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11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE WESTERN DISTRICT OF NEW YORK**

14
15 EMPLOYEES COMMITTED FOR
JUSTICE, et al.,

16 Plaintiffs,

17 v.

18 EASTMAN KODAK COMPANY,

19 Defendant.
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CIVIL ACTION NO.: 6:04-cv-06098

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

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FEDERAL CASES

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<u>Malave v. Potter,</u> 320 F.3d 321 (2d Cir. 2003)	13
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<u>Spinner v. City of New York</u> , 2003 U.S. Dist. LEXIS 19298 (E.D.N.Y. Oct. 10, 2003)	32
<u>Stender v. Lucky Stores, Inc.</u> , 1990 WL 192734 (N.D. Cal. June 8, 1990)	28
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MISCELLANEOUS

DAVID HERR, Federal Judicial Center, ANNOTATED MANUAL FOR COMPLEX LITIGATION 251-53 (3d ed. 2003)	19
------------------------------------------------------------------------------------------------------------	----

1 **I. INTRODUCTION**

2 “Under Title VII, ‘pattern or practice’ claims present a means by which plaintiffs may
3 challenge systemic discrimination in the work place.” Wright v. Stern, 450 F. Supp.2d 335, 363
4 (S.D.N.Y. 2006). In this case, African American employees at Kodak have been and continue to
5 be denied equal employment opportunity as a result of long-term systemic discrimination
6 existing throughout Kodak with respect to pay, promotion, performance appraisals, job
7 assignments, and layoffs. The record also demonstrates that Kodak has been fully aware of its
8 racial discrimination but has been more interested in limiting its liability than in wholeheartedly
9 addressing its problems. This has allowed the racial discrimination at Kodak to ferment. Based
10 on the overwhelming evidence which demonstrates Kodak’s culpability in perpetuating illegal
11 discrimination, this case calls out for injunctive relief. The exhibits to this Motion shed light on
12 Kodak’s sad record with respect to its treatment of African Americans. This Motion seeks to
13 address this record and implement relief to ensure that Kodak’s conduct does not continue.
14 African American employees at Kodak have been subjected to this discrimination based on their
15 race and therefore Plaintiffs have brought pattern and practice disparate treatment, disparate
16 impact, hostile work environment and retaliation claims, challenging Kodak’s specific policies
17 and practices which have caused the discrimination. These policies and practices are common to
18 all Class members.

19 Specifically, Plaintiffs move the Court to certify the following class pursuant to Fed. R.
20 Civ. P. 23:

21 all African Americans employed by Defendant Eastman Kodak
22 Company (“Kodak”) since January 1, 1995 who have been or may
23 be subjected to Kodak’s challenged policies and practices that
24 deny African Americans equal opportunity with respect to pay,
25 promotion, performance appraisals, job assignments, and layoffs
26 (the “Class”).

27 The definition of the Class is based upon the evidentiary record demonstrating that all African
28 Americans employed by Kodak from January 1, 1995 to the present (the “Class Period”) have
been subjected to Kodak’s challenged policies and practices that deny African Americans equal
opportunity with respect to pay, promotion, performance appraisals, job assignments, and

1 layoffs.

2 In addition, Plaintiffs move the Court to certify the following subclass:

3 all African Americans employed by Kodak at its Rochester, New
4 York facilities since January 1, 1995 who have been or may be
5 subjected to Kodak's challenged policies and practices responsible
6 for maintaining a hostile work environment and for retaliation (the
7 "Subclass").

8 The definition of the Rochester Subclass is based upon the evidentiary record demonstrating that
9 all African American employees at Kodak's Rochester facilities during the time period from
10 January 1, 1995 to the present have been subjected to Kodak's challenged policies and practices
11 responsible for maintaining a hostile work environment and for retaliation against employees
12 who complain about Kodak's illegal racial discrimination. With respect to the Class and
13 Subclass, Plaintiffs allege that Kodak fails to enforce laws and policies designed to promote
14 equal employment opportunity, and that Kodak's evasion of these laws and policies constitutes
15 disparate treatment and has had disparate impact on African American employees. As
16 demonstrated below, certification of the Class and Subclass is appropriate under Second Circuit
17 law because Plaintiffs satisfy the requirements of Fed. R. Civ. P. Rule 23(a) and Rule 23(b)(2)
18 and/or (b)(3). Plaintiffs request that the Court appoint named Plaintiffs Courtney Davis, Cynthia
19 Gayden, Robert Gibson, Jannie Nesmith, Noralean Pringle, Maria Scott, Victor Smith, and Edna
20 Williams as representatives of the Class and each of these Plaintiffs as representatives of the
21 Subclass except for Victor Smith, who was not employed by Kodak in Rochester.

22 Over the last ten years, the Second Circuit and its district courts have certified numerous
23 class actions asserting the same claims asserted here. This case is even more fit for class
24 certification because in 1999, and in many documents since then, Kodak has admitted that it has
25 engaged in systemic discrimination against African Americans. Further, on February 6, 2004,
26 the United States Equal Employment Opportunity Commission (the "EEOC"), issued a number
27 of rare Determination Letters¹ following its four-and-a-half year investigation of Kodak's

28 ¹ For example, in 2006, the EEOC found "reasonable cause" for charges of
discrimination in only 3.7% of cases. See <http://www.eeoc.gov/stats/race.html> (last visited July

1 discriminatory employment practices. After conducting a rigorous statistical analysis, the EEOC
2 concluded, in pertinent part:

- 3 ♦ “weekly pay rates for white employees were consistently higher, on
4 average, than weekly pay rates for black employees”;
- 5 ♦ Kodak’s “Do The Right Thing Award” was implemented in an inadequate
6 and inconsistent manner, and as a result, the mean pay differential
7 between Kodak’s Caucasian and African American employees remained
8 “statistically significant”;
- 9 ♦ “white employees, on average, occupy higher wage grades than black
10 employees”; “[t]he net advantage for white employees is approximately
11 one additional wage grade”;
- 12 ♦ “black employees are promoted at a rate lower than white employees”;
- 13 ♦ the Do The Right Thing Award program did not rectify Kodak’s
14 discriminatory conduct with respect to promotions;
- 15 ♦ with regard to job assignments, Caucasian employees at Kodak are
16 consistently given higher-end job assignments that allowed them to move
17 ahead, while African American employees are given less desirable,
18 “dirty,” more dangerous tasks;
- 19 ♦ Kodak has maintained a work environment that is hostile to its African
20 American employees;
- 21 ♦ prior to 1999, Kodak had no consistent policy to address harassment
22 complaints, that often went unanswered;
- 23 ♦ Kodak’s ADR Peer Review Process failed to resolve the issues that were
24 presented to it, because Kodak failed to take the appropriate remedial
25 action recommended by the panels, and consequently, “egregious
26 incidents of harassment continue today”; and
- 27 ♦ Kodak engages in and tolerates a practice of retaliation against African
28 American employees who participate in protected activities in attempting
 to enforce their rights under the federal civil rights laws, including
 African American employees who participated as panelists in the ADR
 Peer Review Process.

Plaintiffs' Statement of Facts in Support of their Motion for Class Certification (“SOF”) at ¶¶
415-17.²

19, 2007). Determinations finding a pattern or practice of systemic racial discrimination are
much more rare.

² References to Plaintiffs’ Statement of Facts are cited as SOF ¶ __.

1 Thus, Kodak’s own internal class-wide statistical study conducted in 1999 *and* the
2 EEOC’s class-wide statistical study conducted in 2004 both confirmed Kodak’s systemic racial
3 discrimination. This evidence is important, but in support of this Motion, Plaintiffs do not rest
4 on it. Rather, Plaintiffs have gathered a huge amount of additional evidence supporting their
5 claims and the claims of the Class. Plaintiffs have also requested learned scholars in the fields of
6 labor economics, labor statistics, organizational sociology, and organizational psychology to
7 examine the factual record, including data on Kodak’s entire U.S. workforce residing in its
8 human resource (“HR”) databases. These experts have concluded that Kodak has common
9 discriminatory policies and practices affecting African Americans with respect to pay,
10 promotions, performance appraisals, job assignments, and layoffs. Plaintiffs seek class
11 certification in order to obtain a class-wide injunction to ensure that Kodak’s discrimination
12 against African Americans does not continue.

13 The Individual Plaintiffs have each worked at Kodak for many years, and received
14 favorable performance appraisals and commendations for their work, but were not able to
15 advance like their white co-workers. The experiences and barriers faced by Plaintiffs and the
16 Class have been uniformly similar. All have been subjected to Kodak’s persistent, systemic
17 racial discrimination which has circumscribed their careers and their compensation. With
18 respect to the Subclass, Plaintiffs have amassed an evidentiary record demonstrating a long
19 history of overt and deplorable racial conduct and retaliation at Kodak’s Rochester facilities.³
20 The evidence shows that Kodak’s discriminatory policies and practices with respect to the Class
21 and Subclass have taken place with the knowledge and/or acquiescence of Kodak’s highest
22 authorities and because these authorities have failed to implement effective corrective action.

23 In this Memorandum, Plaintiffs demonstrate that the Class is numerous, that their claims
24 and the Class claims share many common questions of fact and law, that their claims are typical
25 of the claims of the Class, and that they are appropriate Class representatives. Plaintiffs make

26
27 ³ See Appendix IV, Declaration of Rebecca M. Hamburg, Esq., In Support Of Plaintiffs’
28 Motion For Class Certification (“Appendix IV”).

1 this same showing with respect to the Subclass. A class action is by far the most economical
2 method of proceeding because Plaintiffs' characteristics, claims and goals are well aligned with
3 the proposed Class members. Hundreds or thousands of individual adjudications would not only
4 unnecessarily tax judicial resources but in addition many Class members who might benefit from
5 class relief would be unable to prosecute their individual claims.

6 In seeking class certification, Plaintiffs rely upon, *inter alia*: 1) their Third Amended
7 Class Action Complaint ("Compl."); 2) the multiple Determination Letters issued by the EEOC
8 on February 6, 2004; 3) Plaintiffs' Statement Of Facts In Support Of Their Motion For Class
9 Certification and attached exhibits; 4) the sworn deposition testimony and declarations of the
10 named Plaintiffs, describing their continuous inability to obtain positions, promotions and
11 compensation for which they were qualified, and the harassment and retaliation inflicted upon
12 them; 5) the declarations of additional Class members, which are provided to the Court to
13 "breathe life" into the cold hard statistics; 6) the expert reports of Janice Madden, Ph.D.,⁴
14 Barbara Reskin, Ph.D.,⁵ and Anthony Greenwald, Ph.D.⁶; 7) the sworn deposition testimony of
15

17 ⁴ Dr. Madden's Expert Report ("Madden Report") is Exhibit A to Appendix II,
18 Declaration of Shanon J. Carson, Esq. In Support Of Plaintiffs' Motion For Class Certification
19 ("Appendix II"). Dr. Madden is a labor economist and Professor of Urban Studies, Regional
20 Science, Sociology and Real Estate at the University of Pennsylvania. She has lectured at the
21 Federal Judicial Center on the use of statistics in discrimination litigation. Her statistical
22 analyses of Kodak's HR data are consistent with the existence of racially discriminatory
23 practices with respect to pay, promotion, performance appraisals, initial job assignment, and
24 layoffs. Madden Report at p. 63-64.
25

27 ⁵ Dr. Reskin's Expert Report ("Reskin Report") is Exhibit B to Appendix II. Dr. Reskin
28 is the S. Frank Miyamoto Professor of Sociology at the University of Washington. Dr. Reskin's

1 Kodak’s own witnesses; and 8) documents produced in discovery, including those evidencing
2 Kodak’s internal class-wide study of its discriminatory practices and admissions that it engaged
3 in systemic discrimination. These materials are described in detail in the accompanying
4 Statement Of Facts, which also sets forth a brief description of the named Plaintiffs’ claims.

5 A class action provides the best means for African Americans at Kodak to achieve at long
6 last the changes that the Company could have made -- and should have made -- long ago. With
7 respect to each of the challenged policies and practices, Kodak uses one centralized system,
8 mandated and overseen from the top of the Company down. The challenged policies and
9 practices, which Plaintiffs allege violate the federal civil rights laws, present common legal and
10 factual questions suitable for certification under Rule 23 and established law in this Circuit.

11 **II. THE FACTUAL RECORD ESTABLISHES THAT CLASS CERTIFICATION**
12 **SHOULD BE GRANTED AND THAT THE COURT SHOULD IMPOSE AN**
13 **ADVERSE INFERENCE IN FAVOR OF CLASS CERTIFICATION**

14 The factual record demonstrates that this Motion should be granted. Plaintiffs rely on
15 their Statement Of Facts In Support Of Their Motion For Class Certification and attached

16 _____
17 analysis of this case has led her to conclude that the “widespread disparities between African
18 American and white employees are the product of Kodak’s common culture and centralized
19 personnel practices.” Reskin Report at § 8.

20 ⁶ Dr. Greenwald’s Expert Report (“Greenwald Report”) is Exhibit C to Appendix II. Dr.
21 Greenwald is a Professor of Psychology at the University of Washington. Dr. Greenwald’s
22 analyses of the evidence (which included statistical analyses of Kodak’s HR data), led him to
23 conclude that: 1) Kodak’s centralized performance appraisal system afforded substantial
24 discretion to supervisors and allowed discriminatory bias to intrude into its ratings; and 2)
25 African American employees suffered statistically significant racial adverse impact in initial job
26 assignment, performance appraisals, average annual pay, total pay, receipt and timing of
27 promotions, receipt and timing of layoffs, and total duration of employment at Kodak.
28

1 exhibits which are incorporated here by reference. There is abundant evidence to support class
2 certification. Kodak's centralized policies and practices described therein are common to all
3 Class members. Plaintiffs' claims are typical of the systemic unlawful mistreatment experienced
4 by the Class, and Plaintiffs and the Class assert the same legal theories.

