IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3435

RUDOLPH A. KARLO, ET AL,

Appellants,

v.

PITTSBURGH GLASS WORKS, LLC,

Appellee.

On Appeal from the United States District Court For the Western District of Pennsylvania Case No. 10-CV-1283

BRIEF OF APPELLANTS AND JOINT APPENDIX – VOLUME I (Pgs. A.1-129)

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BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This action arises under the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. §621, *et seq*. Appellants alleged their former employer, Appellee Pittsburgh Glass Works ("PGW") terminated them because of their ages. The district court had jurisdiction over Appellants' claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a). This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291. The district court entered final judgment on Appellants' discrimination claims pursuant to F.R.C.P. 54(d) on October 2, 2015. Appellants timely appealed October 7, 2015.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that age 50 and older disparate impact claims are not cognizable under the ADEA, and therefore granted summary judgment on Appellants' disparate impact claim?

   1a. Whether the district court erred in failing to follow the law of the case doctrine in deviating from Judge Fischer's ruling that 50 and older disparate impact claims are cognizable?

2. Whether the district court erred in granting Appellee's motion to bar Appellants' statistical expert?

3. Whether the district court erred in finding that Appellants were not similarly situated to the opt-in Plaintiffs and decertifying Appellants' collective action under the ADEA?

   3a. Whether the district court erred in failing to follow the law of the case doctrine in deviating from Judge Fischer's determination that Plaintiffs were similarly situated?

4. Whether the district court erred in granting Appellee's motions to bar the opinions of Appellants' social science experts?

These issues were raised and preserved by Appellants in their oppositions to PGW's motions to decertify the collective action, for summary judgment on Plaintiffs' disparate impact claims, and to bar the expert testimony of Michael Campion and Anthony Greenwald. The district court granted PGW's motions and ruled upon these issues in its opinions and orders, dated March 31, 2014, July 13, 2015, and September 2, 2015, respectively.

STATEMENT OF RELATED CASES OR PROCEEDINGS

This case has not previously been before this Court, and no related cases or proceedings are currently pending in any venue. Appellants Mark McLure and Rudy Karlo's closely related retaliation claims were still pending when the district court granted summary judgment on their discrimination claims. Mclure and Karlo's moved to stay the trial of their retaliation claims pending resolution of this Appeal because the retaliation claims and the discrimination claims were closely linked and shared a common thread of discriminatory intent. The district court denied that motion. (A. 129).

Subsequently, Karlo's retaliation claim was tried to a jury during the week of January 17, 2016. Karlo alleged PGW fired him because he refused to withdraw his underlying EEOC charges in this action after PGW rehired him. The jury found PGW willfully violated the anti-retaliation provisions of the ADA and awarded Karlo $922,060. McLure's retaliation claim was settled. At a minimum, the jury's finding of a willful violation arising out of Karlo's refusal to withdraw the very age discrimination charges giving rise to this appeal would provide further evidence to support this claim if the district court is reversed. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (employer's reaction to employee's legitimate discrimination complaints is relevant evidence of pretext in underlying discrimination action).

STATEMENT OF THE CASE

On March 31, 2009, Appellants, all fifty years of age or older, were terminated by PGW in a company-wide reduction in force ("RIF") of its salaried employees in the United States. Appellants sued after determining the RIF had a disparate impact on employees age fifty and older.

The Honorable Nora Barry Fischer of the Western District of Pennsylvania conditionally certified the case as a collective action under the ADEA, and eight additional plaintiffs later opted in to the case. In ruling on conditional certification, Judge Fischer addressed several threshold issues. First she decided that a fifty and older class is cognizable under the ADEA, and rejected PGW's argument that Plaintiffs must demonstrate a disparate impact on employees age forty and older.

Judge Fischer conditionally certified the collective action based upon her determination that Plaintiffs were similarly situated because they were all age fifty or older and were terminated by PGW the same day in the same RIF. Following discovery, Judge Fischer recused herself and this case was reassigned to The Honorable Terrence F. McVerry (hereinafter, "district court"). He then decertified the class, and, in direct contravention to Judge Fischer's finding, held that the opt-in plaintiffs were not similarly situated to the original Plaintiffs. Nothing material changed in the factual record between conditional certification and decertification.

The district court then barred Appellants' statistical analysis, purportedly under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), on the basis that although the analysis showed a statistically significant disparate impact at age fifty and older, it did not at age forty and older. The district court deviated from Judge Fischer's ruling that fifty and older disparate impact claims were independently cognizable. The district court also granted summary judgment in favor of defendant on the disparate impact age discrimination claim because, it found without Plaintiffs' foundational statistical evidence, they were stripped of their ability to prove that claim.

Appellants also intended to use two social science experts to show: (1) that PGW's managers could have been unconsciously affected by hidden bias and stereotypes against older employees in making termination decisions in the RIF; and (2) that PGW failed to use reasonable human resources practices to prevent such unconscious biases and stereotypes from playing out and adversely affecting older employees in the RIF. The district court also erroneously barred these expert opinions under F.R.E. 702.

SUMMARY OF THE ARGUMENT

The Supreme Court has long recognized that age discrimination does not stop at age forty. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Here, Appellants, all over fifty (ages 51, 52, 52, 54 and 55), had a fifty-nine percent higher chance of being terminated in PGW's RIF than employees under fifty. This represents an unlawful disparate impact under the ADEA. Judge Fischer recognized this when she conditionally certified Appellants' ADEA collective action based on a class of employees age fifty and older who Defendant fired in its March 2009 RIF.

In doing so, Judge Fischer recognized that, unlike other forms of discrimination, age is a continuous variable, and employers' stereotypes about the effect of age on employment are not consistent across the entire group of individuals age forty and older. Her decision was premised upon the common sense observation that the spectre of age discrimination increases with age. That is, as a general proposition, people in their forties are less likely to be discriminated against than people in their fifties, sixties, and seventies. Indeed, society's perceptions of age have evolved so much that workers in their forties are not generally perceived as being in the "older" portion of the workforce at all.

However, the district court, ignoring such realities, rejected Judge Fischer's holding (without even acknowledging it or even explaining why) and

incongruously ruled that disparate impact claims are only cognizable if all employees over the age of forty are negatively affected by an employment practice. This allowed PGW to evade liability because its RIF favored employees in their forties at the expense of employees in their fifties and sixties. The district court ruled that disparate impact claims based upon a statistically demonstrated adverse effect upon workers over fifty are not viable, as long as the practice's effect on the whole group of individuals over forty is neutral.

Not only was the district court wrong on the merits, but by deviating from Judge Fischer's ruling, it also contravened the law of the case doctrine, which is designed to provide finality to the parties and prevent repeated litigation of the same issues in the same case. Because Judge Fischer established as the law of the case that Appellants could make a claim that they were discriminated against for being fifty or older, the district court erred by revisiting the issue and ruling to the contrary.

The district court then proceeded to exclude Campion's expert statistical analysis, based upon its erroneous ruling that ADEA disparate impact claims cannot be brought on behalf of a fifty and over class. Thus, if this Court determines that Appellants can make a claim based on a fifty and older class, then Campion's statistical analysis should be reinstated. Even if the Court were inclined to further review the exclusion of Campion's statistical analysis, however, it fully satisfies

the requirements of F.R.E. 702. Furthermore, since the exclusion of the statistical analysis resulted in dismissal of Appellants' claim, the district court erred in not conducting an *in limine* hearing.

