote. JA1719-1796. An expert in industrial selection procedures testified that Nucor's promotion process is excessively subjective, and additional expert testimony established that "the selection procedure for hiring and promotion have these same basic features throughout the Company regardless of department." JA1157,1515-1516,1520.[8] Evidence from both black and white employees showed that Nucor's decisionmakers openly expressed subjective racial bias against African-Americans and fostered a racially hostile culture and environment throughout the plant. *See* pp. 9-12, 14-20 *supra*. The evidence also showed that black applicants for promotion were selected only 36.2% as often as would have been expected in the absence of subjective racial bias, and that this disparity was statistically significant at -2.54 standard deviations. JA 1162.

The district court expressed concern that cases challenging a subjective

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[8] The Fifth Circuit recently relied on similar expert testimony in *McClain*, 519 F.3d, at 277 n.4.

promotion procedure may be too individualized for class certification (JA,8992,8990,9102), but the Supreme Court has held that a pattern-or-practice claim looks to the practice or pattern itself, not individualized promotion decisions. *Cooper*, 467 U.S. at 876, 881 ("'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.' * * * Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant."); *Teamsters*, 431 U.S. at 336, 360 ("At the initial 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a *prima facie* case that such a policy existed. * * * Without any further evidence from the [plaintiff], a court's finding of a pattern-or-practice justifies an award of prospective relief."); *Cox*, 784 F.2d at 1556 ("[I]n stage one proceedings . . . the focus is the broad pattern and practice at issue, not the merits of individual claims."); *Newsome*, 219 F.R.D. at 361, 363; *see generally Gunnells*, 348 F.3d at 425-427.

This Circuit has held that "[a] person who has been injured by unlawful,

discriminatory promotion practices in one department of a single facility may represent others who have been injured by the same discriminatory promotion practices in other departments of the same facility. In such a case, the representatives of the class all have the same interests in being free from job discrimination, and they have suffered injury in precisely the same way in the denial of promotion." *Hill*, 596 F.2d at 102; *International Woodworkers*, 659 F.2d at 1270 ("There is involved but a single plant. Although more than one department is affected, the practices and their discriminatory effects are said to emanate from a unitary employer policy."); *Newsome*, 219 F.R.D. at 362.

Denial of class certification would leave plaintiffs with no means of changing the pattern-or-practice of racial bias in which they work. *Lowery*, 158 F.3d at 759 (precluding pattern-or-practice claims absent class certification); *Teamsters*, 431 U.S. at 360 (requiring prospective injunctive relief upon proof of a pattern-or-practice). If subjective promotion procedures are held to be too individualized to permit class certification, employers will be encouraged to adopt such procedures and to abandon more objective, job-related selection procedures that remain subject to challenge on class grounds. The Supreme Court has cautioned against treating subjective practices differently than more professionally developed selection procedures for this very reason. *Watson*, 487 U.S. at 989-990 ("If we announced a rule that allowed employers

so easily to insulate themselves from liability under *Griggs,* disparate impact analysis might effectively be abolished.").

2. The Promotions At Issue Should Not Have Been Segmented Into Numbers Too Small To Detect A Statistical Pattern Even When It Exists

The district court found that black employees were 19.24% of the applicants for promotion, but only 7.94% of the persons promoted under Nucor's plant-wide subjective promotion procedure — a disparity shown to be statistically significant at a rate of -2.54 standard deviations when the entire four-year (1999-2003) liability period was considered. JA8984,1162.[9] The court, however, artificially reduced this disparity to -1.48 standard deviations by reducing the number of promotions it considered in two ways. First, the court refused to require all the promotion decisions made by the five Department Managers at issue to be produced, allowing Nucor to handpick just 45 promotions from several hundred made by the same Department Managers — the same mangers who refused to promote the seven named plaintiffs. JA486-487,399-400,408-409,1161,1171. Second, the Court reduced the relevant