5 On December 1, 2006, Plaintiffs filed a Motion For Sanctions Based On Kodak's
6 Spoliation Of Evidence (the "Motion for Sanctions") which set forth evidence demonstrating that
7 Kodak systematically destroyed evidence relevant to this case from at least 1997 to 2004 --even
8 after it entered into Tolling Agreements with the Class to have settlement discussions. As a
9 result, Plaintiffs have been deprived access to additional evidence (both testimony and
10 documents) which cannot be presented here, and has therefore prejudiced Plaintiffs and the
11 Class. While there is abundant evidence to support class certification, the Court should not
12 exculpate Kodak from its destruction of evidence. Plaintiffs incorporate their Motion for
13 Sanctions here by reference and request the Court to impose an evidentiary adverse inference
14 that the missing evidence would be favorable to Plaintiffs and in support of class certification.

15 **A. Class Certification Should Be Granted To Address Kodak's Centralized**
16 **Policies And Practice That Are Responsible For Racial Discrimination**
Against The Class

17 The factual record and the expert reports of Dr. Madden, Dr. Reskin and Dr. Greenwald
18 establish conclusively why class certification should be granted and the requirements of Rule 23
19 are met. Kodak, the EEOC, and Plaintiffs' experts (Madden and Greenwald) have all studied
20 Kodak's HR data and confirmed that statistically significant racial disparities affect African
21 Americans. See SOF ¶¶5, 163-67, 175, 218-222, 244-48, 269-70, 382, 415-17; Appendix II, Ex.
22 A at 63 and Ex. C at 5-6. Additionally, Plaintiffs have identified and have set forth evidence
23 demonstrating that a specific set of centralized policies and practices are responsible for causing
24 the disparities. SOF ¶¶149-272. These policies and practices are common to the Class. Id. In
25 the event that Class-wide liability is determined, an injunction can be utilized to address and fix
26 the root causes responsible for the disparities. The entire Class will benefit accordingly.

1 Specifically, Plaintiffs and the Class challenge at least⁷ the following centralized policies
2 and practices responsible for Kodak's racial discrimination, for example:

- 3 ◆ Kodak's centralized policy or practice of allowing unchecked subjectivity
4 to enter into its personnel systems with respect to pay, promotions, job
5 assignments, performance appraisals, and layoffs. SOF ¶¶149-272;
6 Appendix II, Exs. B and C; Appendix III, (second) Declaration of Shanon
7 J. Carson, Esq. in Support of Plaintiffs' Motion for Class Certification
8 ("Appendix III") (Allison Decl. ¶ 7; Barnes Decl. ¶¶ 7, 8; A. Bonham
9 Decl. ¶ 7; J. Bonham Decl. ¶¶ 7- 10; Bradley Decl. ¶ 12; Brinson Decl. ¶
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18 ¶ 7; Roberts Decl. ¶ 7; Scott Decl. ¶ 7; Smith Decl. ¶ 7; Stuckey Decl. ¶
19 7; Taylor Decl. ¶ 7; Thomas Decl. ¶ 7; Walker Decl. ¶ 7; Waller Decl. ¶
20 10; Walters Decl. ¶ 7; Williams Decl. ¶ 7; Wilson Decl. ¶ 7).
- 21 ◆ Kodak's centralized policy or practice of failing to adequately monitor its
22 pay, promotion, performance appraisal, job assignment, and layoff
23 systems for disparate impact and disparate treatment to ensure that African
24 Americans are not statistically significantly affected. SOF ¶¶149-272;
25 Appendix II, Exs. A, B and C.
- 26 ◆ Kodak's centralized policy or practice of utilizing a poorly designed
27 performance appraisal system. SOF ¶¶210, 217; Appendix II, Exs. A-C.
- 28 ◆ Kodak's centralized policy or practice of failing to provide mandatory
training to supervisors concerning its performance appraisal system. SOF
¶¶203-206, 207; Appendix II, Exs. B and C; Appendix III (J. Bonham
Decl. ¶¶ 8 - 10; Bradley Decl. ¶ 15; Cliff Decl. ¶ 13; C. Johnson Decl. ¶
10; Lockett Decl. ¶¶ 7, 8, 9; Pringle Decl. ¶ 14; Rhabb Decl. ¶ 12; Waller
Decl. ¶ 14.)
- ◆ Kodak's centralized policy or practice of failing to utilize a reliable
performance appraisal system. SOF ¶¶210, 217, 222; Appendix II, Ex. C.
- ◆ Kodak's centralized policy or practice of failing to have a fair and open
selection process for promotions, including but not limited to Kodak's
failure to have an adequate posting and interview process. SOF ¶ 260-61;
Appendix II, Ex. B; Appendix III (Barnes Decl. ¶ 11; J. Bonham Decl. ¶

25 ⁷ Discovery is continuing and Plaintiffs reserve the right to identify additional
26 centralized policies and practices which may be responsible for racial discrimination against the
27 Class.
28

1 16; Brinson Decl. ¶ 10; Brown Decl. ¶ 13; Bryant Decl. ¶ 8; Cliff Decl. ¶
2 12; Drains Decl. ¶ 7; Gissendanner Decl. ¶¶ 10, 24; Hopson Decl. ¶ 9; C.
3 Johnson Decl. ¶ 11; Monroe Decl. ¶ 9; Waller Decl. ¶¶ 15, 16; Walters
4 Decl. ¶ 8; Williams Decl. ¶ 10)

5 ♦ Kodak’s centralized policy or practice of failing to maintain an electronic
6 database to monitor disciplinary decisions at the Company, to ensure that
7 such decisions are uniform and that employees who engage in the same
8 conduct are disciplined in the same way, as disciplinary decisions affect
9 future advancement and retention at the Company. Appendix III (Bradley
10 Decl. ¶ 7; Brinson Decl. ¶ 7; Bryant Decl. ¶ 14; Carter Decl. ¶¶ 26, 28, 39;
11 Crosby Decl. ¶ 11; Cummings Decl. ¶¶ 8, 11; Dagher Decl. ¶ 12; Drains
12 Decl. ¶ 17; Gissendanner Decl. ¶ 27; Graham Decl. ¶¶ 13, 14; Green Decl.
13 ¶ 10; Jones Decl. ¶¶ 11, 16; Nesmith Decl. 26; Roberts Decl. ¶ 8; Smith
14 Decl. ¶ 25; Stuckey Decl. ¶ 12; Williams Decl. ¶ 14).

15 ♦ Kodak’s centralized policy or practice of failing to have an effective
16 mechanism to address complaints of racial discrimination in the areas of
17 pay, promotion, performance appraisals, job assignments, and layoffs.
18 SOF ¶¶ 279-80, 286, 288; Appendix II, Ex. B; Appendix III (Barnes Decl.
19 ¶ 10; Brown Decl. ¶ 10; Cobb Decl. ¶ 16; Dudley Decl. ¶ 16; Graham
20 Decl. ¶ 7; Roberts Decl. ¶ 12; Scott Decl. ¶ 16; Stuckey Decl. ¶ 14.

21 ♦ Kodak’s centralized policy or practice of failing to have an effective equal
22 employment opportunity policy which ensures that African Americans are
23 not discriminated against in the workplace, either via disparate treatment
24 or disparate impact, with respect to pay, promotions, performance
25 appraisals, job assignments, and layoffs. Appendix II, Ex. B at 9-10, 20.

26 These centralized policies and practices challenged by Plaintiffs have permitted racial
27 discrimination at Kodak against African Americans with respect to pay, promotions, job
28 assignments, performance appraisals, and layoffs. Further, these discriminatory policies and
practices emanate from the highest level at Kodak and apply to Plaintiffs and all Class members.

29 **B. The Subclass Should Be Certified To Address Kodak’s Centralized Policies
30 And Practices That Are Responsible For Maintaining A Hostile Work
31 Environment And For Retaliation At Kodak’s Rochester Facilities**

32 Plaintiffs and the Subclass allege that Kodak has maintained a racially hostile work
33 environment that engenders discriminatory treatment of African American employees. “[W]hen
34 the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is
35 sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an
36 abusive working environment, Title VII is violated.” National R.R. Passenger Corp. v. Morgan,
37 536 U.S. 101, 116 (2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). In the
38 pattern or practice context, this Court has already adopted a two-stage test that Plaintiffs will

1 have to meet at the summary judgment stage to proceed to trial on this claim. Specifically,
2 Plaintiffs will have to prove by a preponderance of the evidence: 1) that an objectively
3 reasonable person would find the existence of a racially hostile work environment at Kodak; and
4 2) a company policy of tolerating, and therefore condoning and/or fostering, a workforce
5 permeated with severe or pervasive racist incidents. See, e.g., Employees Committed for Justice
6 v. Eastman Kodak Co., 407 F. Supp.2d 423, 430 (W.D.N.Y. 2005) (J. Feldman).

7 Title VII further prohibits Kodak from subjecting an employee to adverse consequences
8 “because he has opposed any practice made an unlawful employment practice ... or because he
9 has made a charge, testified, assisted, or participated in any manner in an investigation,
10 proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). “Title VII is violated
11 when a retaliatory motive plays a part in adverse ... actions toward an employee, whether or not
12 it was the sole cause.” Terry v. Ashcroft, 336 F.3d 128, 140-41 (2nd Cir. 2003).

13 In support of their hostile work environment and retaliation claims, Plaintiffs submit
14 Appendix IV, which compiles and describes no less than 767 complaints of racial discrimination
15 that were made to Kodak during the Class Period.⁸ See Appendix IV: Declaration of Rebecca M.
16 Hamburg, Esq. in Support of Plaintiffs' Motion for Class Certification (“Appendix IV”),
17

18 ⁸ Exhibits B, C and D of Appendix IV refer to the date of complaints of racial
19 discrimination, as opposed to when the incident actually took place. Because these exhibits
20 include complaints made as part of Kodak’s ADR Peer Review Process, which allowed for
21 claims by former employees, it is clear that some of the incidents occurred before the Class
22 Period. However, as the U.S. Supreme Court has recognized, pre-class period information is
23 relevant to the proving employment discrimination during the Class Period. See, e.g., National
24 R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Further, the fact that the complaints
25 were made to Kodak during the Class Period makes them relevant to Kodak’s knowledge of its
26 racial discrimination.
27
28

1 Exhibits B, C, D. Specifically, Exhibit B of Appendix IV demonstrates that there were 259
2 documented complaints of hostile work environment and 49 complaints of retaliation made to
3 Kodak during the Class Period. These complaints demonstrate a pattern or practice of egregious
4 racially discriminatory incidents and are *prima facie* evidence of a Rochester facilities-wide
5 practice of racial harassment and retaliation. See, e.g., Wright v. Stern, 450 F. Supp.2d at 374-
6 75 (holding that the existence of 30 retaliation complaints filed with outside agencies constituted
7 evidence that retaliation occurred on an agency-wide basis).

8 However, it is important to remember that the exhibits to Appendix IV only reflect
9 complaints that were *reported, documented, retained* (*i.e.*, not destroyed), and *produced*.⁹ There
10 are three primary reasons to believe that the number of instances of racial discrimination during
11 the Class Period was much more than what Plaintiffs have been able to chart. First, Kodak has
12 admitted that it inexplicably did not have a system mandating that all complaints of racial
13 discrimination were documented. SOF ¶¶279-80, 286, 288. Second, Plaintiffs have discovered
14 that Kodak (and its third party consultants) destroyed evidence, including complaints of racial
15 discrimination. For example, it is undisputed that all notes from all interviews and focus groups
16 conducted as part of Kodak’s multiple “cultural audits” have been destroyed. Plaintiffs’
17 Statement of Facts in Support of their Motion for Sanctions Based on Kodak’s Spoliation of
18 Evidence at ¶¶72-90. The summary reports that do exist reflect that there were many complaints
19 of racial discrimination made in these interviews and focus groups, which Plaintiffs have been
20 unable to document in Appendix IV. *Id.* at ¶¶78-86. Finally, Kodak’s policy or practice of
21 retaliation quieted many complaints that would have otherwise been made. SOF ¶¶279-281;
22 Appendix III (Barnes Decl. ¶10; Dudley Decl. ¶16; Graham Decl. ¶7; Roberts Decl. ¶12; Scott
23 Decl. ¶16; Stuckey Decl. ¶14).

24 For these reasons, the number of actual complaints to Kodak of racial discrimination
25 during the Class Period was actually much larger than 767, which skyrockets Kodak off the

26
27 ⁹ Of the 767 complaints, there are several that were not produced which Plaintiffs found
28 on publically available court dockets.

1 charts as compared to companies the size of Kodak that do not have a problem with racial
2 discrimination. Appendix II, Ex. C at ¶¶ 61-66 (providing expert opinion that “even this high
3 complaint level certainly underestimated the number of Black employees at Kodak who felt
4 themselves to be victimized by discrimination”).