The district court further erred in decertifying Appellants' collective action. Despite extensive discovery following conditional certification, the facts did not change. Nor did the district court suggest otherwise. Common issues still predominate, as there was a unitary company-wide RIF carried out by individual unit managers on the same day, and all plaintiffs asserted the same claims and comparable damages.

Finally, the district court erred in excluding Appellants' social science experts. Appellants intended to use the opinion of their social scientist, Anthony Greenwald, to demonstrate how age bias and stereotypes can affect termination selection decisions in a RIF, especially in a case where there were no established objective criteria governing the process, as exists here. Appellants intended to then use Michael Campion's opinions on reasonable HR practices to demonstrate that PGW failed to use such practices to prevent unconscious biases and stereotypes from affecting termination decisions in the RIF. The district court admitted that both experts are qualified in their respective fields, but excluded them nonetheless. Both Greenwald and Campion meet the dictates of Rule 702 and should not have been excluded.

ARGUMENT

A. Fifty and Older Disparate Impact Claims are Cognizable

Judge Fischer ruled that Appellants could bring a cognizable disparate impact claim under the ADEA on behalf of employees in their fifties and sixties, regardless of whether there was a disparate impact on employees as a whole forty and over. Judge Fischer soundly rejected PGW's contention that such a ruling would "slice and dice" the class. (A. 153). On summary judgment, the district court was required to accept that in PGW's RIF, employees who were fifty and older had a 59% higher chance of being terminated in the RIF than employees under fifty. (Campion Report on Statistics, A.189-190). This is a powerful demonstration of a correlation between age and the likelihood of termination, given the large sample size (over 850 employees), making it unlikely that such findings were the result of statistical anomalies. (*Id.*, at A.181-184). Nonetheless, the district court denied Appellants the opportunity to present this evidence to a jury.

Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. *Viera v. Life Ins. Co. of North America*, 642 F.3d 407, 413 (3d Cir. 2011). As this Court held in *Alcoa, Inc. v. United States*, 509 F.3d 173, 175 (3d Cir. 2007) (citation omitted),"[s]ummary judgment is appropriate where there is no genuine issue of material fact to be resolved and the moving party is entitled to judgment as

a matter of law." Hence, this Court should apply the same standard of review that the district court should have applied. *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462, 467 (3d Cir. 2012).

In evaluating the evidence at the summary judgment stage, the district court was required to view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Matreale v. New Jersey Dept of Military & Veterans Affairs*, 487 F. 3d 150, 152 (3d Cir. 2007). Final credibility determinations on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993).

Judge Fischer's Holding Recognizing Age as a Continuous Variable

Judge Fischer reasoned that the ultimate legal issue is the same in age discrimination cases, regardless of whether the case is brought under a disparate impact theory or a disparate treatment theory—that is, whether "a relatively younger individual … was preferred to the plaintiff for no reason other than age". *Karlo*, 880 F. Supp. 2d 629, at 638-639 (W.D. Pa. 2012) (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996)).

Judge Fischer noted the Supreme Court recognized in *O'Connor* that in an ADEA disparate treatment claim, a plaintiff can state a prima facie case on the basis that he was replaced by a significantly younger person still within the

ADEA's protected class (*i.e.*, a fifty-five year old being replaced by a forty-two year old). *Id.* In so holding, Judge Fischer recognized that the "legislative history and the holding in [*General Dynamics Land Systems, Inc. v.*] *Cline* [, 540 U.S. 581 (2004)] make one thing clear: age discrimination does not stop at forty":

> During congressional hearings on what would become the ADEA, much was said on the impact of increasing age. *See, e.g.*, Age Discrimination in Employment: Hearings on H.R. 3651 *et al.* before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Congress, 1st Sess. at 151 (1967) (hereinafter House Hearings) (statement of Rep. Joshua Eilberg) ("At age 40, a worker may find that age restrictions become common... By age 45, his employment opportunities are likely to contract sharply; they shrink more severely at age 55 and virtually vanish by age 65"). "The record thus reflects the common facts that an individual's chances to find and keep a job *get worse over time;* as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype." *Cline*, 540 U.S. at 589, 124 S.Ct. 1236 (emphasis added). Thus, it "is beyond reasonable doubt, that the ADEA was concerned to protect a *relatively* old worker from discrimination that works to the advantage of the *relatively* young." *Id.* at 590-91, 124 S.Ct. 1236 (emphasis added).

Karlo, 880 F. Supp. 2d, at 638. Accordingly, here, where Plaintiffs had a fifty-nine percent higher chance of being terminated in the RIF than employees under age fifty, the spectre of age discrimination increasing with age clearly manifested itself.

Judge Fischer further rejected the notion championed by PGW that the statutory text of the ADEA prohibits fifty and older disparate impact claims:

> Indeed, the Court finds support for the opposite: the statute protects "*individuals* who are *at least* 40 years of age." 29 U.S.C. § 631(a) (emphasis added). The statute, by its plain language, protects anyone who is forty or older. The statute likewise clearly protects against

> employment decisions made "because of [an] individual's age." 29 U.S.C. § 623(a)(1)-(2). Clearly, a fifty year old is older than forty, and there can be no serious dispute that fifty year olds can be discriminated against on the basis of their age, even when compared to other, younger members of the protected group.

Id.

Judge Fischer's holding mirrors the Supreme Court's description of the ADEA's prohibitions and protections in *O'Connor*:

> The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U. S. C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.

O'Connor, 517 U.S., at 312. In other words, the ADEA treats age as a continuous variable, not as a dichotomy between individuals over and under forty. This a critical distinction. Just as the Supreme Court held "irrelevant" the fact that the employee who replaced the plaintiff was also in the protected class, the fact that PGW's RIF does not appear to have had a disparate impact on employees in their forties is irrelevant to the question of whether it had a disparate impact on employees in their fifties and sixties.

Other Cases on Fifty and Older Disparate Impact Claims

While relatively few courts have addressed the issue, at least six district courts including two in this Circuit, [1] have found that fifty or fifty-five and older ADEA disparate impact claims are cognizable. See *Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629 (W.D. Pa. 2012) (Fischer, J.); *Finch v. Hercules Inc*., 865 F. Supp. 1104 (D. Del. 1994); *Graffam v. Scott Paper Co*., 848 F. Supp. 1, 4 (D. Me. 1994); *Caron v. Scott Paper Co*., 834 F. Supp. 33, 39 (D. Me. 1993) (allowing claims to proceed); *Klein v. Sec'y of Transp*., 807 F. Supp. 1517, 1524 (E.D. Wash. 1992) (finding that plaintiff had established that hiring practices had a disparate impact on individuals age fifty and over); *EEOC v. Borden's, Inc*., 551 F. Supp. 1095, 1098-99 (D. Ariz. 1982).