[9] This Circuit has recognized that a disparity in promotion rates greater than two standard deviations is statistically significant evidence of a pattern-or-practice of racial discrimination. *Lilly*, 720 F.2d at 326 & n.17; *EEOC v. American National Bank*, 652 F.2d 1176, 1190-1193 (4th Cir. 1981); *see also McClain*, 519 F.3d at 279-280 (two standard deviations held sufficient to establish statistical significance in the context of a subjective promotion procedure).

promotions to an even smaller number by refusing to consider those that occurred in the 1999-2000 part of the four-year pre-suit liability period (1999-2003) merely because Nucor had destroyed its application records for that period (the records of the promotions themselves were not destroyed). JA1503-1504.

This Court and others have recognized that reducing the number of promotions will artificially reduce the number of standard deviations and the chance of detecting a significant racial disparity even when it exists. *Lilly*, 720 F.2d at 326 n.17 ("Combined data is more likely to demonstrate the 'pattern or practice' of defendant's policies, whether discriminatory or not. Moreover, by increasing the absolute numbers in the data, chance will more readily be excluded as a cause of any disparities found."); *American National Bank*, 652 F.2d at 1194-1196; *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654 (5th Cir. 1983) ("[T]his was an unfair and obvious attempt to disaggregate that data to the point where it was difficult to demonstrate statistical significance. By fragmenting the data into small sample groups, the statistical tests became less probative. "); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1263 (6th Cir. 1997) ("[I]t is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination. * * * [U]sing very small sub-units could also mask discrimination because it is much more difficult to show or perceive discrimination when only very small numbers are involved."); *Waisome v.*

The Port Authority of New York and New Jersey, 948 F.2d 1370, 1379 (2nd Cir. 1991).

a. Applicant-Based Statistics Should Not Have Been Required Once Nucor Destroyed Its Applications For Promotion

The district court erred when it eliminated the promotions from 1999-2000 merely because Nucor destroyed its applications for that period. JA8985,1162,1503-1504. The Supreme Court has held there is "no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." *Dothard v. Rawlinson,* 433 U.S. 321, 330 (1977). Rather than just ignoring relevant promotions, Circuit precedent required that the next-best estimate of missing applicant rates be used, such as the applicant rate from the succeeding time period as a proxy for the missing period, *U.S. v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), or census data of the qualified promotion workforce as a reasonable estimate of the available applicant pool. *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 568 (4th Cir. 1985) (holding that "census data" is properly used as proxy for actual applicant data that is no longer available.); *American National Bank,* 652 F.2d at 1195 (same); *see also Ward's Cove Packaging Co., Inc. v. Atonio*, 490 U.S. 642, 650-651 & n.6 (1989) (relying on census workforce benchmark rather than applicant rates in analysis of promotions).[10] Most recently, the

[10] Plaintiffs' experts' use of "qualified workforce" benchmark is based on census data of the qualified workforce likely to bid for *promotions*, not hiring. Plaintiffs' experts did not rely on the general census population or the qualified

Fifth Circuit has held that "potential applicant flow data" may be used when "actual data" is missing or unreliable. *McClain*, 519 F.3d, at 280.

Plaintiffs' experts testified that in using these alternative applicant benchmarks, they followed the commonly accepted statistical methodology for missing application records described in Paetzold's and Wilborn's text, *The Statistics of Discrimination.* JA1503-1504,1160-1161,1270-1275,1352-1353,1363-1364,1381,1388-1389,1413-1414,1416-1417,1421,1475-1476. Nucor offered no evidence that 2001-2003 application rates were not typical of the 1999-2000 time period for which applications had been destroyed.