5 In any event, the evidence collected by Plaintiffs is compelling -- and disturbing. Exhibit
6 D to Appendix IV isolates only the 259 reported incidents of racial harassment and 49 incidents
7 of retaliation in a timeline format and provides twenty-one pages of evidence of the deplorable
8 environment in which African Americans were forced to work in Kodak’s Rochester facilities.
9 Kodak cannot possibly pretend that this record is typical in corporate America during this time
10 period, or, for that question, any normal workplace. For example, the record reflects:

- 11 ◆ that racist remarks such as the term “nigger” often combined with explicit
12 or implicit threats of violence were a regular occurrence at Kodak. See,
13 e.g., Brown Decl. ¶¶ 8, 9; Dagher Decl. ¶ 14; Magnolia Decl. ¶ 16;
14 Nesmith Decl. ¶¶ 24, 25; Walters Decl. ¶ 12; Williams Decl. ¶ 12.
- 15 ◆ that African American employees had to tolerate racist symbols that
16 implied (or made explicit) violence against African Americans, such as the
17 term, “KKK” and nooses¹⁰ being left in areas where African Americans
18 worked. See, e.g., Bradley Decl. ¶ 9; Davis Decl. ¶ 24; Gayden Decl. ¶ 22;
19 Gibson Decl. ¶ 22; Magnolia Decl. ¶ 11; Nesmith Decl. ¶ 25.
- 20 ◆ that racist graffiti was present in many bathrooms and walls and other
21 places within Kodak. See, e.g., Brown Decl. ¶¶ 7, 11, 18; Cobb Decl. ¶ 18;
22 Cyrus Decl. ¶ 8; Gayden Decl. ¶ 23; Gibson Decl. ¶ 12; Graham Decl. ¶¶
23 8, 10; Magnolia Decl. ¶ 13; Rice Decl. ¶ 16.
- 24 ◆ that white employees made racist comments with impunity, and
25 sometimes in the direct presence of supervisors, who exhibited an
26 anything goes attitude toward such conduct. See, e.g., Brown Decl. ¶¶ 9,
27 10; Dukes Decl. ¶ 7; Graham Decl. ¶ 9.

28 See also Appendix IV, Ex. D (summarizing complaints of hostile work environment and
retaliation); Appendix II, Ex. B at 19-20.

Plaintiffs and the Class challenge Kodak’s centralized policy or practice of maintaining a

¹⁰ A noose is “among the most repugnant of all racist symbols, because it is itself an
instrument of violence.” Williams v. City of New York Hous. Auth., 154 F. Supp. 2d 820, 824
(S.D.N.Y. 2001).

1 hostile and retaliatory work environment for Kodak’s African American employees in Rochester.
2 SOF ¶¶273-290; Appendix II, Ex. B; Appendix III (J. Bonham Decl. ¶ 14; Bradley Decl. ¶¶ 8,
3 10; Brinson Decl. ¶¶ 8, 9; Brown Decl. ¶¶ 7 – 11, 16 - 18; Carter Decl. ¶¶ 12 – 17, 24; Cliff
4 Decl. ¶ 25; Cobb Decl. ¶ 18; Cyrus Decl. ¶ 8; Dagher Decl. ¶¶ 13, 14; Davis Decl. ¶¶ 11, 12, 14,
5 24; Drains Decl. ¶¶ 12 – 15, 17; Dukes Decl. ¶ 7; Gainey Decl. ¶¶ 11, 12; Gayden Decl. ¶ ¶ 22,
6 23; Gibson Decl. ¶¶ 11, 12; Gissendanner Decl. ¶ 29; Graham Decl. ¶¶ 8 – 10, 15; Green Decl.
7 ¶¶ 11, 12; Jones Decl. ¶¶ 17, 18; Lockett Decl. ¶¶ 9, 15; Magnolia Decl. ¶¶ 11 – 13, 15; Monroe
8 Decl. ¶¶ 10 - 12; Nesmith Decl. ¶¶ 12, 24, 25; Pringle Decl. ¶ 30; Rhabb Decl. ¶ 15; Rice Decl.
9 ¶¶ 11, 16, 34, 37; Roberts Decl. ¶ 9; Scott Decl. ¶¶ 14, 17 – 21, 37; Walker Decl. ¶¶ 14, 22;
10 Waller Decl. ¶ 8; Walters Decl. ¶ 12; Williams Decl. ¶¶ 8, 12; Wilson Decl. ¶ 24); see also
11 Appendix IV, Ex. D. Plaintiffs and the Class further challenge: 1) Kodak’s centralized policy or
12 practice of failing to properly document all racist incidents and complaints, (SOF ¶286); 2)
13 Kodak’s centralized policy or practice of failing to designate a central agency within Kodak to
14 deal with all racist incidents and complaints, (SOF ¶286-290); and 3) Kodak’s centralized policy
15 or practice of failing to properly monitor the environment to ensure that such incidents do not
16 occur (SOF ¶¶279-80, 286, 288; Appendix II, Ex. B at 9-10, 20). Each of these policies or
17 practices is responsible for contributing to the hostile work environment and retaliation
18 identified by Plaintiffs at Kodak’s Rochester facilities. Each of these policies or practices is
19 centralized and affects Plaintiffs and the Subclass in a common way. Plaintiffs’ claims are
20 typical of the claims of the Class members with respect to Kodak’s course of conduct.

21 **III. ARGUMENT**

22 Plaintiffs allege that Kodak’s challenged policies and practices result in both disparate
23 treatment and disparate impact against Plaintiffs and the Class. Pattern or practice disparate
24 treatment claims involve “allegations of widespread acts of intentional discrimination against
25 individuals.” Robinson, 267 F.3d 147, 158 (2nd Cir. 2001). A plaintiff states a disparate
26 treatment pattern or practice claim by demonstrating sufficient evidence that the defendant had a
27 policy, pattern, or practice of intentionally discriminating against a protected group. Robinson,
28 267 F.3d at 158.

1 Title VII, however, not only prohibits overt and intentional discrimination, but also
2 facially neutral practices that have a disparate impact on protected groups. Malave v. Potter, 320
3 F.3d 321, 325 (2nd Cir. 2003). “Thus, disparate impact claims offer a means to erase
4 ‘employment obstacles, not required by business necessity, which create built-in headwinds and
5 freeze out protected groups from job opportunities and advancement.’” Wright v. Stern, 450 F.
6 Supp.2d 335, 367 (S.D.N.Y. 2006) (quoting Robinson v. Metro-North Commuter R.R., 267 F.3d
7 147, 160 (2nd Cir. 2001)).

8 **A. Class Certification Legal Standards In The Second Circuit**

9 In order to certify a class under Rule 23, a party must satisfy the four prerequisites of
10 Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ.
11 P. 23(a). The party seeking certification must also qualify under one of the three criteria set
12 forth in Rule 23(b). Fed. R. Civ. P. 23(b). “In determining the propriety of a class action, the
13 question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on
14 the merits, but rather whether the requirements of Rule 23 are met.” Eisen v. Carlisle &
15 Jacquelin, 417 U.S. 156, 178 (1974). Plaintiffs have the burden of establishing that the class
16 satisfies the requirements of Rule 23. W.D.N.Y. Local Rule 23. The district court must apply a
17 rigorous analysis to determine that the requirements of Rule 23 are satisfied. General Telephone
18 of the Southwest v. Falcon, 457 U.S. 147, 160-161 (1982).

19 In 2006, the Second Circuit addressed what standards govern a district court judge in
20 adjudicating a motion for class certification under Rule 23, and set forth the following standard:

- 21 (1) a district judge may certify a class only after making
22 determinations that each of the Rule 23 requirements has been met;
23 (2) such determinations can be made only if the judge resolves
24 factual disputes relevant to each Rule 23 requirement and finds
25 that whatever underlying facts are relevant to a particular Rule 23
26 requirement have been established and is persuaded to rule, based
27 on the relevant facts and the applicable legal standard, that the
28 requirement is met; (3) the obligation to make such determinations
is not lessened by overlap between a Rule 23 requirement and a
merits issue, even a merits issue that is identical with a Rule 23
requirement; (4) in making such determinations, a district judge
should not assess any aspect of the merits unrelated to a Rule 23
requirement; and (5) a district judge has ample discretion to
circumscribe both the extent of discovery concerning Rule 23
requirements and the extent of a hearing to determine whether such

1 requirements are met in order to assure that a class certification
2 motion does not become a pretext for a partial trial of the merits.

3 In re Initial Public Offering Securities Litigation, 471 F.3d 24, 41 (2nd Cir. 2006) (petition for
4 rehearing denied, 483 F.3d 70 (2nd Cir. 2007) (hereinafter “IPO”).¹¹

5 _____
6 ¹¹ Since IPO, as of the date of this brief, almost all of the district courts within the
7 Second Circuit which have considered motions for class certification have granted class
8 certification. See, e.g., Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204 (S.D.N.Y. 2007) (in
9 a Title VII race discrimination class action which the defendant moved to decertify post-IPO, the
10 district court denied the motion and held that deciding which side’s expert statistical report was
11 more persuasive was not warranted in deciding that the commonality requirement for class
12 certification was met; to do so would be to decide on the merits whether the class was actually
13 discriminated against); see also In re Citigroup Pension Plan ERISA Litig., 241 F.R.D. 172
14 (S.D.N.Y. 2006) (certifying a Rule 23 class asserting ERISA claims); Thompson v. Linvatec
15 Corp., No. 6:06-CV-0404, 2007 WL 1526418, at *3 (N.D.N.Y. May 22, 2007) (certifying a Rule
16 23 class asserting ERISA claims); Vengurlekar v. HSBC Bank, No. 03 Civ. 0243, 2007 WL
17 1498326 (S.D.N.Y. May 22, 2007) (certifying a Rule 23 class asserting ERISA and UFTA
18 claims); In re Vivendi Universal, S.A., No. 02 Civ. 5571, 2007 WL 1490466 (S.D.N.Y. May 21,
19 2007) (certifying a Rule 23 class asserting securities fraud); In re J.P. Morgan Chase Cash
20 Balance Litig., No. 06 Civ. 732, 2007 WL 1549121 (S.D.N.Y. May 30, 2007) (certifying a Rule
21 23 class asserting ERISA claims); In re Metlife Demutualization Litig., No. CV 00-2258, 2007
22 WL 1395560 (E.D.N.Y. May 9, 2007) (denying defendant’s motion to decertify a Rule 23 class
23 asserting fraud claims following the IPO ruling); Iglesias-Mendoza v. La Belle Farm, Inc., 239
24 F.R.D. 363 (S.D.N.Y. 2007) (certifying a Rule 23 class asserting New York Labor Law claims).
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1 It is important to note that “the determination as to a Rule 23 requirement is made only
2 for purposes of class certification and is not binding on the trier of facts, even if that trier is the
3 class certification judge.” Id. “A district judge is to assess all of the relevant evidence admitted
4 at the class certification stage, and determine whether each Rule 23 requirement has been met,
5 just as the judge would resolve a dispute about any other prerequisite for a continuing lawsuit.”
6 Id. at 42.

7 An order certifying a class “may be altered or amended before final judgment.” Fed. R.
8 Civ. P. 23(c)(1)(C). “A district court also has the discretion to decertify a class by amending the
9 order granting the certification, ‘if the court finds that certification should not have been granted
10 or is no longer appropriate.’” Richards v. FleetBoston Financial Corp., 238 F.R.D. 345 (D. Conn.
11 2006) (citing 5 Moore’s Federal Practice § 23.87 (Matthew Bender 3d ed.)). “Accordingly, in
12 deciding the appropriateness of class certification, there is no need for the court to address the
13 merits of the plaintiffs’ allegations to identify putative class members. Nor does class
14 membership here require the court to engage in a fact-intensive inquiry as to each potential
15 member.” Thompson v. Linvatec Corp., No. 6:06-CV-0404, 2007 WL 1526418, at *3
16 (N.D.N.Y. May 22, 2007) (certifying a Rule 23 class post-IPO). “When deciding a motion to
17 certify a class, the allegations in the complaint are accepted as true.” Id. (citations omitted);
18 Cokely v. The New York Convention Center Operating Corp., 2004 WL 1152531 (S.D.N.Y.
19 May 21, 2004) (citing Shelter Realty Corp. v. Allied Maint. Corp., 574 F.2d 656, 661 n. 15 (2nd
20 Cir. 1978)); Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884, at *7 (E.D.N.Y. Jan.
21 26, 2004); Wright v. Stern, 2003 WL 21543539, at *4 (S.D.N.Y. July 9, 2003).

22 The “law in the Second Circuit favors the liberal construction of Rule 23 and courts may
23 exercise broad discretion when they determine whether to certify a class.” Thompson v.
24 Linvatec Corp., No. 6:06-CV-0404, 2007 WL 1526418, at *4 (citation omitted). “Moreover,
25 courts should resolve all doubts about whether a class should be created in favor of
26 certification.” Id. (citation omitted). The Second Circuit has stressed that courts of appeal are
27 noticeably less deferential to the district court when that court has denied class status than when
28 it has certified a class. See Lundquist v. Security Pacific Automotive Fin. Serv. Corp., 993 F.2d

1 11, 14 (2nd Cir. 1993); see also Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997).
2 Further, “because courts are given discretion to tailor the scope of the class later in the litigation,
3 liberal consideration of the requirements for class certification is permitted in the early stages of
4 litigation.” Wright v. Stern, 2003 WL 21543539, at *4 (citing Woe ex rel. Woe v. Cuomo, 729
5 F.2d 96, 107 (2nd Cir.)(1984), cert. denied, 469 U.S. 936 (1984)).

6 With respect to this case, it is important to note that while the Second Circuit in IPO
7 reversed in part its decision in Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2nd Cir.
8 1999) that permitted courts to certify a class based on “some showing” of compliance with the
9 Rule 23 requirements as opposed to the standard set forth above in IPO, the Second Circuit in
10 IPO “*did not revisit or reverse that part of the Caridad decision that held that the commonality*
11 *requirement [of Rule 23] may be satisfied in a challenge to subjective employment practices.*”
12 Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 207 (S.D.N.Y. 2007) (emphasis added).