Importantly, with the exception of *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), the decisions from other Circuits that the district court relied upon conduct analysis that is cursory, at best, and are thus unpersuasive. In *Lowe v. Commack Union Free Sch. Dist*., 886 F.2d 1364, 1374 (2d Cir. 1989), the

[1] The district court relied upon *Petruska v. Reckitt Benckiser, LLC*, No. CIV.A. 14–03663 CCC, 2015 WL 1421908, at *6 (D.N.J. Mar. 26, 2015) as a recent district court decision from within the Third Circuit rejecting a subgroup disparate impact claim. It is important to note, however, that the district court in *Petruska* considered and chose not to apply Judge Fischer's holding because the plaintiff used an artificial and plainly arbitrary age breakpoint of 47.7 in order generate a statistically significant finding of discrimination—a practice that Judge Fischer stated the courts should not countenance. *Id.* Moreover, this unpublished district court case was not binding on the district court here.

court was mostly focused on the weakness of the plaintiff's statistical evidence rather than the theoretical cognizablity of fifty and over claims. *Id. Smith v. Tennessee Valley Authority*, No. 90-5396, 1991 WL 11271, at *4 (6th Cir. Feb. 4, 1991) held that fifty and older claims were not permissible with a single citation to *Lowe* and no additional discussion or analysis. Notably, *Lowe* was decided before *O'Connor* and its panel thus did not have the benefit of the Supreme Court's holding that the ADEA protects against discrimination in favor of younger members of its protected class.

It should be further noted that, in a concurring opinion in *Lowe*, Judge Pierce of the Second Circuit took a position strongly favoring the allowance of fifty and older disparate impact claims, arguing:

> The likely beneficiary ... will be another member of the protected group, i.e., a person more than 40 years of age. Thus, if no intra-age group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40.

Lowe, 886 F.2d, at 1379 (Pierce, J., concurring; internal quotations omitted). Judge Pierce also found no persuasive reason for excluding fifty and older disparate impact claims while permitting disparate treatment claims by employees who were replaced by a significantly younger employee still within the ADEA's protected class. *Id.*, at 1380; see also *O'Connor v. Consolidated Coin Caterers Corp*., 517 U.S. 308, 313 (1996) (holding that such disparate treatment claims are

permissible). Thus, the most persuasive and well-reasoned authority supports Plaintiffs' position.

Lowe's majority took an alarmist view that should ADEA disparate impact claims be permitted based on higher minimum age groups, plaintiffs will be able to skew data to create an appearance of disparate impact even where a RIF was objectively fair. Judge Fischer rightly found this argument to be far-fetched and unpersuasive. *Karlo*, 880 F. Supp. 2d, at n.8.

This fanciful argument—based entirely on unsubstantiated musings by the *McDonnell Douglas* panel over fifteen years ago—ignores the fact that the typical attempted subclass does not have arbitrary starting and ending points, for example, individuals at least fifty-seven-and-a-half years of age but younger than sixty-two years old. Instead, typical subclass evidence seeks to demonstrate that individuals over the age of fifty or fifty-five were disparately impacted by a practice as compared to individuals younger than that age. *See* Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence is Consistent with the Age Discrimination in Employment Act*, 90 MARQ. L. REV. 227, 248 (2006).

Campion's statistical analysis is consistent with the "typical" subclass evidence discussed by Professor Sperino, in that it compared the chances of being terminated in a RIF for employees over a particular age with employees under that

age, not subclasses with random starting and ending points, which were the concern of the *McDonnell-Douglas* panel.

Surely the courts can recognize and exclude abuse of statistical evidence as the District of New Jersey did in *Petruska*, *supra* while still recognizing that age is a continuous variable and allowing reasonable use of statistical evidence to prove fifty and older disparate impact claims.

The District Court Impermissibly Reversed the Law of the Case

Nonetheless, although Judge Fisher applied these legal and common sense rules and permitted fifty and older disparate impact claims, Judge McVerry reversed course without revealing any justification for disregarding the law of the case. (A.32-34; A.110-112).

The law of the case doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008) (quoting *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816 (1988)). The law of the case doctrine has developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Bellevue Drug Co. v. Caremarks PCS*, 582 F.3d 432, 439 (3d Cir. 2009).

In *Bellevue*, this Court set forth the extraordinary circumstances where the law of the case doctrine does not preclude a district court from reversing a prior

holding in the same case: (1) new evidence is available; (2) a supervening new law has been announced; (3) clarifying an earlier ambiguous ruling; or (4) because manifest injustice would otherwise result. *Id.* Moreover, this Court has cautioned that if a "trial judge decides to change or explain an earlier ruling, he should state his reasons on the record" and also "take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *Id.*

Because Judge Fischer ruled as a matter of law that fifty and older disparate impact claims are cognizable under the ADEA, Judge McVerry erred in departing from this holding in subsequent stages of the same case. No new facts were discovered or binding precedent issued during the intervening period between the two rulings to justify a departure from the law of the case. Judge Fischer's ruling was unequivocal and unambiguous. Her nine-page discussion was cogently reasoned and supported by both law and common sense. (A.153-162). There was no manifest injustice—nor did the district court state its reasons for so finding on the record, as *Bellevue* requires.

Furthermore, it is self-evident the district court's disregard of the law of the case severely prejudiced Appellants. The logical point in this litigation to rule on the purely legal question of whether a fifty and older disparate impact claim is cognizable was early in the litigation before the parties had invested substantial resources in the litigation. In reliance upon the finality of Judge Fischer's carefully

explained ruling, Appellants conducted extensive discovery including approximately sixty depositions and engaged four experts. The parties also briefed and argued the summary judgment and *Daubert* motions that are at issue in this Appeal. Needless to say, such activity consumed an enormous amount of legal and financial resources borne by Appellants and their counsel.

In *Bellevue*, the district judge vacated the ruling of another district judge who had been previously assigned to the case. *Id.* He did so without making any finding that any of the extraordinary circumstances set forth above were present, and on review, this Court did not find any such circumstances present. *Id.* Because the district court violated the law of the case doctrine, this Court reversed the district court's holding, reinstated the earlier district judge's holding, and remanded with orders to reinstate the earlier district judge's order. *Id.*

Again, in *Lesende v. Borrero*, 752 F.3d 324, 338-339 (3d Cir. 2014), a civil rights case, this Court reversed a district court's ruling after it reversed its own earlier ruling. This Court explained that while district courts have discretion to hold that their earlier decision was improvidently entered, this discretion must be exercised only when extraordinary circumstances are present. *Id.* This Court reasoned that the district court "did not explain how or why its earlier decision was improvidently granted, and, on appeal, we cannot find a basis for concluding that it was clearly erroneous." *Id.*

Judge Fischer's well-reasoned ruling that fifty and older ADEA disparate impact claims are cognizable was properly entered. No extraordinary circumstances are present to justify the district court's reversal, and even if there were, the district court did not follow this Circuit's requirement that such circumstances be stated on the record. Also, Appellants engaged in a protracted and intensive litigation effort in reliance upon Judge Fischer's ruling. The district court therefore erred in reversing her.

B. The District Court Erred in Excluding the Statistical Opinions of Michael Campion, Ph.D.

The district court effectively disposed of Appellants' disparate impact claim when it excluded Michael Campion's expert statistical analysis. (See Opinion and Order on Motions for Summary Judgment, A.111) (granting summary judgment on Appellants' disparate impact claim because they could not prove said claim without Campion's excluded statistical analysis).

Standard of Review

The district court excluded Campion's statistical analysis purely based on a legal interpretation-–—that employees fifty and older cannot bring ADEA disparate impact claims, absent statistically significant disparate impact on employees forty and over. In *Pritchard v. Dow Agro Sciences*, 430 F. App'x 102, 103 (3d Cir. 2011), this Court explained that "a decision to exclude expert testimony is reviewed for abuse of discretion, though we apply *de novo* review to the district

court's articulation of the governing legal standards." *Id.* (citing *Elcock v. Kmart Corp.*, 233 F.3d 734, 745 (3d Cir. 2000)).