The district court found that these alternative applicant benchmarks "may be reasonable and the statistics based thereon may be relevant to prove discrimination at the plant", but it still elected to eliminate all promotions for which applications had been destroyed because "[s]tatistics based on actual data is more probative than statistics based on assumptions." JA8985. This created an impossible standard to meet because the "actual data" on applicants had been destroyed and the remaining number of promotions were too small to allow a true test of statistical significance. A defendant should not be allowed to press for "actual data" when it has not maintained

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workforce for entry-level jobs that are typically filled for hiring at Nucor, but have limited the qualified workforce statistic to upper-level jobs that are the same or similar to the ones that Nucor promotes employees into. JA1161-1164.

that data. The next best proxy for the missing applicant records should have been required below even if some degree of inference or assumption had to be made. JA1503-1504,1160-1161. Otherwise, the defendant is able to artificially reduce the time period to the point that the numbers of promotions are too small to detect racial discrimination even when it exists. Employers who destroy their records avoid class certification or pattern-or-practice liability, while other employers who retain their records will remain liable.

The substitute benchmark proffered by plaintiffs' experts involved fewer "assumptions" than the district court's choice to simply ignore the 1999-2000 promotions altogether. The 1999-2000 promotions were the most probative of racial discrimination because they were the only ones that occurred before EEOC Charges began to be filed in early 2001.[11] This Court and others have recognized that "[j]ob offers made after learning of a Charge 'are entitled to little weight.'" *Holsey*, 743 F.2d at 215; *Teamsters*, 431 U.S. at 342 ("later changes in . . . promotion policy . . . could not erase its previous illegal conduct"). The district court would have engaged in fewer assumptions if it had applied the two substitute benchmarks that this Court has previously approved in *Fairfax* and *Lewis, supra,* rather than ignoring the promotions

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[11] Sheldon Singletary filed the first EEOC Charge in February 2002, followed by Ramon Roane's Charge which was filed in March 2002. JA5922,5942.

in 1999-2000 altogether. This Court and others have held that promotions for the entire liability period should be used whenever possible without disaggregating them into separate time period in the manner done below. *Lilly,* 720 F.2d at 326 n.17.

b. Excluding Promotions Made By The Same Department Managers Who Refused To Promote The Named Plaintiffs Was An Error And An Abuse of Discretion

The district court also erred by allowing Nucor to withhold production of all but 45 of the promotions that were made by the Department Managers who refused to promote the named plaintiffs. JA 4860487,399-400,408-409,1161,1171. The entire pattern of such decisionmakers' decisions was necessary in order to have had a valid assessment of the statistical significance of such pattern. *See* JA941-942. Three experts have confirmed that subjectivity is a common feature of the promotion process for all jobs in the production departments at issue, not just the promotions Nucor handpicked for discovery. JA1157,1160-1161,1171,1515-1516,1520. The mind-set or subjective bias of a given supervisor or manager cannot be partitioned between one set of jobs under their purview and another. *See e.g. Lilly*, 720 F.2d at 338 ("We agree that evidence of discriminatory intent in one employment context (e.g., hiring) may be probative of discriminatory intent in a different context (e.g., promotions) where it has been demonstrated that the same company managerial personnel were responsible for decisionmaking in both contexts.").

Plaintiffs' statistician demonstrated that Nucor did not apply any coherent standard in producing some promotions and not others under the same Department Manager. JA397-410,1161,1171. Nucor represented that it produced the promotions that it thought to be "similar in pay, grade and experience required as the job the plaintiffs bid on" (JA483-484), but plaintiffs' statistician demonstrated that this was not true, that "[m]any of the positions and vacancies that have not been produced are in the same job classifications and departments that the defendant has designated as 'similarly situated' to the named plaintiffs." JA399. Dr. Bradley testified that Nucor essentially gerrymandered the promotion pool without any valid basis for distinguishing between the promotions produced and those withheld:

> 11. The defendant has first reached its own conclusion about what should be found "similarly situated" and then worked backward to produce only information that fits its definition. Statistics is a branch of scientific inquiry that reasons in the opposite direction, first constructing the inquiry and data to be gathered free of any preconceived conclusions and then letting the data lead to any number of conclusions on its own. If, for example, the world were defined as flat and the only data permitted to be discovered was limited to that which fit that hypothesis, then any inquiry would almost of necessity come to the conclusion that the world is indeed flat. At this early stage of a case, the data that will allow statistical inquiry into who is really "similarly situated" should not be restricted in this way. Defendant's definition is only one of the possible outcomes on that issue unless the data is limited to fit a predetermined conclusion.
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> * * *