13 Further, in actions alleging a pattern and practice of discrimination, “[t]he Second
14 Circuit has made clear that statistical evidence is sufficient to establish a *prima facie* case in
15 Title VII cases.” Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476, 484 (S.D.N.Y. 2005)
16 (citing Robinson, 267 F.3d at 158-159; Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 604 (2nd
17 Cir. 1986)).¹² The standard for establishing a *prima facie* case is higher than the standard at the
18

19 ¹² In its summary judgment opinion in Wright v. Stern, a Title VII race discrimination
20 case in which a class had previously been certified, the district court noted:
21

22 For statistics to give rise to an inference of discrimination, they
23 must be statistically significant, for disparity among protected and
24 unprotected groups will sometimes result by chance. Ottaviani v.
25 State Univ. of N.Y., 875 F.2d 365, 371 (2nd Cir. 1989). Though
26 not dispositive, statistics demonstrating a disparity of two standard
27 deviations outside of the norm are generally considered
28 statistically significant. See, e.g., Smith v. Xerox Corp., 196 F.3d
358, 365-66 (2nd Cir. 1999) (disparate impact claim); Ottaviani,
875 F.2d at 371 (disparate treatment claim, collecting cases). “A
finding of two standard deviations corresponds approximately to a
one in twenty, or five percent, chance that a disparity is merely a

1 class certification stage. Hnot, 228 F.R.D. at 484. Thus, statistical evidence *alone* is sufficient
2 evidence on which to base a determination that class certification of a pattern and practice
3 discrimination case is appropriate. Further, deciding which side's expert statistical report is
4 more persuasive is not warranted in deciding whether the commonality requirement for class
5 certification is satisfied. Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 210 (S.D.N.Y.
6 2007) (post-IPO decision).

7 Here, Plaintiffs and the Class have submitted a detailed statistical expert report by one of
8 the country's leading labor economists, Dr. Janice Madden. See Exhibit A to Appendix II. In
9 addition, Plaintiffs have submitted additional statistical information analyzed by Dr. Anthony
10 Greenwald. See Exhibit C to Appendix II. Both of these reports detail statistically significant
11 disparities affecting African American employees at Kodak, and conclude that Kodak's policies
12 and practices with respect to pay, promotions, performance appraisals, job assignments, and
13 layoffs, are not race-neutral. Appendix II, Ex. A at 63 and Ex. C at 5-6. On the basis of these
14 expert reports alone, class certification is warranted. When combined with the internal statistical
15 analysis conducted by Kodak in 1999 and the EEOC's statistical conclusions in 2004 -- both of
16 which identified class-wide discrimination against African Americans at Kodak -- class
17 certification is dictated.

18 However, Plaintiffs and the Class have also gathered and organized an incredible amount
19 of anecdotal evidence supporting class certification. Above, Plaintiffs discussed the evidence set
20

21 random deviation from the norm...." Ottaviani, 875 F.2d at 371.
22 Where plaintiffs demonstrate "gross statistical disparities" between
23 the protected and unprotected groups, statistics "alone may ...
24 constitute *prima facie* proof of a pattern or practice of
25 discrimination." Hazelwood Sch. Dist. v. United States, 433 U.S.
26 299, 307-08 (1977) (citing Teamsters, 431 U.S. at 339).

27 Wright v. Stern, 450 F. Supp.2d at 363 (describing the standards to be utilized by the federal
28 courts in evaluating pattern and practice disparate treatment and disparate impact claims at the
summary judgment stage).

1 forth in Appendix IV (detailing 767 reported complaints of racial discrimination by Kodak
2 during the Class Period). In addition to this evidence, Plaintiffs direct the Court’s attention to
3 Appendix III, Declaration of Shanon J. Carson, Esq. In Support Of Class Certification
4 (“Appendix III”), which contains 53 declarations of the named Plaintiffs and Class members in
5 this case. These declarations reflect that the claims of Plaintiffs and the Class are typical, and
6 that common issues predominate their claims. Sadly, these declarations read in concert also
7 reflect the tremendous barriers imposed by the centralized policies and practices that Plaintiffs
8 are challenging in this litigation.

9 With respect to such non-statistical evidence in a pattern or practice discrimination case
10 at the class certification stage, “[a]necdotal information can be important in bringing ‘the cold
11 numbers convincingly to life,’ but is not a necessity. Hnot, 228 F.R.D. at 484 (quoting Rossini,
12 798 F.2d at 604) (quoting Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339
13 (1977)). Anecdotal information may take the form, for example, of declarations of the named
14 plaintiffs, class members and witnesses, as well as deposition testimony and documents
15 produced during discovery. See 1 Merrick T. Rossein, *Employment Discrimination Law and*
16 *Litigation* § 2:28, at 2-94 (2006) (“It is important always to present stories of actual
17 discrimination against individuals to make the statistics come alive....”). The declarants tell such
18 stories.

19 Finally, under Fed. R. Civ. P. 23(c)(4), a court may divide a class into subclasses when
20 all members of the class challenge the same conduct but assert different specific interests or legal
21 theories. See Fed. R. Civ. P. 23(c)(4); David Herr, Federal Judicial Center, *Annotated Manual*
22 *for Complex Litigation, Third* 251-53 (2003). District courts have broad discretion to decide
23 whether subclasses are necessary based on the facts of the particular case. See id. at 252-53.
24 Here, Plaintiffs have moved for certification of a subclass because they do not assert their claim
25 for hostile work environment and retaliation on behalf of non-Rochester-based employees.

26 For the reasons set forth below, Plaintiffs meet the requirements set forth in Rule 23 for
27 class certification.

28 **B. The Court Should Follow The Many Precedential Decisions Of The Second**

1 **Circuit And Its District Courts Granting Class Certification In Actions**
2 **Alleging A Pattern And Practice Of Company-Wide Racial Discrimination**

3 The Second Circuit and its district courts have a long history of granting class
4 certification in cases alleging a pattern or practice of race discrimination. For example, in
5 Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147 (2nd Cir. 2001), a Title VII
6 action alleging racial discrimination with respect to promotion and discipline, and in an earlier
7 appeal in the same case, Caridad v. Metro-North Commuter Railroad, 191 F.3d 283 (2nd Cir.
8 1999), the Second Circuit twice reversed the district court’s denial of a motion to certify a class
9 and ultimately directed certification of the liability stage of the disparate impact pattern or
10 practice claim. In Robinson, the plaintiffs challenged Metro North’s alleged company-wide
11 policy of delegating discretionary authority to department supervisors to make employment
12 decisions related to promotions and discipline. The plaintiffs relied on statistical and anecdotal
13 evidence and argued that this authority was exercised in a racially discriminatory manner and
14 had a disparate impact on African American employees. See Robinson, 267 F.3d at 155;
15 Caridad, 191 F.3d at 286-87. In Caridad, the Second Circuit concluded that the delegation of
16 discretionary authority constituted a policy or practice sufficient to establish commonality under
17 Rule 23(a)(2), Caridad, 191 F.3d at 291-92, and reaffirmed this holding in Robinson. Robinson,
18 267 F.3d at 169-70.

19 In Latino Officers Ass’n City of New York v. City of New York, 209 F.R.D. 79, 88
20 (S.D.N.Y. 2002), the district court reached a similar result. In this case, the plaintiffs were
21 Latino and African American members of the New York City Police Department (“NYPD”),
22 who, among other allegations, complained that grants of discretion to NYPD supervisors to
23 administer discipline resulted in racially discriminatory disciplinary treatment and retaliation.
24 The district court certified the class for the purpose of establishing liability, relying on the
25 plaintiffs’ statistical analysis because “it tend[ed] to establish that being Latino or African-
26 American ha[d] an effect on an officer’s involvement and treatment in the NYPD’s disciplinary
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1 system.”¹³ 209 F.R.D. at 89.

2 In Wright v. Stern, 2003 WL 21543539 (S.D.N.Y. July 9, 2003), eleven African
3 American and Hispanic current and former employees brought a class action against the New
4 York City Department of Parks and Recreation (“DPR”), alleging discrimination on the basis of
5 race, color and national origin under Title VII and Section 1981. Id. at *1. The plaintiffs moved
6 “for an order certifying a class of present and former African-American and Hispanic full-time
7 employees of DPR who have worked at DPR since May 24, 1998.” Id. at *1. The plaintiffs
8 relied on the allegations in their complaint (which the Court took as true for purposes of the
9 motion), as well as a statistical report. Id. at *2. The plaintiffs alleged that DPR engaged in
10 disparate treatment by denying African American and Hispanic employees advancement
11 opportunities and salary increases comparable to similarly situated white employees and that
12 DPR engaged in discriminatory practices causing a significant racial disparity in compensation,
13 promotions, and the composition of managerial and higher level staff. Id. at *2. The plaintiffs
14 also offered testimonial evidence of a racially hostile work environment and retaliation, alleging
15 that certain employees made racially derogatory remarks and that nooses were displayed at
16 certain facilities. Id. at *4. Further, as in the case at bar, on January 30, 2001, “the EEOC issued
17 a Determination finding reasonable cause to believe that DPR engaged in a pattern and practice
18 of racial discrimination through its promotions and assignments....” Id. at *4. The district court
19 certified the requested class finding that it satisfied all of the requirements of Rule 23(a) and
20 23(b)(2). The district court firmly rejected the defendants’ contention that there were too many
21 individualized issues, holding:

22 The instant case presents precisely the situation contemplated by
23 Rule 23(b)(2). Plaintiffs, if successful on the merits, would be
24 entitled to injunctive relief to ensure that the alleged race and
national origin-based discrimination ceases, and this relief would

25 ¹³ On September 14, 2004, the district court approved a class settlement of this case.
26 Latino Officers Ass’n City of New York v. City of New York, No. 99 Civ.9568, 2004 WL
27 2066605 (S.D.N.Y. September 15, 2002).
28

1 advance the interests of the entire class “even if not every member
2 actually felt the brunt of the actions.” Latino Officers, 209 F.R.D.
3 at 93. Hence, injunctive relief against defendants would be
4 appropriate should plaintiffs prevail. The fact that plaintiffs also
5 seek monetary damages for the class does not preclude
6 certification under Rule 23(b)(2).

7 Defendants argue that as to damages, too many individualized
8 determinations are necessary for the class to be certified under
9 Rule 23(b)(2). This is not a concern at the liability stage. Should a
10 need for individualized relief arise at the remedial stage of the
11 proceedings, “it would be appropriate for the Court to afford notice
12 and opt-out rights to absent class members. Latino Officers, 209
13 F.R.D. at 93. See Robinson, 267 F.3d at 166. At this stage,
14 however, the rights of absent class members are adequately
15 protected.

16 Wright v. Stern, 2003 WL 21543539, at *8.

17 In Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884 (E.D.N.Y. Jan. 26,
18 2004), six African American sales employees filed a complaint against Xerox Corp. (“Xerox”)
19 on May 9, 2001, alleging that the company “carried out a continuing pattern and practice of race
20 discrimination and retaliation by: (1) systematically assigning black salespeople to inferior sales
21 territories, often located in low-income or minority neighborhoods; (2) refusing to promote them
22 or to transfer them to more lucrative territories no matter how hard they work or how well they
23 perform; (3) denying them sales commissions they have rightfully earned; and (4) retaliating
24 against black salespeople who assert their civil rights.” Id. at *1. On August 7, 2002 -- as in this
25 case -- in response to charges filed by other African American sales representatives, the EEOC
26 “issued a ‘reasonable cause’ determination that Xerox had engaged in a pattern or practice of
27 discrimination on the basis of race.” Id. at *1. On May 30, 2003, the plaintiffs requested the
28 district court to certify a class of “[a]ll black individuals employed at Xerox Corporation in the
United States as a salesperson at any time from February 1, 1997 to the present, or who will be
employed as a salesperson between the date of the filing of the Complaint in this action and the
date of judgment.” Id. at *2. In support of their motion, the plaintiffs relied on their own
affidavits and an analysis conducted by their statistical expert. Id. at *2-3. Following a careful
review of the parties’ submissions, the district court ruled that it would:

bifurcate the liability and remedial phases of this litigation and
certify the following class pursuant to Rule 23(b)(2), for liability

1 and class-wide injunctive and declaratory relief on plaintiffs’
2 disparate impact and treatment claims: all black Xerox sales
3 representatives who (within the applicable statute of limitation)
4 have been, continue to be, or may in the future be, affected by
5 defendant’s alleged pattern and practice of racial discrimination in
6 assignments of sales territories, promotions, and compensation.

7 Id. at *18.

8 In Cokely v. The New York Convention Center Operating Corp., 2004 WL 1152531
9 (S.D.N.Y. May 21, 2004), four African American and Hispanic employees of the New York
10 Convention Center Operating Corporation (“NYCCOC”), brought a putative class action against
11 their employer alleging claims under Title VII and Section 1981. Id. at *1. The plaintiffs
12 alleged four different types of discrimination:

13 First, plaintiffs complain that the job allocation and promotion
14 system is manipulated to give white male employees preferences
15 with respect to the type and amount of work assigned, and greater
16 opportunities to obtain higher paying jobs at the Javits Center.
17 Second, plaintiffs claim that management has created, and
18 condones, a hostile work environment, rife with racist and
19 misogynist epithets. Third, plaintiffs allege that they have been
20 denied various privileges of employment and singled out for
21 reprimand because of their race. Finally, plaintiffs argue that they
22 have suffered retaliation for complaining to management about this
23 discrimination.

24 Id. at *1.

25 Initially, the district court denied class certification, on the grounds that “plaintiffs had
26 provided only one affidavit of one named plaintiff beyond the pleadings already submitted.” Id.
27 at *2. However, following a period of discovery, the plaintiffs renewed their motion and
28 provided: 1) affidavits of fourteen class members and three white employees; 2) various forms
of complaints of racial discrimination that had been made to defendant during the relevant time
period, including union grievances, and administrative complaints filed with the New York State
Division of Human Rights and the EEOC; and 3) “some statistics calculated by one of their
attorneys purporting to demonstrate that plaintiffs are paid less than white employees.” Id. at *2.