This Court should review the district court's ruling excluding Campion's statistical analysis *de novo* because it turns on the pure legal question of whether fifty and older disparate impact claims are cognizable under the ADEA.

Campion's Findings

Campion issued six analyses in his report. The first, Analysis 1, evaluated disparate impact of the RIF using a stipulated dataset[2] at 40 and older, 45 and older, 50 and older, and 55 and older. (A.70-71). In Analysis 1, he found a statistically significant disparate impact at the 45 and older, 50 and older, and 55 and older levels. *Id.*[3]

[2] PGW also argued that Campion improperly included employees who were terminated in an earlier plant closure. Campion addressed this alleged deficiency in a rebuttal report, and his statistical outcomes remained the same. (A.70).

[3] Analyses 2-6 are not subject of this appeal. They add other groups of employees to the analysis in order to test various hypotheses based on how companies typically eliminate older employees. (A.70-71). While the district court found Analyses 2-6 to be based on "rank speculation," it made no such finding as to Analysis 1. *Id.* Analyses 2-6 are significant because Dr. Campion found statistically significant evidence of disparate impact on employees forty and older. *Id*

The District Court Conceded that Analysis 1 Should be Admitted

The district court conceded that Analysis 1 would "be helpful to the factfinder if this Court held that Plaintiffs could maintain an over-fifty disparate impact claim." (A.71, n. 16). Thus, if this Court overturns the district court's holding disallowing Appellants' fifty and older disparate impact claim, then Campion's Analysis 1 should be reinstated without further analysis under Rule 702.

Campion's Opinions Should Have Been Admitted Under Rule 702

Regardless, Analysis 1 satisfies all of Rule 702's requirements and should be reinstated. Rule 702 provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

F.R.E. 702.

Campion is Qualified

Campion is unquestionably qualified and the district court did not hold otherwise. (A.70). At least two courts have found Campion qualified to render and expert statistical analysis of the type he offered in this case. In *Brand v. Comcast Corp*., 123 Fair Empl. Prac. Cas. (BNA) 1312; 2014 U.S. Dist. LEXIS 91398, at *9-12 (N.D. Ill. Jul. 5, 2014), the district court thoroughly vetted Campion's qualifications to perform a statistical analysis and concluded that he was qualified. The court's analysis is highly instructive:

> Campion concedes he is not a professional statistician, and it is fairly clear that the nature of his report is statistical. For example, Campion makes judgments about the statistics value of defendant's expert's study. ***The report also contains regression analyses and various other statistical computations. The Court must determine if Campion is qualified to answer the specific questions he poses, … which include assessments of the correctness of Comcast's expert's statistical report, as well as Campion's own statistical analyses.***Although Campion is not a statistician—he is a professor of management—he has a sufficient background in statistics to testify on the subjects covered in his report. As Campion's report notes, he has written or co-authored many articles in scientific and professional journals, and "[t]he majority of the articles and presentations include statistical analyses." … A perusal of these articles, which are listed on Campion's academic resume …, reveals ample evidence of Campion's experience in the field of statistics, including regression analyses…
>
> Comcast says Campion has "never published on statistics," … but as the above-cited articles and others on his resume show, Campion has certainly employed statistics in academic work concerning employment. Given his background and experience, Campion need not have written articles opining on the subject of statistics to qualify as an expert qualified to perform statistical analysis. Comcast also selectively quotes from Campion's deposition; although Campion did

> answer "it depends" when asked whether he is a statistician, he also noted correctly that statistics is "one of the core competencies of people in my field," a statement borne out by his published academic work. … The Court concludes that Campion is qualified to perform statistical analysis and draw conclusions from it about plaintiffs' allegations in this case.

Id. (internal citations omitted).

Similarly, in *Ernst v. City of Chicago*, 123 Fair Empl. Prac. Cas. (BNA) 338; 2014 U.S. Dist. LEXIS 61586, at *19 (N.D. Ill. May 5, 2014), the district court allowed Campion to present a statistical analysis as an expert, finding that "Campion is clearly operating within the reasonable confines of his subject area." The court in *Ernst* engaged in an exhaustive review of Campion's background—similar to the one quoted above from *Brand*—in reaching this conclusion. *Id.*, at *17-19.

Moreover, the Third Circuit has continuously espoused a liberal standard for deciding the qualification of experts on *Daubert* Motions:

> Rule 702's liberal policy of admissibility extends to the substantive as well as the formal qualification of experts. We have eschewed imposing overly rigorous requirements of expertise and have been satisfied with more generalized qualifications. See *Hammond v. International Harvester Co.*, 691 F.2d 646, 652-53 (3d Cir. 1982) (holding that an engineer, whose only qualifications were sales experience in the field of automotive and agricultural equipment and teaching high school automobile repair, nevertheless could testify in a products liability action involving tractors); *Knight v. Otis Elevator Co.*, 596 F.2d 84, 87-88 (3d Cir. 1979) (holding that an expert could testify that unguarded elevator buttons constituted a design defect

> despite expert's lack of specific background in design and manufacture of elevators).

In re Paoli R.R. Yard PCB Litig., 35 F. 3d 717, 741 (3d Cir. 1994). Based on Campion's background, the persuasive value of the *Ernst* and *Brand* decisions admitting his expert statistical opinions, and this Court's liberal standard for accepting expert testimony, there can be no serious question that he was qualified to render his statistical opinions here.

Campion Satisfies the Remaining Rule 702 Factors

The second factor under Rule 702—regarding the sufficiency of the data—is satisfied because the parties stipulated to the data-set. (A.70-71).

The third factor—reliability of principles and methods—is also not in serious dispute. PGW's own statistical expert admitted in his report that Campion's basic methodology—application of a z-score test—is reliable and "exactly equivalent" to the chi-squared test espoused by PGW.[4] (Rosenberger Report, A.371-372).

[4] Campion conducted two separate statistical tests, the z-score test and the EEOC's four-fifths test. (A.70-71). While the district court held that the four-fifths test is not reliable independently, it correctly noted that the four-fifths test can be reliable when combined with other statistical analysis such as the z-score test conducted here. *Id.* Moreover, the district court apparently misunderstood his analysis, which argues that the z-score test proves disparate impact independent of the four-fifths test. (A.182)(describing the z-score test as an "alternative index"). Thus, the district court's criticism of the four-fifths test is irrelevant.

The final factor—reliable application of the methodology to the case—is also satisfied. The district court's only criticism of Campion's application of the z-score test in this case falls away if this Court overturns the district court's holding that fifty and older disparate impact claims are not permissible under the ADEA. The district court even conceded that Analysis 1 would "be helpful to the factfinder if this Court held that Plaintiffs could maintain an over-fifty disparate impact claim." (A.71, at n. 16).