13. There are also additional problems which make defendant's definition of "similarly situated" individuals inadvisable. Defendant's definition has resulted in the production of posting and bidding records for what appears to be 45 vacancies in the 23 job classifications listed in Appendix D. Those, however, are only some of the positions and vacancies in those 23 "similarly situated" job classifications. Defendant's definition omits many vacancies and positions in the identical job classification, pay grade and department. For example, it has produced posting and bidding records for some of the vacancies in the Mill Inspector job classification but not others in the same job classification, pay grade and department. Positions in the same classification, pay grade and department are usually deemed similarly situated under even the narrowest definition of that term. Defendant's definition, however, is more restricted. Appendix A lists over 50 positions for which posting and bidding records have not been produced which are in the identical job classification, pay grade and department as the positions that the defendant has designated as "similarly situated" to the named plaintiffs. There are also many other positions which have not had postings and bidding records produced which appear to be very similar to those that the defendant has designated "similarly situated." For example, they produced some inspector jobs but not others. The defendant's "similarly situated" definition is just too restricted to permit meaningful statistical analysis in this case.

14. * * * For all the reasons I have discussed above, the information and data produced by the defendant is inadequate to allow proper statistics to be computed. The defendant's effort to limit the inquiry and data to a predetermined definition of who is "similarly situated" prevents any genuine inquiry into that issue. Defendant's electronic databases make records readily available on all employees in the six manufacturing departments which would provide an adequate statistical basis for genuine

> inquiry into whether or not there is a common question of fact in this case that applies to everyone in those six departments, rather than just the 23 job classifications that the defendant has deemed "similarly situated" before any statistical inquiry has begun.

JA406-409, *see also* JA399,400,1161,1171.[12]

The district court stated that plaintiffs never showed that production of more than 45 promotions would have made a difference, but it is well known that reduction of a promotion pool to small numbers artificially reduces the likelihood of detecting statistically significant disparities. JA8985 & 8985 n.3. *See Lilly*, 726 F.2d at 326 n.17; *Capaci*, 711 F.2d at 654. The district court itself found that the standard deviation was only -1.48 for the 45 promotions that Nucor produced under its cryptic "similarly situated" contention. The reduced number of deviations was the direct product of the reduced number of promotions that the court required Nucor to produce. JA8985. The

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[12] The court initially said in a footnote that "plaintiffs have not requested additional evidence to compile reliable statistics" (JA8985 n.3), but when that was shown to be inaccurate in plaintiffs' motion for reconsideration, the court held only that plaintiffs had not "attempted to show that the limitation prevented them from compiling reliable statistics." JA9103. Plaintiffs, however, presented expert testimony that the limitation to just 45 promotions had reduced the numbers to a point too small to permit a true test of statistical significance on several different occasions and in several different motions to compel. JA399-400,408,409,1161,1171,9059-9060,9066-9075; *see also* JA89,233,397,453,489,557,589,785,853. Plaintiffs attempted to obtain production of all the promotions made by the Department Managers at issue through additional discovery and motions to compel that continued to be denied by the district court until shortly before the deadline for submitting the evidence in support of class certification. *Id.* n.19, *supra*.

disparties at issue were large and would be expected to be statistically significant if the district court had not reduced the promotions considered to such small numbers.