Following a careful review of the Rule 23 requirements, the district court certified the
class under 23(b)(2), “with the intention of reconsidering the certification category [(b)(2) or
(b)(3)] if the class is successful at the liability stage.” Id. at *9. Specifically, the court held:

1 Like our sister court in Gelb, we “subscribe to the approach of
2 several commentators that ... ‘if the Rule 23(a) prerequisites have
3 been met and injunctive or declaratory relief has been requested,
4 the action usually should be allowed to proceed under subdivision
5 (b)(2).’” Gelb v. Am. Tel. & Tel. Co., 150 F.R.D. 76, 78
6 (S.D.N.Y. 1993) (quoting Charles A. Wright, et al., 7A Federal
7 Practice and Procedure: Civil 2d § 1775, at 470 (1986)). Under
8 23(b)(2), defendants are alleged to have acted on grounds
9 applicable to the class as a whole. Those grounds are racist
10 grounds. We find that the value to the plaintiffs of the injunctive
11 relief sought predominates over the value of the monetary relief
12 sought. Plaintiffs allege a work environment in which pervasive
13 racism not only cripples earning potential, partly through dishonest
14 manipulation of a supposedly random system of work assignment,
15 and jeopardizes the jobs of those who are subjected to retaliation
16 and/or discriminatory discipline, but also infects the work
17 environment, manifesting itself in the form of vicious verbal slurs,
18 physical attacks, and death threats. Were these allegations to
19 prove true, reform would be urgent, and long overdue for those
20 who allege that they have suffered ongoing retaliation in response
21 to their complaints. We are thus satisfied that “even in the absence
22 of a possible monetary recovery, reasonable plaintiffs would bring
23 the suit to obtain the injunctive or declaratory relief sought.”
24 Robinson, 267 F.3d at 164. We are also satisfied that the
25 injunctive or declaratory relief sought would be both reasonably
26 necessary and appropriate were the plaintiffs to succeed on the
27 merits. Robinson, 267 F.3d at 164. Indeed, were plaintiffs to
28 succeed on the merits, the risk of retaliation could reasonably be
expected to be greater than ever, and thus injunctive relief
restraining defendants from retaliation would be particularly
urgent. While it may be that individualized damages issues would
make it necessary to adopt an approach other than the single class,
we are confident that a single class can be efficiently administered
at the liability stage.

Id. at *9.

19 In Hnot v. Willis Group Holdings Ltd., 228 F.R.D. 476 (S.D.N.Y. 2005), two female
20 employees of Willis Group Holdings Ltd. (“Willis”), brought a nationwide gender discrimination
21 class action which was subsequently limited to Willis’s Northeast Region. Id. at 479. The
22 plaintiffs filed a motion asking the court to certify a class of “current and past female officers,
23 and female employees eligible to receive officer titles.” Id. at 479. Specifically, the plaintiffs
24 alleged a pattern and practice of gender discrimination and contended that Willis “delegates
25 substantial authority regarding promotion and compensation decisions to regional and local
26 officers, leading to inequitable consequences for women at Willis.” Id. at 479-480. The specific
27 policies or practices challenged by the plaintiffs included the allegations that Willis: “had a
28

1 policy of vesting its regional and local officers with ‘unfettered discretion’ on these matters”;
2 that there were “no written policies for awarding officer titles”; and that there were “few or no
3 guidelines or criteria for determining salary or bonuses.” Id. at 480. Plaintiffs motion for class
4 certification relied primarily on a statistical expert report concluding that “women were
5 statistically significantly adversely affected in compensation and promotions.” Id. at 480.

6 The district court certified the class. With respect to the commonality element of Rule
7 23(a)(2), the district court followed Caridad and held that whether Willis had a common policy
8 of vesting regional and local officers with unfettered discretion in making promotion and
9 compensation decisions presented a common issue. Id. at 482. The district court further held
10 that the plaintiffs’ statistical report by itself supported a finding of commonality. Id. at 483
11 (“Here, as in Caridad, the statistical evidence is sufficient to demonstrate common questions of
12 fact regarding the discriminatory implementation of Willis’s company-wide policies regarding
13 promotion and compensation.”). The district court also certified the class under Rule 23(b)(2) on
14 the issues of liability and injunctive relief, and deferred consideration of whether Rule 23(b)(3)
15 was met as to individual damages. Id. at 486. In making this ruling the district court relied on
16 Robinson and held that the plaintiffs’ claims for declaratory, injunctive, and equitable relief
17 predominated over their claims for monetary relief. Id. at 486. The court noted that Title VII
18 civil rights cases may be divided into liability and remedial phases, and that the issue of whether
19 the plaintiffs meet the requirements of Rule 23(b)(3) could be deferred until after the liability
20 trial. Id. at 486.

21 **C. The Proposed Class And Subclass Satisfy The Numerosity, Commonality,**
22 **Typicality And Adequacy Requirements Set Forth In Rule 23(a)**

23 Rule 23(a) provides that:

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

Fed. R. Civ. P. 23(a).

1 **1. The Proposed Class and Subclass Are Sufficiently Numerous**

2 The proposed Class and Subclass satisfy Rule 23(a)(1), which permits a class action
3 when it is likely that the Class is so numerous that “joinder of all members is impracticable.”
4 Fed. R. Civ. P. 23(a)(1). Courts do not require evidence of the exact size of the class nor the
5 identity of class members to satisfy the numerosity requirement. Robidoux v. Celani, 987 F.2d
6 931, 935 (2nd Cir. 1993); Latino Officers Ass’n City of New York, Inc. v. City of New York, 209
7 F.R.D. 79, 88 (S.D.N.Y. 2002).

8 Kodak produced HR data encompassing the time period from January 1, 1995 to May 1,
9 2005. Appendix II, Ex. A at 1. That database contains information for 5,884 African American
10 employees, most of whom worked in Kodak’s Rochester facilities.¹⁴ Appendix II, Ex. A at 1.
11 Here, Plaintiffs plainly satisfy the numerosity requirement for both the Class and Subclass.
12 Marisol A., 126 F.3d at 376; see also Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d
13 473, 483 (2nd Cir. 1995) (“numerosity is presumed at a level of 40 members”). Here, joinder of
14 the claims of all Class and Subclass members would be impracticable. Clearly, the numerosity
15 requirement of Rule 23(a)(1) is met.

16 **2. There Are Many Questions Of Law And Fact Common To The Class**
17 **And The Subclass**

18 “The commonality requirement is satisfied if plaintiffs’ grievances share a common
19 question of law or of fact.” Marisol A., 126 F.3d at 376. “To satisfy the ‘commonality’
20 requirement of Rule 23(a)(2), the named plaintiffs need show only a single question of fact or
21 law common to the prospective class. Cokely, 2004 WL 1152531, at *4 (quoting Robinson v.
22 Metro-North Commuter R.R., 267 F.3d 147, 155 (2nd Cir. 2001), cert. denied, 122 S. Ct. 1349
23 (2002) (citing Marisol A., 126 F.3d at 376)).

24 Where injuries derive from a “unitary course of conduct by a single system,” issues of
25 fact are deemed common. Marisol A., 126 F.3d at 377. So long as claims arise out of the same

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27 ¹⁴ This number does not include African Americans who were hired by Kodak after it
28 produced its HR database in this litigation. Plaintiffs believe that this number is very small.

1 legal or remedial theory, the presence of individual variations will not preclude class treatment.
2 See Wright v. Stern, 2003 WL 21543539, at *6 (The plaintiffs’ “allegations of a ‘dual-track’
3 system of compensation and promotion, segregated work force, hostile environment, and
4 retaliation are common to all members of the proposed class regardless of civil service rank,
5 title, provisional status, or collective bargaining agreement.”); Daniels v. City of New York, 198
6 F.R.D. 409, 417 (S.D.N.Y. 2001); Ventura v. New York City Health & Hosp. Corp., 125 F.R.D.
7 595, 600 (S.D.N.Y. 1989); Canadian St. Regis Band of Mohawk Indians v. New York, 97 F.R.D.
8 453, 457 (N.D.N.Y. 1983).

9 Here, Plaintiffs’ statistical evidence supports their class allegations and presents an issue
10 common to all Class members. For example, in Wright v. Stern, the district court held:

11 ...plaintiffs’ statistical evidence supports their class allegations.
12 The proffered evidence shows racial disparities in promotion,
13 location, and compensation of DPR employees, including racial
14 disparities within different salary ranges. Plaintiffs also show low
15 numbers of African-Americans and Hispanics at the managerial
16 level or higher compared with their proportion of DPR employees
17 as a whole. Hence, plaintiffs’ statistics demonstrate common
18 questions of fact because they tend to show that being African-
19 American or Hispanic has an effect on an employee’s promotion,
20 compensation, and geographic assignment.

21 Wright v. Stern, 2003 WL 21543539, at *6; see also Warren v. Xerox Corp., No. 01-CV-2909,
22 2004 WL 1562884, at *10 (E.D.N.Y. Jan. 26, 2004) (“In short, consistent with the decisions in
23 Robinson, Caridad, and Latino Officers, where, as here, plaintiffs’ statistical and anecdotal
24 evidence tends to show that being a member of a racial minority has a negative effect on
25 compensation, that showing suffices to demonstrate a common question of fact concerning
26 defendant’s employment practices, within the meaning of Rule 23(a).”). Similarly, in this case,
27 the statistical evidence resulting from Kodak’s own internal study, the EEOC study,¹⁵ and the
28 expert reports of Dr. Madden and Dr. Greenwald all present common issues shared by Plaintiffs

15 The fact that the EEOC independently issued a Letter of Determination asserting a
pattern and practice of racial discrimination at Kodak also presents a common issue of law and
fact under Rule 23(a). See Wright v. Stern, 2003 WL 21543539, at *6.

1 and the Class members. See SOF ¶¶4, 5, 163–67, 175, 218-222, 244-48, 269-70, 295-304 382,
2 415-18; see generally, Appendix II, Exs. A and C.

3 In addition, it is now beyond dispute in the Second Circuit that an allegation of a
4 company-wide practice of delegating subjective decision-making raises common factual and
5 legal issues, even when the processes at issue are not entirely subjective. For example, in both
6 Caridad and Xerox, the African American plaintiffs challenged the “subjective *components* of
7 company-wide employment practices,” which negatively affected African Americans in terms of
8 disciplinary and promotion decisions). See, e.g., Caridad, 191 F.3d at 292 (emphasis added);
9 Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884, at *11. Although both Metro-
10 North and Xerox had promulgated policies that included objective variables, “it was the
11 application of those variables by individual managers to specific employees that allegedly
12 injected subjectivity into the process.” Id.; Caridad, 191 F.3d at 292-93. In Caridad, the Second
13 Circuit reversed the district court’s ruling that such a decisionmaking process precluded a
14 finding of commonality. Id. This decision was followed in Xerox, as well as in Latino Officers,
15 in which a class was certified where, as here, the plaintiffs challenged, as racially discriminatory,
16 the delegation of authority to supervisors to apply entity-wide objective rules and practices.”
17 Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884, at *10 (“The fact that one class
18 member may have been given a less desirable territory, while another was denied a promotion, is
19 of little moment. Both allegedly were injured by discriminatory acts of Xerox, resulting from the
20 overarching practice challenged by plaintiffs: decentralized, subjective decisionmaking at the
21 managerial level.”) (citing Latino Officers, 209 F.R.D. at 81-83, 88-89) (quotations omitted); see
22 also Dukes v. Wal-Mart Stores, 222 F.R.D. 137, 150 (N.D. Cal. 2004); Adams v. Pinole Point
23 Steel Co., 1994 WL 515347, at *8 (N.D. Cal. May 18, 1994); Stender v. Lucky Stores, Inc., 1990
24 WL 192734, at *3-5 (N.D. Cal. 1990); see also Caridad, 191 F.3d at 286; Butler v. Home Depot,
25 Inc., 1996 WL 421436, at *3 (N.D. Cal. 1996).¹⁶

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27 ¹⁶ Multiple courts have observed that “greater possibilities for abuse ... are inherent in
28 subjective definitions of employment selection and promotion criteria,” such as those in place at

1 Thus, here, Plaintiffs' allegation that Kodak utilized a centralized policy or practice of
2 delegating substantial discretion to its supervisors to make personnel decisions in the areas of
3 pay, promotions, performance appraisals, job assignments, and layoffs, to the detriment of
4 African American employees, presents a common question of fact sufficient to support a finding
5 of commonality under Rule 23(a).

6 As already shown above, however, class treatment in this case is not based simply on an
7 allegation of subjective decision-making. Plaintiffs have also set forth substantial evidence
8 demonstrating that Kodak's performance appraisal system is deficient in its design and that
9 Kodak fails to provide proper training to its supervisors and managers who concerning this
10 system. SOF ¶¶176-222; Appendix II, Exs. A at 34-36; B at 22-23 and C at 7-22; Allison Decl.
11 ¶ 7; Barnes Decl. ¶¶ 7, 8; A. Bonham Decl. ¶ 7; J. Bonham Decl. ¶¶ 7- 10; Brinson Decl. ¶ 9;
12 Brown Decl. ¶ 12; Buckner Decl. ¶ 6; Cobb Decl. ¶¶ 8, 14; Cooper Decl. ¶ 7; Cummings Decl. ¶
13 7; Cyrus Decl. ¶ 7; Davis Decl. ¶ 25; Dawson Decl. ¶ 7; Dukes Decl. ¶ 8; Gayden Decl. ¶ 7;
14 Gibson Decl. ¶ 10; C. Johnson Decl. ¶ 7; Taylor Decl. ¶ 7; Wilson Decl. ¶ 7. Each of these
15 allegations, as well as management's knowledge of these defects (as reflected in Kodak's
16 documents), are further common questions of fact which supports a finding of commonality.

17 With respect to the Subclass, Plaintiffs' hostile work environment and retaliation
18 allegations also target sufficiently centralized Company-wide policies and practices to support a
19 finding of commonality. Wright v. Stern, 2003 WL 21543539, at *6. Plaintiffs class-wide
20 pattern and practice hostile work environment and retaliation claims are premised not only on a
21 showing of many incidents of explicit racism over the relevant time period, but, more
22 importantly, on Kodak's practice of failing to properly monitor the environment. "Furthermore,
23 class members need not allege that they all suffered the same injury to show commonality;

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26 Kodak. Wright v. Stern, 450 F. Supp.2d at 365-366 (citations omitted); accord Grant v.
27 Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2nd Cir. 1980) (recognizing that subjective hiring
28 practices might mask racial bias).