Based on the district court's holding that fifty and older disparate impact claims are not cognizable, it held that Campion's analysis of older age subgroups "is data-snooping," because it did not employ the "Bonferroni procedure" to increase the required level of statistical significance. (A.71). As. Campion explained in his report:

> Dr. Rosenberger argues that analyzing the data at successive ages beyond 40 (specifically 45, 50, and 55) is "data snooping." .... Data snooping, or the similar term of data dredging, is defined as the inappropriate use of data mining. "The process of data mining involves automatically testing huge numbers of hypotheses about a single data set by exhaustively searching for combinations of variables that might show a correlation". More broadly, data snooping refers to conducting a huge number of analyses of all possibilities to try to find something significant. Because of the large number of analyses conducted, some significant findings can be spurious based on chance alone. When there is a likelihood of chance findings, researchers will take precautions such as replicating the study, crossvalidating the analyses, or adjusting the required significance level to make it smaller [(the Bonferroni adjustment)].
>
> To the contrary, our analysis approach is best described as

> "hypothesis driven." We are NOT looking at every possible analysis or even a large number of analyses. We are specifically looking for age discrimination and evidence that increasing age relates to increased likelihood of termination at a small number of logical increments (40, 45, 50, and 55).

(A.240-241) (internal citations omitted). Dr. Campion was testing the hypothesis that because age is a continuous rather than dichotomous variable, the likelihood of discrimination increases with age over 40. *Id*. This hypothesis was provided by authoritative published human resources and social science literature. (A.183-184). Because Dr. Campion was testing this hypothesis, he was not data-snooping and no Bonferroni adjustment was necessary. (A.240-241). Therefore, if the Court of Appeals finds that the test Campion performed was legally valid (by holding that fifty and older disparate impact claims are cognizable), then Dr. Campion's analysis should stand.

The District Court Erred in Not Conducting an In Limine *Hearing*

This Court has taken a "hard look" at exclusion of experts where such exclusion may result in summary judgment because, as here, the exclusion of expert opinion would leave a party without sufficient evidence to prove its claims:

> Although review of the district court's fact findings that undergird its rulings on the admissibility of expert opinion is deferential, given the enormous power of the district court to foreclose submission of a party's case to a jury on the basis of a threshold determination of nonreliability of opinion evidence, we conclude that the review requires a "hard look" to insure that the district court's exercise of

> discretion was sound and that it correctly applied the several *Daubert* factors.

In re Paoli R.R. Yard Pcb Litig., 35 F.3d 717, 733 (3d Cir. 1994).

This Court has reversed exclusion of expert testimony in such cases where—as here, the district court excluded expert opinion without allowing the plaintiff an *in limine* hearing under F.R.E. 104. See *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999). In *Padillas,* this Court emphasized the importance of allowing a party a sufficient process to defend its expert submissions, particularly where summary judgment turns on expert evidence. *Id.*, at 417.

Because Appellants' disparate impact claim could not stand without Campion's expert statistical analysis, the district court should have conducted an *in limine* hearing before it excluded that analysis.

C. The District Court Erred in Decertifying the Collective Action

The District Court Has Not Justified its Deviation from Judge Fischer's Earlier Holding Conditionally Certifying the Class

After Judge Fischer conditionally certified Appellants' collective action under 29 U.S.C. § 216(b), the Parties conducted discovery on the opt-in Plaintiffs' claims. Discovery, however, did not adduce any facts critical to whether the collective action should have remained certified that were not already developed during the pre-conditional certification round of discovery. Indeed, Judge Fischer's

recitation of the facts relied entirely on the facts as pled in Appellants' First Amended Complaint. (A.149-150).

Specifically, Judge Fischer explained that PGW's VP of Human Resources "worked on a reorganization plan in which each business unit director in the company identified the work that needed to be done and the personnel that were necessary to perform that work", and that "in performing the RIF, upper management relied upon the individual directors of each unit to determine which employees must be retained and which might be terminated." *Id.* Judge Fischer further stated that, "[t]he criteria used in the RIF revolved around the work that was done in each unit." *Id.* Judge Fischer proceeded to analyze these facts and concluded that: "plaintiffs have demonstrated that they were all terminated in the course of a single, company-wide RIF," which constituted a single decision, policy or plan, even if it was implemented by individual managers. *Id.*, at A.170.

Judge McVerry's factual recitation reads remarkably similarly to that of Judge Fischer:

> As the record makes clear, neither the high-level management decision to implement the RIF nor its purported flaws provide the necessary factual nexus to move forward as a collective action. Plaintiffs were each selected for termination on a decentralized basis at the discretion of local unit managers. Many of the RIF deficiencies cited by Plaintiffs varied from manager to manager and location to location. And, while the non-use of PPG's RIF guidelines was universal, that perceived shortcoming is not sufficient to bind the collective together in light of the substantial dissimilarities between the Representative and Opt-in Plaintiffs.

(A.37). Both Judges acknowledge that the RIF was ordered on a company-wide basis by upper management and that individual business units made their own decisions about which employees to terminate in the RIF. They both further acknowledge that PGW failed to use the RIF guidelines that were previously in place in the organization and were designed to protect older employees in RIFs.

Nonetheless, both judges reached opposite conclusions from the same evidence in the same case. While they were applying different evidentiary standards,[5] both Judges applied the same legal standard to determine whether the class members were similarly situated. In light of this, the fact that Judge McVerry's opinion decertifying the class is devoid of any discussion of Judge Fischer's earlier ruling is inexplicable.

The law of the case doctrine (explained above) requires reversal of the district court's determination on this mixed question of law and fact. The law of the case doctrine has been applied to preclude re-litigation of both findings of fact and conclusions of law. See *In re De Facto Condemnation & Taking of Lands of WFB Assocs., L.P.*, 588 Pa. 242, 272 n.14 (2006) (citing *United States v. Monsisvais*, 946 F.2d 114, 115 n.2 (10th Cir. 1991); *EEOC v. Int'l Longshoremen's Assoc.*, 623 F.2d 1054, 1058 (5th Cir. 1980)) (applying the law of the case doctrine

[5] Judge Fischer applied a "modest factual showing" standard for conditional certification, while Judge McVerry applied a preponderance of the evidence standard (compare A.152; A.38).

to preclude reconsideration of mixed questions of law and fact). The district court violated the doctrine when he applied the same facts to the same law as Judge Fischer and made the opposite finding.

The Court Should Review This Mixed Question of Law and Fact De Novo

While a district court's order on class certification is reviewed for abuse of discretion, this Court exercises plenary review to the extent a threshold question of law bears on its review of that order. *McNair v. Synapse Grp., Inc*., 672 F.3d 213, 222 n.9 (3d Cir. 2012).

To the extent class certification turns on a mixed question of law and fact—as here—the Court of Appeals should exercise plenary review. As this Court explained in *United States v. Brown*, 631 F.3d 638, 642-43 (3d Cir. 2011):

> In *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Supreme Court explained that "in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." See also Edwards & Elliott, Federal Standards of Review § I.D (West 2007). *De novo* review is favored where there is a need for appellate courts to control and clarify the development of legal principles, and where considered, collective judgment is especially important. *Ornelas v. United States*, 517 U.S. 690, 697 (1996); Edwards & Elliott, *supra*, at § I.D. By contrast, issues involving assessments of witness credibility and juror bias are wrapped up in evaluations of demeanor that a trial judge is in a better position to decide; appeals courts therefore defer to district court factfinding in the absence of clear error. *Miller*, 474 U.S. at 114-15.