The district court misconstrued *Ardrey v. United Parcel Service*, 798 F.2d 679, 684-685 (4th Cir, 1986), which denied discovery only in the context of the named plaintiffs' individual claims. Class discovery was not denied, but merely reserved until after trial on the merits of plaintiffs' individual claims. *Id.* at 680-682 ("a limitation on initial discovery . . . restricted plaintiffs to . . . their individual claims as opposed to information regarding their class action"; the district court stated it would "consider requests for further discovery" after trial of the individual claims). When plaintiffs lost their individual claims at trial, they did not further pursue their class-based discovery. *Id.* at 682. The opposite bifurcation occurred in this case; class discovery went first by agreement and order. *Ardrey* does not address class certification discovery or approve making a determination of "similarly situated" class members, commonality or typicality *before discovery* is ever allowed. If plaintiffs are to show that there is a common pattern of race discrimination across department lines, then they must at least be provided all the promotions that comprise such pattern so that statistical significance can be shown. *Ardrey* says nothing different

3. The Court Erroneously Precluded Use Of The 80% Standard For Disparate Impact

The district court also erred by refusing to apply the 80% standard adopted by

the federal enforcement agencies in the *Uniform Guidelines On Employee Selection Procedures*, 29 C.F.R. §1607.4D. This Court and numerous other courts have applied the 80% standard as proof of disparate impact, and the standard text on statistical evidence in employment discrimination endorses such standard. *See e.g. Chisolm v. U. S. Postal Services*, 665 F.2d 482, 496-96 (4th Cir. 1981); *Mulligan v. South Carolina Dept. of Transp.*, 446 F.Supp.2d 446 (D.S.C. 2006); *Underwood v. Lehman*, 530 F. Supp. 139, 144-145 (D.S.C. 1982); Paetzold and Wilborn, *The Statistics of Discrimination*, §5.06 (2002) ("The predominant approach for comparing the treatment of favored and disfavored groups is the four-fifths rule."). Plaintiffs' experts testified that the 80% standard is a commonly accepted statistic for determining disparate impact, and that black applicants promotion rate was only 36.2% of the promotion rate for Caucasian employees. JA1162-1163,1165-1168. The weight to be given to such evidence was for the jury at trial, not the court in deciding summary judgment. *Dukes*, 509 F.3d at 1177.

4. The District Court Went Too Far Into The Merits

The district court went too far into the merits in finding that the "assumptions" necessary for the statisticians to estimate the missing applicant rates "diminishes the probative value" of the statistics. JA8981. "Diminishes" does not mean "eliminates," and these were the best statistics available for that highly relevant pre-suit time period.

Such a ruling might be appropriate by the jury at the end of a trial on the merits, but it is not appropriate for the court in determining whether there are common questions of law or fact suitable for class certification. Rejecting the clear statistical evidence of a disparity shown by the best available means was, in fact, to decide the merits of who is likely to prevail at trial. "The likelihood of the plaintiffs' success on the merits . . . is not relevant to the issue of whether certification is proper." *Thorn,* 445 F.3d at 319.

Once the court determined that plaintiffs' statistical assumptions "may be reasonable and the statistics may be relevant to prove discrimination at the plant" (JA 8985), it should not have gone further to decide which parties' statistics it would prefer if it were the finder of fact at trial. That is the sole province of the jury. Because plaintiffs' experts estimated the missing applicant rates in the way approved by this Court in *Fairfax* and *Lewis*, the district court should have left it to the jury to decide what weight to be given to such evidence in deciding whether Nucor engaged in a pattern-or-practice of racial discrimination in promotions. This Court has held that "plaintiffs need not, at the time of the motion for class certification, demonstrate by statistical evidence that blacks have been [adversely affected] at a higher rate than have whites, or any other differential. Certification is only concerned with the commonality not the apparent merit of the claims." *Lilly*, 720 F2d at 332-333.

The district court erred by weighing the parties' competing evidence to

determine the likelihood of prevailing on the merits of the underlying claim rather than simply deciding whether there is a common *question* that presents a *triable* issue of fact. Plaintiffs offered statistical evidence only to show that a common ***triable*** issue of fact exists, not to establish a conclusive case on the merits of whether a pattern-or-practice of discrimination will be found by the jury at trial. *Id.*; *see also Mulligan*, 446 F.Supp.2d at 452 & n.6 ("The court need only determine whether the plaintiffs are asserting a claim which, assuming the merits, would satisfy the requirements of Rule 23. * * * Challenges to the merits of Plaintiffs' claims would be more appropriately raised in a motion for summary judgment.").