1 ‘demonstrating that all class members are *subject* to the same harm will suffice.’” Cokely, 2004
2 WL 1152531, at *4 (citing cases) (emphasis in original); Wright v. Stern, 2003 WL 21543539, at
3 *6 (same).

4 In any class action case where there are several plaintiffs, there will be some
5 individualized facts. In this case, however, given Plaintiffs’ allegations, the common questions
6 overwhelmingly predominate over any individual variations.¹⁷ Plaintiffs have presented a
7 powerful showing that core class grievances flow out of a centralized pay, promotion and
8 performance appraisal system which was designed and operated from the top-down. SOF ¶¶149-
9 52, 154, 176, 223-24, 262; Appendix II, Ex. B at 3 and Ex. C at 5. The statistics clearly show
10 that Kodak utilized this system to favor white employees at the expense of African American
11 employees. Appendix II, Ex. A at 4, 7-8, 12, 20-25, 39-41, 44-47, 55-58, 64, and Ex. B at 5, 7-8,
12 11-13, 29-35. Additionally, Plaintiffs claim that even absent intent to accomplish the outcome
13 which the statistical, documentary and anecdotal evidence reveals, whether each of Kodak’s
14 facially neutral policies and practices set forth above had disparate impact against African
15 American employees presents questions of law and fact common to Plaintiffs and all Class
16 members. See Caridad, 191 F.3d at 286-293; see also East Texas Motor Freight v. Rodriguez,
17 431 U.S. 395, 405 (1977) (“suits alleging ... discrimination are often by their very nature class
18 suits, involving class-wide wrongs. Common questions of law or fact are typically present.”);
19 Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 599 (2nd Cir. 1986) (finding that commonality
20 was established where the plaintiffs alleged the existence of a “discriminatory system” in the
21 workplace).

22 Here, the fact that Kodak has already admitted to class-wide racial disparities -- and
23 purported to deal with them on a class-wide basis -- presents numerous additional common
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26 ¹⁷ Moreover, any individual issues can be dealt with far more economically and quickly
27 if the underlying common factual and legal questions are resolved on a class-wide basis, as held
28 by numerous Second Circuit courts in analogous circumstances. See supra.

1 issues of fact. The circumstances of this case demonstrate that there are countless interwoven
2 factual and legal issues that are common to Plaintiffs and all Class members that warrant class
3 treatment, and would have to be addressed in any pattern or practice case brought by any Class
4 member. Here, not only is the commonality requirement of Rule 23(a)(2) met, it is clear that the
5 common issues in this case predominate over any individual ones.

6 **3. Plaintiffs' Claims Are Typical Of The Class And Subclass**

7 Rule 23(a) requires that “the claims or defenses of the representative parties [be] typical
8 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The purpose of Rule 23(a)(3)
9 is to ensure that maintenance of a class action is economical and that the named plaintiff’s claims
10 and the class claims are so interrelated that the interests of the class members will be fairly and
11 adequately protected in their absence.” Wright v. Stern, 2003 WL 21543539, at *6 (citations and
12 quotations omitted).

13 The requirements of commonality and typicality “tend to merge” because “both serve as
14 guideposts for determining whether ... the named plaintiff’s claim and the class claims are so
15 interrelated that the interests of the class members will be fairly and adequately protected in their
16 absence.” Caridad, 191 F.3d at 291. Typicality, therefore, “is satisfied when each class
17 member’s claim arises from the same course of events, and each class member makes similar
18 legal arguments to prove the defendant’s liability.” Robinson, 267 F.3d at 155; H. Newberg &
19 A. Conte, 1 Newberg on Class Actions § 3.15, at 3-78 (3d ed. 1992) (the typicality element is
20 satisfied if the representatives’ claims “arise[] from the same event or practice or course of
21 conduct that gives rise to the claims of the class members....”).

22 Here, as detailed above, the typicality requirement is met with respect to the Class and
23 the Subclass because Plaintiffs’ claims and the claims of the Class arise from the same course of
24 conduct by Kodak, namely, the centralized policies and practices which are being challenged in
25 this litigation. SOF ¶¶149-52, 154, 176, 223-24, 262; Appendix II, Ex. B at 3 and Ex. C at 5.
26 Each of the Plaintiffs has asserted that Kodak has engaged in a pattern or practice of racial
27 discrimination, and are all seeking class-wide relief “under legal theories applicable to the class
28 as a whole.” Latino Officers, 209 F.R.D. at 89.

1 Specifically, the named Plaintiffs and the Class seek recovery under the exact same legal
2 theories -- disparate impact and disparate treatment. Plaintiffs and the Subclass seek recovery
3 under the exact same legal theories -- hostile work environment and retaliation. The typicality of
4 these claims is reflected in the named Plaintiff declarations and Class member declarations set
5 forth in Appendix III. With respect to Plaintiffs' claims of a pattern or practice of disparate
6 treatment and disparate impact in Kodak's pay, promotion, performance appraisal, job
7 assignment, and layoff systems, the creation of a hostile work environment and in retaliating
8 against those who complain, the nature of the discrimination and the legal relief sought are the
9 same. See Cokely, 2004 WL 1152531, at *6.

10 It is important to note that typicality does not require "that the factual background of each
11 named plaintiff's claim be identical to that of all class members. Rather, it simply requires that
12 the disputed issue of law or fact occupy essentially the same degree of centrality to the named
13 plaintiff's claim as to that of other members of the proposed class." Caridad, 191 F.3d at 293;
14 Cokely, 2004 WL 1152531, at *6. Thus, class representatives need not hold every single job
15 title or perform the same work, or work in every single location as class members in order to
16 demonstrate typicality. Hnot, 228 F.R.D. at 485 (citing Meyer v. Macmillan Publ'g Co., 95
17 F.R.D. 411, 414 (S.D.N.Y. 1982) ("[T]he fact that the jobs performed by the named plaintiffs are
18 ... unique ... is not a bar to their being class representatives. If it were, no class of professional
19 employees could ever be certified.")). For example, in Wright v. Stern, the district court held:

20 In this case, the named plaintiffs assert claims typical of the other
21 members of the proposed class. Class representatives are African-
22 American and Hispanic DPR employees who allege they have
23 suffered discrimination in compensation, promotion, and
24 geographic assignment, are subject to a hostile environment, and
25 are retaliated against for asserting claims of discrimination. They
26 include supervisor, non-supervisor, field office, and administrative
27 employees. While the factual circumstances of their claims may
28 differ, their allegations of disparate treatment are typical of the
class.

Wright v. Stern, 2003 WL 21543539, at *7. Similarly, in Xerox, the district court held:

Courts within the Second Circuit have repeatedly certified classes
challenging discriminatory policies or practices, despite differing
factual circumstances of the class members' claims. See Spinner,
2003 U.S. Dist. LEXIS 19298, at *10 (certifying class of persons

1 subjected to policy or practice of strip search at booking facility
2 although central policy may have been “carried out in a variety of
3 different ways in different cases”); Wright, 2003 WL 21543539, at
4 *7 (typicality satisfied when plaintiffs’ allegations of disparate
5 treatment are shared by the class although factual circumstances
6 differ); Ingles, 2003 WL 402565, at *5 (plaintiff inmates with
7 different accounts of violent conduct by prison officials met
8 typicality requirement because their “claims [are] grounded in the
9 same legal arguments and aris[e] from sufficiently similar
10 events....”); Latino Officers, 209 F.R.D. at 89 (typicality
11 established even though plaintiffs felt different effects of
12 discrimination and had different backgrounds).

13 Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884, at *13; see also Rossini v. Ogilvy
14 & Mather, Inc., 798 F.2d 590, 597 (2nd Cir. 1986) (“The Falcon Court did not hold that a plaintiff
15 asserting one particular type of employment discrimination claim can never represent a class of
16 employees asserting other types.”).

17 The typicality requirement further helps to protect the due process rights of absent class
18 members. Cokely, 2004 WL 1152531, at *5; Latino Officers, 209 F.R.D. at 89. “In that vein,
19 the primary criterion for determining typicality is the forthrightness and vigor with which the
20 representative party can be expected to assert the interests of the members of the class.” Cokely,
21 2004 WL 1152531, at *5; Latino Officers, 209 F.R.D. at 89-90; see also In re NASDAQ Market-
22 Makers Antitrust Litig., 169 F.R.D. 493, 510 (S.D.N.Y. 1996) (As long as the class
23 representatives have “incentive to prove all the elements of the cause of action which would be
24 presented by the individual members of the class were they initiating individualized actions,” the
25 representatives satisfy the typicality requirement). Here, the named Plaintiffs have asserted the
26 interests of the Class members with forthrightness and vigor since the inception of this litigation.
27 It is significant to note that the Employees Committed for Justice, an organization of close to one
28 thousand current and former African American employees at Kodak, “believes that the proposed
Class Representatives will fairly and adequately protect the interests of the Class.” ECJ
DECLARATION at ¶ 11.

Finally, in addition to the fact that Plaintiffs are raising claims which are typical of the
Class members’ claims, it is reasonably anticipated that Kodak will raise the same legal defenses
to Plaintiffs’ and the Class members’ pattern or practice claims. For all of these reasons, Rule

1 23(a)(3)'s typicality requirement is satisfied.

2 **4. The Proposed Class Representatives Will Fairly And Adequately**
3 **Represent The Class And The Subclass**

4 Rule 23(a)(4) requires that the proposed class representatives “will fairly and adequately
5 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This “adequacy” requirement looks
6 to the qualifications of the class representatives and their counsel. In re Drexel Burnham
7 Lambert Group, Inc., 960 F.2d 285, 291 (2nd Cir. 1992). Two factors inform whether the
8 adequacy requirement is satisfied: “(1) absence of conflict and (2) assurance of vigorous
9 prosecution.” Robinson, 267 F.3d at 170.

10 **a. The Proposed Class And Subclass Representatives Are**
11 **Adequate**

12 The adequacy rule is satisfied where, as here, the representatives' claims are sufficiently
13 interrelated, and not antagonistic, to the claims of the class. Hanlon v. Chrysler Corp., 150 F.3d
14 1011, 1020 (9th Cir. 1998); Marisol A., 126 F.3d at 378. Here, the interests of the named
15 Plaintiffs and the Class are the same, namely, to address Kodak's challenged centralized policies
16 and practices at issue. See generally Appendix III. There is no antagonism between the claims of
17 Plaintiffs and the Class. The proposed Class Representatives have each affirmed that they
18 “understand the responsibilities of a Class Representative, and [are] prepared to fulfill [their]
19 duties to all of the Class Members in this case.” Appendix III (Davis Decl. ¶ 30; Gayden Decl.
20 ¶24; Gibson Decl. ¶20; Nesmith Decl. ¶31; Scott Decl. ¶38; Smith Decl. ¶27).

21 As their sworn testimony and declarations establish, there are no real grounds upon
22 which to challenge the honesty, conscientiousness or personal qualities of the named Plaintiffs.
23 The named Plaintiffs are fully adequate class representatives because the legal theories under
24 which they will proceed and any defenses that may be alleged against these theories are identical
25 to all Class members. Nor will the Class Representatives' efforts to establish Kodak's pattern or
26 practice of discrimination, hostile work environment and retaliation pose any conflict of interest
27 with the virtually identical claims of the Class members.¹⁸ See generally Appendix III.

28 ¹⁸ Even if the Court were to find any such potential conflict precluding any named

1 For these reasons, the proposed Class Representatives meet the adequacy requirement of
2 Rule 23(a)(4).

3 **b. The Proposed Class Counsel Are Adequate**

4 To satisfy Rule 23(a)(4), the attorneys representing the putative Class must be able to
5 prosecute the action vigorously. This means that the class counsel must be qualified,
6 experienced and generally able to conduct the litigation. Marisol A., 126 F.3d at 378.

7 Plaintiffs are represented by Berger & Montague, P.C., Garwin, Gerstein & Fisher LLP,
8 .L.C, The Chavers Law Firm, P.C., and Blitman & King, LLP. See infra at p.48. As set forth in
9 Plaintiffs' SOF, Plaintiffs' counsel bring a wealth of relevant experience to this litigation and are
10 well-acquainted with complex federal litigation. SOF ¶¶419-20. Plaintiffs' counsel will
11 continue diligently and vigorously to pursue all rights and interests of Plaintiffs and the Class.

12 **D. This Case Satisfies The Requirements Of Rule 23(b)**

13 Rule 23 requires that in addition to the Rule 23(a) prerequisites, a proposed class must
14 also meet the definition of one of the Rule 23(b) categories. Here, Plaintiffs satisfy the
15 requirements of Rule 23(b)(2) and/or Rule 23(b)(3).

16 **1. The Court Should Certify The Class And Subclass Under Rule**
17 **23(b)(2) With An Opt-Out Right**

18 Certification under Rule 23(b)(2) should be granted when the defendant "has acted or
19 refused to act on grounds generally applicable to the class," thereby making appropriate final
20 injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R.

21 _____
22 Plaintiff from representing the Class or Subclass (and Plaintiffs do not believe that any such
23 conflicts exist), there is an ample number of potential plaintiffs who could take their place. The
24 Class member declarations submitted by Plaintiffs constitute just a fraction of those who are
25 ready to step forward to assert the Class claims. The Court has discretion to permit any claimant
26 to step forward as representatives or to permit another member of the Class leave to intervene.
27 Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2nd Cir. 1972).
28

1 Civ. P. 23(b)(2). Rule 23(b)(2) is intended for cases -- like this one -- “where broad, class-wide
2 injunctive or declaratory relief is necessary to redress a group-wide injury.” Robinson, 267 F.3d
3 at 162; Cokely, 2004 WL 1152531, at *8.