Neither the appropriate legal standard for decertification nor the facts of the case are in dispute here. Instead, the district court's error lies in its determination of the legal meaning of those facts.[6]

In doing so, the district court made erroneous judgments on the application of legal principles that, left unchecked will prevent plaintiffs with meritorious claims from seeking collective action relief in future cases. This is exactly the sort of "need for appellate courts to control and clarify the development of legal principles" that the Supreme Court recognized in *Ornelas supra.*

Legal Standard for Similarly Situated

The collective action authorized by the ADEA "affords plaintiffs the advantage of lower individual costs to vindicate rights by pooling their resources." *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 170 (1989). The purpose of such authorization is to further the ADEA's public policy goal of eliminating age discrimination in the workplace. That purpose "would be frustrated by a higher evidentiary hurdle precluding employees who have suffered the same illegal treatment by an employer from prosecuting one action more efficiently and economically than would be possible with numerous individual claims." *Carter v.*

[6] Importantly, there are no issues involving witness credibility here to justify deference to the district court because it decertified Appellants' collective action based solely on the written record, and heard no live witness testimony. (A.27-28).

Anderson Merchandisers, LP, 2008 U.S. Dist. LEXIS 53852 *8 (N.D. Cal. July 10, 2008).

To prove that the members of a 29 U.S.C. § 216(b) collective action are "similarly situated", the plaintiffs must demonstrate, by a preponderance of the evidence, that the positions of the proposed class representatives are "similar, not identical, to the positions held by the putative Class members". *Sperling v. Hoffmann-LaRoche, Inc.*, 118 F.R.D. 392, 405 (D.N.J. 1988) (*aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989)). This is not a heavy burden. *Id.*, at 407; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001).

Plaintiffs are found to be similarly situated when they have produced evidence to establish that they "more likely than not" are "subject to some common employer practice that, if proved, would help demonstrate a violation..." *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 538 (3d Cir. 2012). For example, in *Hipp*, the Eleventh Circuit found that plaintiffs were similarly situated while "they all alleged similar, though not identical, discriminatory treatment," despite the defendant's contention that the Plaintiffs worked in different geographical locations and that "each Plaintiff's case was unique and required an individual analysis of his or her working conditions." *Hipp*, 252 F.3d at 1219.

In *Hyman v. First Union Corp.*, 982 F. Supp. 1, 3 (D.D.C. 1997), the court found plaintiffs to be similarly situated where they were terminated in a centrally-orchestrated reduction in force, and—as here—individual managers had discretion on whom to select for the RIF and whom to retain:

> If there is evidence that the alleged discrimination was part of a institution wide practice, such evidence would support the use of a collective action. In support of certification, plaintiffs have outlined what they allege to be a centralized decision-making process that resulted in the discrimination. Acknowledging that individual managers did have discretion when deciding whom to retain, plaintiffs argue that a few central individuals were responsible for the ultimate discrimination. Plaintiffs allege that high-level managers on First Union's due diligence team determined how many positions existed; top executives chose the leaders who decided which First American employees would fill the positions…

Hyman, 982 F. Supp., at 3.

Similarly, in *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D. W. Va. 1985), the court rejected the defendant's attempt to defeat the collective action based on the fact that the representative plaintiff and other opt-in plaintiffs worked in six different departments. The court immediately noted that collective actions under 29 U.S.C. § 216(b) do not impose the same requirements of Rule 23 class actions—namely, that collective actions do not require typicality among the class members' claims. *Id*. at 212. The court further observed that Owens did "not seek to represent employees who were affected differently by any company-wide policy

of discrimination …they were all discharged during a reduction in force on account of their age." *Id*. at 211-12.

The Appellants and Putative Opt-in Plaintiffs are Similarly Situated

The facts here are on all-fours with *Hyman* and *Owens*. The district court found that all of the Appellants and putative opt-in plaintiffs were terminated in the last days of March, 2009 in a company-wide RIF orchestrated by PGW's upper management. (A.36). They were all over fifty years old at the time and alleged closely similar claims and damages. *Id.*

The district court seized on the fact that Appellants and the putative opt-in plaintiffs "held seven different titles with varied job duties in two separate divisions of PGW and across five locations in which no less than six decision-makers independently included them in the RIF." *Id.*, at A.34. This, however, ignores the basic principle set forth in *Hyman* and *Owens*—namely that all the plaintiffs (named and opt-in) were affected identically by PGW's RIF because they were terminated—all at the same time—and over fifty years old.

Because of the small class size—five named plaintiffs and four opt-in plaintiffs—the class was easily manageable even with the presence of potentially individualized defenses and damages evidence. The existence of asserted separate defenses with respect to each plaintiff does not automatically eliminate § 16(b) joinder. *Lockhart v. Westinghouse Credit Corp*., 879 F.2d 43, 52 (3d Cir. 1989).

When there is the potential for problems with class management because of different defenses, a district court has the discretion to decide when such problems make class management impossible. *Id*.

Here, the district court presented no explanation of how this case would be unmanageable as a collective action beyond having to manage the presentation of evidence on individualized defenses and damages for nine persons. (A.38). This must fail because any ADEA collective action will require the presentation of some individualized evidence. If the district court's holding is allowed to stand that nine plaintiffs with some individualized evidence destroys certification even when common issues predominate, then it will be nearly impossible for any ADEA collective action to be certified.

The Cases Relied Upon by the District Court are Inapposite

The district court misapplied the above legal standard for determination of whether individuals are similarly situated based on factually different cases, chiefly *Zavala v. Wal-Mart Stores Inc*., 691 F.3d 527 (3d Cir. 2012), an FLSA case. The *Zavala* panel's finding was heavily predicated on the fact that the putative class members were independent contractors (and not employees for the purposes of the FLSA), and that they worked in 180 different stores in 33 states throughout the country and for 70 different contractors and subcontractors, working varying hours and for different wages, compensation methods, and working conditions—

depending on which contractor or subcontractor for whom they worked. *Id.*, at 531-532, 538.

The only factual similarity that the *Zavala* putative class members shared was that they were undocumented immigrants working as contractors on night cleaning crews in Wal-Mart stores. *Id.*, at 538. The putative class members were so different that there were no common questions as to liability or damages, such that maintaining their claims in a collective action would serve no advantage for streamlining proceedings over individual suits. *Id.*

Zavala emphasized that "similarly situated" "means that one is subject to some common employer practice that, if proved, would help demonstrate a violation" of the ADEA. *Id*. Unlike the *Zavala* putative class members, the putative class members here were all employed by the same employer—PGW, which terminated them on the same day in a company-wide RIF. They share identical evidence for liability—the decisional unit matrix from the RIF and Campion's statistical analysis of the same. Thus, trying all nine putative class members' claims together would result in substantial judicial efficiencies.