C. Plaintiffs Were Adequate Class Representatives Because They Sought Promotion To The Same Jobs, But Not The Same Vacancies In Such Jobs, As Other Class Members

The district court further erred and abused its discretion by holding that the named plaintiffs may not be adequate class representatives to the extent they seek instatement in the same vacancy as other putative class members. JA8988. Such an approach to Rule 23, however, would doom virtually every class action or pattern-or-practice case because competition for promotion is inherent to the workplace. The standard treatise on class actions states that "most courts have recognized that such potential competition among employees is a normal feature of employment discrimination suits of all types and exists in individual suits" as much as a class action.

8 Newberg on Class Actions §24.33 (4th ed.). Various courts have found that competing for the same vacancies at Stage II of a bifurcated trial does not create antagonistic interests, and that to hold otherwise would "doom almost every class action" because such competition is inherent to most promotion claims. *See e.g. Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989); *Matyasovsky v. Housing Authority of The City of Bridgeport*, 226 F.R.D. 35, 42-43 (D. Conn. 2005); *Smith v. The Univ. of Washington Law School*, 2 F.Supp.2d 1324, 1343 (W.D. Wa. 1998); *Christman v. American Cyanamid Co.*, 92 F.R.D. 441, 452-453 (N.D. West Va. 1981); *Hartman v. Duffy*, 158 F.R.D. 525, 547 (D.D.C. 1994); *Dean v. International Truck*, 220 F.R.D. 319, 322 (N.D. Ill. 2004); *In Re Polypropylene Carpet*, 178 F.R.D. 603, 613-614 (N.D. Ga. 1997).

Moreover, individual promotion claims do not arise until *after* the named plaintiff and the putative class have proven the common disparate impact and pattern-or-practice of discrimination and had classwide injunctive relief and punitive damages awarded for the benefit of the class as a whole. *See Cooper*, 467 U.S. at 876; *Teamsters*, 431 U.S. at 361; *Gunnells*, 348 F.3d at 429("In fact, Plaintiffs' claims for punitive damages do not require *any* individualized inquiry at all because this damage calculation would be based solely on *TPCM*' s conduct.").

Such remedial issues at Stage II do not undercut the common interest of the

named plaintiffs and class members in seeking classwide injunctive relief at Stage I. This Circuit has held that the named plaintiffs' interest in proving and enjoining a pattern-or-practice of promotion discrimination throughout a single plant is inherently adequate, common and typical of a putative promotion class:

> All employees of a firm that allegedly discriminates in promotions have an identical interest in obtaining declaratory and injunctive relief against the perpetuation of the challenged practices. Therefore, quite apart from any possibility of sharing in classwide damages as to practices to which the named representative alleges no particularized individual claim, employee representatives share interests of a kind with other employees in redressing racially discriminatory employment practices that either pollute their working environment or else threaten them with harm in the foreseeable future.

Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1276 (4th Cir. 1981).

Any conflict between the named plaintiffs and putative class members at Stage II is also more apparent than real. Plaintiffs showed that they bid on the same or similar jobs, but not the *same vacancy* in such jobs as putative class members. JA9073-9075,7203-7860.[13] Because there were multiple vacancies in the jobs they