4 “Civil rights cases against parties charged with unlawful, class-based discrimination are
5 prime examples” of Rule 23(b)(2) classes. Amchem Products, Inc. v. Windsor, 521 U.S. 591,
6 614 (1997); Barefield v. Chevron, U.S.A., Inc., 1988 WL 188433, at *2 (N.D. Cal. 1988). The
7 Second Circuit courts have repeatedly affirmed this principle. For example, in Corner v.
8 Cisneros, the Second Circuit held that “pattern of racial discrimination cases for injunctions
9 against state or local officials are the ‘paradigm’ of Fed. R. Civ. P. 23(b)(2) class action cases.”
10 37 F.3d 775, 796 (2nd Cir. 1994); see also Marisol A., 126 F.3d at 378 (“Civil rights cases
11 seeking broad declaratory or injunctive relief for a large and amorphous class ... fall squarely
12 into the category of 23(b)(2) actions.”); Nicholson v. Williams, 205 F.R.D. 92, 99 (E.D.N.Y.
13 2001) (“Rule 23(b)(2) is designed to assist litigants seeking institutional change in the form of
14 injunctive relief.”).¹⁹

15 Here, certification under Rule 23(b)(2) is appropriate because Plaintiffs have alleged that
16 Kodak has acted and refused to act on grounds generally applicable to the Class and Subclass.
17 The factual record fully establishes the class-wide nature of Plaintiffs’ claims, which are
18 premised on Kodak’s centralized discriminatory policies and practices that are alleged to be
19 responsible for the class-wide disparities identified by Kodak in 1999, the EEOC in 2004, and
20 Plaintiffs’ experts in 2007. SOF ¶¶5, 163–67, 175, 218-222, 244-48, 269-70, 382, 415-17;
21 Appendix II, Ex. A at 63 and Ex. C at 5-6. As a result, Plaintiffs will seek appropriate
22 declaratory and injunctive relief with respect to the Class and Subclass as a whole. Such
23

24 ¹⁹ The current Advisory Committee Notes to Rule 23(b)(2) further emphasize that
25 “[i]llustrative are various actions in the civil-rights field where a party is charged with
26 discriminating unlawfully against a class, usually one whose members are incapable of specific
27 enumeration.” Advisory Committee Note to Rule 23(b)(2).
28

1 injunctive relief must include remedying each of Kodak's challenged policies and practices, and
2 with respect to the Subclass, ensuring that the work environment at Kodak's Rochester facilities
3 is not hostile for African Americans and prohibiting retaliation. Plaintiffs further seek to rectify
4 the historic pattern of systemic discrimination in each of these areas as well as a monitor to
5 oversee compliance with such directives. This relief will have dramatic positive consequences
6 for all Class and Subclass members -- and indeed, all employees at Kodak. Many examples exist
7 of such relief being granted in cases similar to this one.

8 Secondary to Plaintiffs' request for declaratory and injunctive relief is their request for
9 monetary damages. For example, Plaintiffs seek back pay on behalf of themselves and the Class.
10 Back and front pay awarded under Title VII, while monetary in nature, is a form of equitable
11 relief. See Robinson, 267 F.3d at 157. Plaintiffs seeking back pay have long secured
12 certification under Rule 23(b)(2). Id.

13 Plaintiffs also seek a Class-wide award of compensatory and punitive damages. Where
14 such damages are sought, class certification under Rule 23(b)(2) is appropriate when the
15 equitable relief sought predominates over the claims for monetary relief. Robinson, 267 F.3d at
16 164; Wright v. Stern, 2003 WL 21543539, at *8 (racial discrimination class seeking injunctive
17 relief and monetary damages certified under Rule 23(b)(2)); Latino Officers Assn. v. City of
18 New York, 209 F.R.D. 79, 93 (S.D.N.Y. 2002) (same); Robinson v. Sears, Roebuck & Co., 111
19 F. Supp.2d 1101, 1127 (E.D. Ark. 2000) (certifying the class under (b)(2) for both monetary and
20 equitable remedies with notice and opt-out). See also Hilao v. Estate of Marcos, 103 F.3d 767,
21 780-81 (9th Cir. 1996) (mandatory class certified including compensatory and punitive damages
22 in human rights abuse case with bifurcated damage phase).

23 “To evaluate whether injunctive relief predominates, courts in this circuit conduct an *ad-*
24 *hoc* determination.” Wright v. Stern, 2003 WL 21543539, at *8 (citing Robinson, 267 F.3d at
25 164). The court “should, at a minimum, satisfy itself [that] (1) even in the absence of a possible
26 monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or
27 declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both
28 reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” Robinson,

1 267 F.3d at 164; Warren v. Xerox Corp., No. 01-CV-2909, 2004 WL 1562884, at *15.

2 Here, these tests are easily met. Plaintiffs seek substantial injunctive relief, and
3 reasonable plaintiffs would bring this suit to obtain the goal of stopping widespread
4 discrimination in their workplace. Further, if Plaintiffs prevail on their claims on the merits,
5 injunctive relief will be necessary and appropriate to remedy Kodak's illegal pattern or practice
6 of discrimination. Moreover, each of the named Plaintiffs have submitted declarations averring
7 that their "primary goal is to ensure that the employment practices at Kodak which permit
8 African American employees to be treated differently than Caucasian employees in the areas of
9 pay, promotion, performance appraisal, job assignments, terminations and layoffs, and with
10 respect to Kodak's maintenance of a hostile work environment and retaliation, be changed, to
11 ensure fair and equitable treatment of all employees, regardless of race." Appendix III (Davis
12 Decl. ¶ 30; Gayden Decl. ¶24; Gibson Decl. ¶20; Nesmith Decl. ¶31; Scott Decl. ¶38; Smith
13 Decl. ¶27). Similarly, each of the Class members who have submitted declarations have averred
14 that they "share a unified interest with the Class Representatives in ending racial discrimination
15 at Kodak by addressing, through the Court, Kodak's policies and practices that are the subject of
16 this litigation. This is the most important goal of this litigation." See generally, Appendix III,
17 Ex 2.

18 In Wright v. Stern, the district court concluded, concerning a racial discrimination case
19 very similar to this one:

20 The instant case presents precisely the situation contemplated by
21 Rule 23(b)(2). Plaintiffs, if successful on the merits, would be
22 entitled to injunctive relief to ensure that the alleged race and
23 national origin-based discrimination ceases, and this relief would
24 advance the interests of the entire class "even if not every member
25 actually felt the brunt of the actions." Latino Officers, 209 F.R.D.
at 93. Hence, injunctive relief against defendants would be
appropriate should plaintiffs prevail. The fact that plaintiffs also
seek monetary damages for the class does not preclude
certification under Rule 23(b)(2).

26 Wright v. Stern, 2003 WL 21543539, at *8; see also Warren v. Xerox Corp., No. 01-CV-2909,
27 2004 WL 1562884, at *15-16 ("class treatment of the liability phase of trial is appropriate under
28 Rule 23(b)(2)); Robinson, 267 F.3d at 167 (district court erred in refusing to bifurcate pattern-or-

1 practice claim and certify liability stage for (b)(2) class treatment); Latino Officers, 209 F.R.D.
2 at 93 (certifying liability stage for class treatment and severing individual remedial stage).

3 After Robinson, district courts have granted Rule 23(b)(2) certification in cases where
4 broad, class-wide injunctive or declaratory relief was sought to redress a group-wide injury, as
5 well as money damages. See, e.g., Latino Officers Ass'n v. City of New York, 209 F.R.D. 79,
6 92-93 (S.D.N.Y. 2002); Dodge v. County of Orange, 209 F.R.D. 65, 78 (S.D.N.Y. 2002). Here,
7 as in Latino Officers, the injunctive relief sought is so “significant” that “the qualitative value of
8 the declaratory and injunctive relief they seek overwhelms [Plaintiffs’] requests for damages.”
9 209 F.R.D. at 193. Because Kodak has acted on grounds generally applicable to the putative
10 class and Plaintiffs seek broad injunctive relief, Rule 23(b)(2) certification is appropriate.

11 Given that Plaintiffs and the Class are also seeking monetary damages, Plaintiffs
12 respectfully request that the Court direct that Class members be provided notice and an
13 opportunity to opt out. The Court may do so pursuant to Rule 23(d), which permits it to issue
14 such orders as necessary. Molski v. Gleich, 318 F.3d 937, 947 (9th Cir. 2003). In this way, if
15 individual Class members wish to independently pursue damage claims, they may opt-out and do
16 so.

17 **2. The Court Should Certify The Class And Subclass Under Rule**
18 **23(b)(3)**

19 Rule 23(b)(3) provides another avenue to class certification if:

20 the court finds that the questions of law or fact common to the
21 members of the class predominate over any questions affecting
22 only individual members, and that a class action is superior to
23 other available methods for the fair and efficient adjudication of
24 the controversy. The matters pertinent to the findings include: (A)
25 the interest of members of the class in individually controlling the
26 prosecution or defense of separate actions; (B) the extent and
27 nature of any litigation concerning the controversy already
28 commenced by or against members of the class; (C) the
desirability or undesirability of concentrating the litigation of the
claims in the particular forum; (D) the difficulties likely to be
encountered in the management of a class action.

26 Fed. R. Civ. P. 23(b)(3).

27 Here, certification of the Class and Subclass is also proper under Rule 23(b)(3) because
28 as demonstrated earlier in this brief, common questions of law and fact predominate over any

1 questions affecting individual Class members, and because the class action is superior to other
2 available methods for the fair and efficient adjudication of the controversy. See Rossini, 798
3 F.2d at 598; Martens v. Smith Barney, 181 F.R.D. 243, 260 (S.D.N.Y. 1998).

4 Rule 23(b)(3) encompasses cases in which certification of a class would achieve
5 economies of time, effort, and expense, and promote uniformity of decision as to persons
6 similarly situated, without sacrificing procedural fairness or bringing about any other undesirable
7 result. See Fed. R. Civ. P. 23(b)(3) Advisory Committee Note. Civil rights actions in which
8 plaintiffs can show that common issues of law or fact predominate by alleging central and
9 systemic failures to comply with civil rights law are readily certifiable as (b)(3) classes. See
10 Martens, 181 F.R.D. at 260. Given the abundance of evidence here, this case clearly involves
11 centralized, systemic and pervasive discrimination in violation of the civil rights laws.

12 With regard to the predominance element, “satisfaction of the typicality requirement of
13 23(a) ... goes a long way toward satisfying the Rule 23(b)(3) requirement[s].” Rossini, 798 F.2d
14 at 598. Class-wide issues predominate if resolution of some of the legal or factual questions that
15 qualify each class member’s case as a genuine controversy can be achieved through generalized
16 proof, and if these particular issues are more substantial than the issues subject only to
17 individualized proof. Moore v. PaineWebber, 306 F.2d 1247, 1252 (2nd Cir. 2002).

18 As the record evidence of discrimination demonstrates, there is a common thread -- a
19 pervasive and ongoing pattern of operative facts and circumstances -- running between the
20 individual and Class claims which is not destroyed merely because the named Plaintiffs’
21 individual claims may also require proof of some facts relating to their particular allegations that
22 differs from that of the class claims. See Rossini, 798 F.2d at 598-599. The issues of fact and
23 law common to the Class arise from Kodak’s centralized discriminatory policies and practices
24 which have caused similar types of professional and economic. Thus, the common questions and
25 Plaintiffs’ allegations of Kodak’s central and systemic failures to comply with the federal civil
26 rights laws predominate over any individual issues. See Martens, 181 F.R.D. at 260.

27 In addition, there is little question that class treatment in this case also will benefit
28 Kodak. If Kodak prevails on the common liability issues in the class context, they will be freed

1 from repetitive litigation brought by other plaintiffs. See Hernandez v. Motor Vessel, 61 F.R.D.
2 558, 561 (S.D. Fla. 1974), aff'd, 507 F.2d 1278 (5th Cir. 1975); Daniels, 198 F.R.D. at 413.

3 With regard to the superiority element of Rule 23(b)(3), the first “superiority” factor
4 involves examination of the Class members’ interest in individually controlling the prosecution
5 of separate actions. Rule 23(b)(3)(A). As to this factor, the harm sustained in this case, to
6 livelihood and earnings and emotional well-being, and the deterrent effect on protected activity
7 coupled with the existence of liability issues common to all Class members, establish that a
8 collective prosecution is far superior to individual suits. Further, all of the Class members who
9 have submitted declarations have averred that they “believe that the proposed Class
10 Representatives will fairly and adequately protect the interests of the Class, and [] designate the
11 Class Representatives as [their] agents to make decisions on [their] behalf concerning the
12 litigation, the method and manner of conducting this litigation, and all other matters pertaining to
13 this lawsuit. Additionally, the ECJ has submitted a declaration averring on behalf of its
14 membership: 1) that the ECJ is an unincorporated association consisting of almost one-thousand
15 African American current and former employees of” Kodak; 2) that “[t]he ECJ was founded with
16 a primary purpose of bringing an end to Kodak’s policies and practices which have permitted
17 racial discrimination against African Americans”; and 3) that the ECJ “believes that the
18 proposed Class Representatives will fairly and adequately protect the interests of the Class.”
19 ECJ DECLARATION at ¶¶ 4, 6, 11.