The district court's reliance on *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D. N.J. 1987) is also misplaced. *Lusardi* presented entirely different facts included a proposed class that included employees terminated in multiple RIFs that occurred over a three year period, in addition to resignations and persons who remained

employed but were passed over for promotion. *Id.*, at 353-354. The proposed class included not only Xerox itself but its subsidiaries—some of which had autonomous personnel policies. *Id.*, at 355. Moreover, the proposed class included sixty-five separately-implemented RIF's—some voluntary and some involuntary. *Id.*, at 356. Both the number and identities of persons to be reduced was decided by individual business units, not upper management. *Id.*

In contrast, the class here included employees terminated in the end of March, 2009 in a single, unitary RIF that was ordered by PGW's upper management and orchestrated centrally by its HR department. (A.9-11). While individual managers had discretion as to whom to terminate, the number of terminations was dictated from the top. *Id*. All of the employees in the class were direct employees of PGW at the time they were terminated. *Id.*

Similarly, *Kuznyetsov v. W. Penn Allegheny Health Sys., Inc*., CIV.A. 10-948, 2011 WL 6372852, at **4-5 (W.D. Pa. Dec. 20, 2011), relied upon by the district court, is an FLSA case where the plaintiffs alleged that they were forced to work off the clock during their lunch breaks. There were 806 plaintiffs working in 142 different locations and 1,174 different departments for 312 supervisors. *Id.* The defendant's timekeeping software automatically deducted a half hour lunch break from the plaintiffs' pay, but employees were directed to ask their supervisors to cancel this deduction if they had to work through lunch. *Id*. Some supervisors

refused to allow some employees to cancel the deduction, resulting in the employees not being compensated for all hours worked. *Id.*

The district court decertified the case mainly because allowing the class to proceed would require the court to hear individualized evidence on both liability and damages in order to determine which plaintiffs were required to work through lunch but did not have the automatic half hour deduction cancelled by their supervisors. *Id.* In short, *Kuznyetstov* would have been impossible to try on a class-wide basis. *Id.* By contrast, the nine *Karlo* plaintiffs sought to present common statistical evidence for liability, such that common evidence would predominate in the presentation of their claims and there were few enough plaintiffs for the presentation of any individualized evidence to be manageable.

The district court also relied on *Martin v. Citizens Financial Group, Inc.*, CIV.A. 10-260, 2013 WL 1234081 (E.D. Pa. Mar. 27, 2013), where the court decertified the class because—as in *Kuznyetstov*, the plaintiffs alleged not that the employer engaged in a uniform illegal policy or plan, but that some branch managers violated a uniform company policy prohibiting them from forcing employees to work unpaid overtime. *Id.* Thus, as in *Kuznyetstov*, the *Martin* plaintiffs would have needed to present individualized evidence to prove liability for the entire 466-plaintiff class. *Id.*

PGW's Failure to Engage Reasonable HR Practices is Critical

There is nothing fundamentally unfair to PGW about being held accountable for its failure to engage the RIF guidelines that had previously been in place in the organization and were designed to protect older employees in a RIF such as this. (A.86, at n.4). The EEOC promulgated the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607. The Guidelines are intended to direct employers in conducting business decisions such as RIFs in a manner that removes the possibility of an adverse impact on older employees. Employers regularly use these guidelines in conducting RIFs to protect older employees from conscious and unconscious bias on the part of the managers selecting employees for the RIF. In doing so, companies may insulate themselves from liability for claims of the type asserted here. PGW, which engaged experienced HR consultants to assist with the RIF, inexplicably chose not to avail itself of such procedures. (A.85-87).

PGW in fact failed to adhere to *any* reasonable industry-accepted HR practices in carrying out the RIF, including the RIF Guidelines inherited from PPG. *Id.* No guidance came from senior management or HR as to any objective standards governing who should be eliminated in the RIF. *Id.*

A jury could find that these omissions and conspicuous lack of any guidance effectively served as a "wink and a nod" to PGW's managers to make selections

for the RIF based on impermissible age-based criteria such as "adaptability"[7], or a motive to protect younger employees who were on the rise at the expense of older employees. Additionally, by ignoring the RIF Guidelines, PGW intentionally eliminated all checks against unconscious age bias and stereotypes held by the managers making the termination decisions, such as those requiring a disparate impact analysis, the use of any historical performance criteria, the use of any objective evaluation criteria, crediting of seniority, or the retention of documentation supportive of the terminations. (See generally, A.402-446, Greenwald Expert Report).

This conscious and intentional failure to use standard HR protections that were already part of the organization's established practices affected all members of the proposed class. *See Colgan v. Fisher Scientific Inc.*, 935 F.2d 1407, 1422-23 (3d Cir. 1991)(*en banc*), *cert denied*, 112 S.Ct. 379 (1991) (HR expert's opinion that employer did not follow its own and standard personnel policies supports inference of age discrimination). Removing protections against age discrimination before managers made their RIF selections was greatly enhanced the likelihood that managers would act based upon age bias and stereotypes. This was part of the company-wide policy or plan for PGW's March, 2009 RIF.

[7] Plaintiff Karlo's supervisor told him he was selected for termination in the RIF because other employees were more adaptable. (A.447-449 [Karlo 2011 Dep. pp.12-13]).

The Supreme Court's Recent Pronouncements in Tyson Foods, Inc. v. Bouaphakeo Favor Reversal

In *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ____, slip op., at 13-14 (2016), the Supreme Court recently limited the reach of *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011) and endorsed the use of class actions driven by statistical evidence, even where individualized defenses may exist.

In *Dukes*, the plaintiffs proposed a "trial by formula" approach for 1.5 million plaintiffs whereby the aggregate damages award was to be derived by taking the percentage of claims determined to be valid from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims by the average backpay award in the sample set. *Id*. The Supreme Court found that this violated the Rules Enabling Act because it would have given individual plaintiffs a right that they would not have been entitled to in individual actions and denied Wal-Mart the opportunity to litigate individualized defenses. *Id.*

In *Tyson*, the Supreme Court distinguished that where, as here, an individual plaintiff could use the same statistical evidence to support his individual discrimination claim, the presence of individualized defenses does not weigh against certification. *Id.*

The impact of *Tyson* is that *Dukes'* holding is limited to its facts—namely the use of statistical evidence by plaintiffs to avoid litigating individual claims,

deprive the defendant of individualized defenses, and secure for a portion of the plaintiffs a redress that they would not be entitled to if they brought an individual claim. This is not the case here.

D. The District Court Erred in Excluding the Social Science Opinions of Anthony Greenwald and Michael Campion

Appellants intended to use two social science experts, Anthony Greenwald and Michael Campion, to show: (1) that PGW's managers could have been unconsciously affected by bias against older employees while they were selecting employees for the RIF; and (2) that PGW failed to use reasonable human resources practices to prevent such unconscious biases from operating against its older employees.

In *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999), *cert. denied*, 528 U.S. 1161 (2000), the court explained that the courts have long-recognized cognitive biases as being central to employment discrimination law:

> The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus. Indeed, discussing age discrimination in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Court characterized employer decisions "based in large part on stereotypes unsupported by objective fact," *Id.* at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)), as "the *essence* of what Congress sought to prohibit in the ADEA," 507 U.S. at 610 (emphasis added).

Id. In *Price Waterhouse*, the U.S. Supreme Court recognized that expert testimony concerning the presence of sex stereotyping is clearly relevant:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), *citing Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978).

Likewise in *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1422-23 (3rd Cir 1991) *cert denied*, 112 S.Ct. 379 (1991), this Court recognized that the testimony of an HR expert similar to Campion supported an inference of discrimination. In *Colgan*, an age discrimination case, the plaintiff employee introduced in opposition to the defendant's motion for summary judgement, an affidavit from his HR expert in which the expert concluded the employer breached its own and standard HR procedures in the way it evaluated the plaintiff's performance. *Id.*, 935 F.2d at 1423. The court held that a jury could infer the employer's evaluation that did not comply with standard personnel practices was the product of age discrimination. *Id.*

Standard of Review

In *In re Paoli Railroad Yard Pcb Litigation*, 35 F.3d 717, 749-50 (3d Cir. 1994), this Court articulated a heightened standard for review of a district court's exercise of discretion in excluding expert testimony:

> While evidentiary rulings are generally subject to a particularly high level of deference because the district court has a superior vantage point to assess the evidence, evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses and thus is often not significantly more difficult on a cold record. Moreover, here there are factors that counsel in favor of a hard look at (more stringent review of) the district court's exercise of discretion. For example, because the reliability standard of Rules 702 and 703 is somewhat amorphous, there is a significant risk that district judges will set the threshold too high and will in fact force plaintiffs to prove their case twice. Reducing this risk is particularly important because the Federal Rules of Evidence display a preference for admissibility.