[13] The bid package exhibit (JA7203-7860) showed that there were no other putative class members who bid on: (1) the Mill Adjuster, Coiler Technician, or Supervisor jobs that Ray Roane bid on in the Beam Mill and Hot Mill; (2) the Mill Operator, Strand Tender or Coiler Technician jobs that Alvin Simmons bid on in the Melt Shop, Hot Mill and Beam Mill; (3) the Exit Operator and Entry Operator jobs that Jacob Ravenell bid on in the Cold Mill; (4) the Crew Leader or Supervisor job that Gerald White bid on in the Beam Mill; (5) the Mill Adjuster and CPI Operator jobs that

sought, and there were no class members who bid on the exact same vacancy as the named plaintiffs, the district court had no basis to find even a potential conflict of interest with the putative class, much less an actual one. *Id.* The only instance of competitive bidding cited by the court involved two named plaintiffs who bid on the same vacancy, not a competition with putative class members. JA9104 (citing Exh. 39, defendants' supplemental interrogatory answers). The competing named plaintiffs, however, agreed among themselves as to which was better qualified, leaving no real conflict between them for the same vacancy. JA2652. There were also multiple vacancies for the same job, and so no actual conflict existed even in the limited circumstance of two named plaintiffs bidding on the same job.

Even if there were such a *potential* competition with putative class members, it would not become an issue until a class member elected at Stage II to file a claim for the same vacancy as one of the seven named plaintiffs after a finding of classwide liability at Stage I of a bifurcated proceeding. *See e.g., Sledge v. J. P. Stevens & Co., Inc.*, 585 F.2d 625, 637-638 (4th Cir. 1978). That is not only highly unlikely, but also easily resolved in a Stage II proceeding for individualized relief. Both class members

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Quinton Brown bid on in the Beam Mill; (6) the Mill Operator Furnace Recorder, Mill Inspector, Utility Man, Straighter Operator and Stacker Operator vacancies that Jason Guy bid on in the Cold Mill and Beam Mill. JA-7203-7860 (bid packages for vacancies bid on by named plaintiffs).

and the named plaintiffs would be equally entitled to the presumption of racial discrimination which carries into Stage II from the finding of classwide liability of Stage I, and the factfinder would merely have to decide which of the two was best qualified. *Id.* To the extent that a "quagmire of hypothetical judgments" were to arise at Stage II which makes it difficult to determine which claimant was best qualified, the Court would then be permitted to use a formula approach to Stage II remedies. *McClain*, 519 F.3d at 280-282; *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974).

The decision in *General Telephone Co. of the Northeast v. EEOC*, 446 U.S. 318, 331 (1980) cited by the district court held that the EEOC was not even subject to the adequacy requirement of Rule 23, and only said in dicta that private hiring applicants seeking to be hired might have conflicting interests with existing employees because, if hired, they might "compete with employees for fringe benefits or seniority." *Id.* The Court did not have before it the current situation in which only employees, not hiring applicants, are trying to enjoin and replace a subjective promotion process with a more objective procedure that will benefit all employees alike, not just the named plaintiffs. The Fourth Circuit has held since *General Telephone* that the named plaintiffs' interest in proving and enjoining a pattern-or-practice of promotion discrimination throughout a single plant adequately represents the interest of a putative

promotion class. *Brown*, 663 F.2d at 1276.

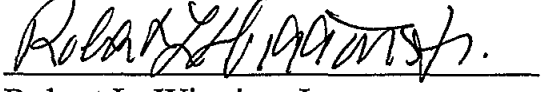
CONCLUSION

For all the foregoing reasons, the denial of class certification should be reversed and remanded with instructions to: (1) certify the putative class of African-American employees from December 8, 1999 forward; and (2) to require production of the records surrounding all vacancies that have been posted or filled since December 8, 1999.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested and necessary. The issues in this appeal require oral argument because: (l) the appeal is not frivolous; (2) the dispositive set of issues presented have not been recently authoritatively decided; (3) the facts and legal arguments cannot be adequately presented in the briefs and record; and (4) the decisional process will be significantly aided by oral argument.

Respectfully submitted this 13th day of May, 2008.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 08-1247 ***Brown, et. al. v. Nucor, et al.***

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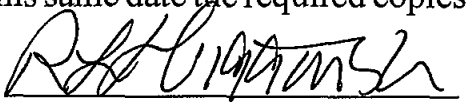

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