20 The second “superiority” factor involves the extent and nature of any litigation
21 concerning the controversy already commenced by class members. Rule 23(b)(3)(B). Here, any
22 individually instituted suits previously filed by putative Class members stemming from
23 challenged policies or practices in this case are not a barrier to class certification with respect to
24 the more than 5,800 putative Class members, as any such cases already filed do not “provide a
25 vehicle for the determination of the rights of all the interested parties.” 7A Wright & Miller,
26 Federal Practice and Procedure § 1780, at 570 (2d ed. 1986). Most importantly, class
27 certification will create a single forum to resolve the issues of Kodak’s pattern or practice of
28 disparate treatment, disparate impact, hostile work environment, and retaliation. Accordingly,

1 such certification will serve the goals of judicial economy and reduce the possibility of a vast
2 array of other cases. See Anournana v. Gristede's Operating Corp., 201 F.R.D. 81, 89
3 (S.D.N.Y. 2001).

4 The third "superiority" factor involves review of the desirability of concentrating the
5 litigation in the particular forum. Rule 23(b)(3)(C). Jurisdiction is proper in this Court and there
6 is nothing to suggest that this action should not be maintained in this forum. Further, where, as
7 here, there is a "large number of plaintiffs making similar claims, consolidated litigation
8 conserves judicial and party resources." Martens, 181 F.R.D. at 260; see generally, Appendix
9 III, Ex. 1 (Summary Chart of Complaints Contained in Class Member Declarations).

10 Fourth, any difficulties likely to be encountered in the management of the class action
11 should be considered. Rule 23(b)(3)(D). In this regard, Plaintiffs respectfully submit that this
12 Court has and will continue to efficiently manage this class action, and that any difficulties that
13 may be encountered are significantly outweighed by the problems that would attend any other
14 management device chosen. See Anournana, 201 F.R.D. at 89.

15 Accordingly, because Plaintiffs' and the Class claims raise common question of fact and
16 law which predominate over any questions affecting individual class members, and because a
17 class action is, by far, the most superior and effective means to resolve the claims of Plaintiffs
18 and the Class and insure that Kodak takes steps both to undo the damage it has inflicted and
19 adopt new policies and practices which eliminate racial discrimination, certification under Rule
20 23(b)(3) also is appropriate in this case.

21 **E. Appointment Of Class Counsel**

22 This Court should appoint Berger & Montague, P.C., Garwin, Gerstein & Fisher, LLP,
23 The Chavers Law Firm, P.C., and Blitman & King LLP to represent the Class and Subclass in
24 this action. Rule 23(g) governs the standards for the selection of class counsel for a certified
25 class. The rule articulates four criteria that the district court must consider in evaluating the
26 adequacy of proposed counsel. The four mandatory considerations are: 1) the work counsel has
27 done in identifying or investigating potential claims in the action; 2) counsel's experience in
28 handling class actions, other complex litigation, and claims of the type asserted in the action; 3)

1 counsel's knowledge of the applicable law; and 4) the resources counsel will commit to
2 representing the class. Fed. R. Civ. P. 23(g)(1)(C)(I). The Court is also free to consider any
3 other matter pertinent to counsel's ability to fairly and adequately represent the interests of the
4 class. Fed. R. Civ. P. 23(g)(1)(C)(ii). The Advisory Committee noted that "[n]o single factor
5 should necessarily be determinative in a given case." Advisory Committee Note to Fed. R. Civ.
6 P. 23(g).

7 Here, the Court is familiar with the work done by Plaintiffs' Counsel in this matter.
8 Moreover, the resumes of Plaintiffs' Counsel are set forth in Plaintiffs' SOF. SOF ¶¶419-20.
9 Plaintiffs' Counsel is well-qualified to represent the interests of the Class and Subclass.

10 **IV. PLAINTIFFS' TWO-STAGE TRIAL PLAN**

11 Plaintiffs respectfully submit this Proposed Class Action Trial Plan in support of their
12 Motion for Class Certification to show how they propose to conduct the trial in this case, and
13 that trial of this case within a Rule 23 framework is manageable. Specifically, Plaintiffs propose
14 "a consolidated common issues trial with [the named] plaintiffs presenting their claims against
15 [Kodak] on all issues, yielding findings on common issues." Manual for Complex Litig.,
16 (Fourth), (Federal Judicial Center 2005) § 22.93.

17 This trial plan is based on long-established and well-tested procedures. Plaintiffs'
18 proposed trial plan demonstrates that class adjudication of the many common issues is superior
19 to other available methods of adjudication, will fairly and effectively resolve the key issues in
20 this lawsuit, and represents the only opportunity that Class members have to have their claims
21 adjudicated in an impartial forum.

22 Phase I of the trial will address the predicate conduct necessary to establish Kodak's
23 liability to the Class and the Subclass for employment discrimination. Concurrent with the trial
24 of these common liability issues will be a "front-to-back" liability and damage trial of the claims
25 of the Class Representatives. The jury would be asked to determine Kodak's overall liability to
26 the Class and Subclass. If a verdict for Plaintiffs is returned, the jury would proceed to
27 determine any class-wide damage issues as well as all non-equitable monetary relief sought by
28 the Class Representatives. The Court would also consider what, if any, equitable relief should be

1 ordered.²⁰

2 Simultaneous with this evidence, the Court would consider the record with regard to the
3 scope of any equitable relief to be ordered. In this connection, the Court may convene additional
4 proceedings, such as the further testimony of experts, which may be helpful to the Court in
5 devising an injunction or other equitable remedies.

6 Assuming a verdict for the Class and/or Subclass in Phase I, individual relief for Class
7 and/or Subclass members would be determined as part of the Phase II process. Such relief could
8 include determining a Class or Subclass member's share in any Class or Subclass-wide award
9 the jury or the Court had made during Phase I, and/or assessing individual damage awards for
10 qualifying Class or Subclass members (or groups thereof).

11 This approach has its origin in Intl. Bro. of Teamsters v. U.S., 431 U.S. 324, 360-362
12 (1977). There, the Court expounded on the now-familiar three stage burden shifting process
13 governing pattern or practice discrimination cases. Although Teamsters was decided when the
14 only pattern or practice cases could be brought by the EEOC and only equitable relief was
15 available, its model remains valid in the era of private pattern or practice cases. As noted in the
16 most recent version of the Manual for Complex Litigation – Fourth (Fed. Judicial Center 2005)
17 (hereinafter, “Manual”):

18 Employment discrimination class actions have commonly been
19 tried in separate stages under Rule 42(b). . . . The Phase I trial
20 determines whether the defendants have discriminated against the
class.... If class-wide discrimination is found, issues of
[individual] relief are tried in Phase II.

21 Manual, § 32.45 at 636. This model has been applied in the context of other claims as well. See
22 also In re Tri-State Crematory Litig., 215 F.R.D. 660, 699 (N.D. Ga. 2003) (phase one to be trial
23 of common issues; phase two to determine individual issues including damages); Mullen v.
24 Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999) (approving of bifurcated class action
25 trial where all individual issues, including damages, were reserved for Phase II).

26 _____
27 ²⁰ In addition, Phase I would include evidence regarding punitive damages and the jury
28 would be asked to determine what, if any, punitive damages should be assessed against Kodak.

1 The Teamsters Court set forth a logical step by step procedure to be followed in a pattern
2 and practice case such as the instant matter. Phase I is to determine whether or not the defendant
3 has discriminated against the class. The burden for a plaintiff in such a case:

4 is to demonstrate that unlawful discrimination has been a regular
5 procedure or policy followed by an employer.... At the initial,
6 'liability' stage of a pattern-or-practice suit the [plaintiff] is not
7 required to offer evidence that each person for whom it will
ultimately seek relief was a victim of the employer's
discriminatory policy.

8 Teamsters, 431 U.S. at 360.

9 If the plaintiff meets their burden (in this case by obtaining a jury verdict for the Class
10 and/or Subclass), the Court then considers the issue of injunctive relief. "Without any further
11 evidence from the [plaintiff], a [jury's] finding of a pattern and practice justifies an award of
12 prospective relief. Such relief might take the form of an injunctive order against continuation of
13 the discriminatory practice...." Id. at 361.

14 The case then moves to Phase II, because "the question of individual relief does not arise
15 until it has been proved that the employer has followed an employment policy of unlawful
16 discrimination." Id. During Phase II, "[t]he proof of the pattern or practice supports an
17 inference that any particular employment decision, during the period in which the discriminatory
18 policy was in force, was made in pursuit of that policy." Id. at 362. To determine the nature of
19 the individual relief, "a district court must usually conduct additional proceedings after the
20 liability phase of the trial...." Id. at 361.

21 As endorsed by the Manual, Teamsters remains the guiding light in the conduct of an
22 employment discrimination class action trial.

23 **A. Phase One: Trial of Kodak's Liability for a Pattern and Practice of**
24 **Employment Discrimination and Full Trial on the Claims of the**
Representative Plaintiffs

25 Phase One of the trial will involve the determination of common issues which are
26 required to establish Kodak's liability to the Class and Subclass for employment discrimination.
27 Phase One would also include the full trial of the claims of the named Plaintiffs.

28 **1. Common Proof Relating To Kodak's Liability**

1 Phase I is the critical element of the trial. Absent success in this stage, Plaintiffs cannot
2 obtain class-wide relief. Thus, Phase I would encompass the full scope of Plaintiffs' case that
3 Kodak has engaged in a pattern or practice of racial discrimination. The evidence would include
4 fact and expert witnesses aimed at convincing the jury that Kodak has discriminated against
5 African Americans in the various aspects of employment at issue here.

6 In response, Kodak would present its evidence attempting to convince the jury that there
7 has been no such pattern or practice. As with Plaintiffs, it can be expected that Kodak would
8 present both fact and expert witnesses in this phase of the trial.

9 **2. Proof of the Class Representatives' Claims, Including Damages**

10 Phase One of the trial also includes the full trial on the claims of the Class
11 Representatives, including damages. Here, each of the proposed Class Representatives has
12 alleged that he or she was subject to racial discrimination in employment by Defendant Kodak.
13 Each of the Plaintiffs' individual claims will have been the subject of extensive discovery, in part
14 to assess their ability to serve as Class Representatives and in part because they are named
15 parties to the case whose claims must be adjudicated. Based on this evidence, the jury would be
16 asked to determine what, if any, damages should be awarded to each of the named Plaintiffs.

17 **3. Punitive Damages**

18 Phase One would also involve any determination of punitive damages. By its very
19 nature, punitive damages focuses on the reprehensibility of the conduct of the defendant toward
20 the Class as a whole. Since this conduct "should not markedly vary" as to individual Class or
21 Subclass members, punitive damages can be determined on a class-wide basis. See, e.g., Watson
22 v. Shell Oil Co., 979 F.2d 1014, 1019 (5th Cir. 1992); Hilao v. Marcos, 103 F.3d 767 (9th Cir.
23 1996) (class-wide jury award of \$1.2 billion).

24 **4. Equitable Relief Remains the Province of the Court**

25 A jury cannot be expected to develop a detailed injunction aimed at ending racial
26 discrimination at Kodak. Instead, the Court determines what equitable relief, if any, should be
27 ordered. See e.g., In re Copley Pharm., Inc., 161 F.R.D. at 469 (equitable remedies to be
28 considered by the Court). Evaluation of proposed equitable remedies may be the subject of

1 further evidence presented only to the Court.

2 As previously noted, back pay has traditionally been considered an aspect of equitable
3 relief because its intent was to make whole the victims of discrimination. Courts have
4 determined back pay relief on a class-wide or group basis and then devised methods for the
5 distribution of such an award to the victims of the discrimination. See, e.g., EEOC v. O&G
6 Spring and Wire Forms Specialty Co., 38 F.3d 872, 879-880 and fn. 9 (7th Cir. 1994).

7 One possibility for the allocation of the back pay award would be an award to Class
8 members pursuant to an equitable matrix that takes into account any meaningful differences
9 among them in their claims, such as their pay level and tenure at Kodak. For example, in the
10 Swiss Banks case, Holocaust Victim Assets Litig., 2000 WL 33241660 (E.D.N.Y. Nov. 22,
11 2000), following a class-wide settlement, the district court utilized a Special Master to suggest a
12 plan for the allocation and distribution of a settlement fund among the five worldwide settlement
13 classes of Holocaust victims and their survivors). Such allocation and distribution is properly
14 the function of the Court since back pay is considered equitable relief.

15 **B. Phase Two: Proceedings on Class Members' Damages**

16 If the jury finds that Kodak is liable to the Class and/or Subclass, the case would then
17 move on to Phase Two, where issues relating to the damages sustained by individual Class or
18 Subclass members will be resolved. Manual, §32.45 at 637 (“The individual damage claims of
19 the class members should be resolved in Phase II”).

20 The Court has considerable discretion with regard to the nature of the Class members'
21 damages proceedings. The non-equitable monetary relief sought by individual Class members
22 could be described as tort damages. In employment discrimination cases, this primarily involves
23 psychological harm caused by the discrimination and racially hostile work environment at
24 Kodak. These would be individualized jury determinations.

25 The Court has many administrative devices at its disposal, including the use of special
26 masters. Manual §32.45 at 637 (“It may also be feasible to establish a claims resolution
27 procedure administered by a magistrate judge or special master under Rule 53”). See also Hilao
28 v. Marcos, 103 F.3d 767 (9th Cir. 1996) (sampling and Special Master evidentiary hearings

1 presented to the jury to establish class-wide damage formulas governed by nature of injury).

2 Plaintiffs' proposed trial plan demonstrates that the inherently common liability issues in
3 this case can and should be tried in one proceeding. This Court has various, well-established
4 options at its disposal for the manageable oversight of the common aspects and follow-on
5 proceedings in this case.

6
7 **V. CONCLUSION**

8 This case is a straightforward challenge to Kodak's centralized policies and practices
9 with respect to pay, promotion, performance appraisals, job assignments, and layoffs. It presents
10 questions of liability and relief under Title VII and Section 1981 that are well-suited for class
11 treatment under Rule 23. Plaintiffs' counsel are prepared and able to represent the interests of
12 the Class and Subclass. Accordingly, for the foregoing reasons, Plaintiffs respectfully request
13 that this Motion be granted in all respects.

14 Dated: July 20, 2007

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