Id. (internal citations omitted). This Court has regularly reversed district courts' exclusion of experts. See e.g. *Schneider v. Fried*, 320 F.3d 396 (3d Cir. 2003); *Holbrook v. Lykes Bros. S.S. Co*., 80 F.3d 777 (3d Cir. 1996).

Rule 702 Standard

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

F.R.E. 702.

This Court has interpreted Rule 702 as having "three major requirements: (1) the proffered witness must be an expert, i.e., must be qualified; (2) the expert must

testify about matters requiring scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (citing *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997)).

This Court has further "interpreted the second requirement to mean that an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable." *Id*. In evaluating whether a particular methodology is reliable, the Court of Appeals has identified several factors district courts should consider:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Meadows v. Anchor Longwall & Rebuild, Inc., 306 F. App'x 781, 788 (3d Cir. 2009) (citing *Paoli*, 35 F.3d at 742 n.8). However, these factors "are neither exhaustive nor applicable in every case." *Id.* (quoting *Kannankeril*, 128 F.3d at 806-07).

The inquiry "is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research." *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999),

amended, 199 F.3d 158 (3d Cir. 2000). Instead, the court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The third element under Rule 702, namely, whether the expert testimony would assist the trier of fact, "goes primarily to relevance." *Meadows*, 306 F. App'x at 790 (*quoting Lauria v. Amtrak*, 145 F.3d 593, 599 (3d Cir. 1998). This element requires that "the expert's testimony must 'fit' under the facts of the case so that 'it will aid the jury in resolving a factual dispute.'" *Id.* And "the standard for the factor is not high; it is met when there is a clear 'fit' connecting the issue in the case with the expert's opinion that will aid the jury in determining an issue in the case." *Id.* (citing *Lauria*, 145 F.3d at 600 (quoting *Paoli*, 35 F.3d at 745)).

The District Court Imposes an Unworkable Standard for Experts

The district court found both Drs. Campion and Greenwald's[8] analyses to be defective because they relied upon deposition excerpts selected by counsel and did

[8] The District Court also criticized Greenwald because the selection of depositions he reviewed included PGW managers in different parts of the organization from the named plaintiffs. (A.53-54, n.3). First, this ignores the fact that when Greenwald prepared his report, the class was conditionally certified and it was thus proper for him to review the deposition transcripts of persons who supervised the opt-in Plaintiffs. More importantly, however, the District Court ignores the fact that Greenwald reviewed the deposition transcripts of the key persons in the chain

not visit PGW facilities or interview PGW managers and subject them to the IAT. (A.53-55,60,75).

The district court seeks to impose an unworkable standard on parties seeking to present expert opinion in complex cases. In a case such as this (approximately sixty depositions were taken), it would not be possible to have an expert such as Campion or Greenwald review all the transcripts in their entirety, much less interview all of the adverse witnesses, nor is it necessary given the scope and subject matter of their opinions. Instead, our system of justice relies on attorneys to distill the evidence and select which testimony is relevant for an expert to review. See *Peil v. Nat'l Semiconductor Corp.*, 105 F.R.D. 463, 465 (E.D. Pa. 1984) (recognizing that "in a case involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research"). Moreover, the district court cites no authority otherwise.

The reliance on evidence selected and relayed by counsel is a subject for cross-examination, not exclusion. "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where

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of command to which the named plaintiffs reported, including the CEO of the company, the two HR consultants who were the architects of the company-wide RIF, the HR manager who managed the RIF, and the named plaintiffs' direct and next-level supervisors—who PGW claims made the decision to terminate them in the RIF. *Id.*

appropriate, on summary judgment." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1068 (7th Cir. 2013). As *Daubert* stressed: "Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 596 (1993).

The District Court Conceded Greenwald and Campion are Qualified

The district court conceded that Drs. Greenwald and Campion are qualified in their respective fields. The district court even went as far as to describe Greenwald as being "renowned in his field." (A.62). Similarly, the district court described Campion as being "well-respected" in his field. (A.75). Thus, the inquiry here involves only the second and third elements under Rule 702, reliability and fit.

Greenwald's Methodology is Reliable

Greenwald was retained by Appellants to provide opinion "in the area of social psychological research on attitudes, prejudices, and stereotypes," which includes implicit bias, "a lay designation for mental processes that function outside of conscious awareness." (A.403). Greenwald explained that he based his opinions on widely-accepted scientific methodology:

> 7. My studies of implicit social cognition [cognition = thinking] include the topic of implicit bias. Implicit bias is a lay designation for mental processes that function outside of conscious awareness. Lay understanding of implicit bias is based on scientific research on

> stereotypes and attitudes. Attitudes are evaluations of groups of people or of concepts, and stereotypes are beliefs about traits (attributes) that are associated with (i.e., taken to be characteristic of) groups or categories of people. The term "implicit bias" is used in this report as an informal reference to the relevant scientific work on attitudes and stereotypes.
>
> 8. My research on implicit social cognition includes invention and development of a specific research method—the Implicit Association Test ("IAT"). The IAT is considered an "implicit" measure because it infers the strength of a mental association that links a social category (such as a race, gender, or age group) with a trait (i.e., a stereotype) from testing procedures that are influenced by those associations in a manner not discerned by the respondents. The IAT has been successfully used as an implicit measure for a wide variety of mental associations that underlie stereotypes and social attitudes. My research has included study of implicit biases involved in age attitudes.
>
> 9. The psychometric properties of IAT measures have been validated with tens of thousands of participants in laboratory research studies. Variations of the IAT have been taken more than 14 million times at the on-line educational site, www.implicit.harvard.edu/implicit. Many social cognition experts have used the IAT as a method in their own research. No method for measuring implicit bias is more widely used than the IAT. IAT measures have been subjected to repeated empirical testing and peer review. There exists near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurement of attitudes and stereotypes.

(A.405-406).

The Supreme Court has established that employment decisions affected by implicit bias and stereotypes constitute unlawful discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (affirming district court's admittance of expert testimony on social biases).

Greenwald's expert testimony on this topic was admitted in *Samaha v. Washington State Dep't of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012). Also, courts throughout the country have routinely admitted expert testimony regarding bias and stereotyping in discrimination cases.[9] These courts rejected Rule 702 challenges and recognized that experts have an important role to play in educating jurors about stereotyping and bias and how they can influence employment decisions. The district court erred in failing to do that here.

Greenwald's methodology is—as quoted in from his report above—widely used in the field and validated by laboratory research studies involving tens of thousands of participants. Nonetheless, the district court derided it as being Greenwald's "self-invented IAT." (A.60). This satisfies the *Meadows* factors set forth above and *Kuhmo*'s dictate that an expert must, "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152.

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[9] *See Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996, 1008-1009 (D. Minn. 2011); *Tuli v. Brigham & Women's Hospital, Inc.*, 592 F. Supp. 2d 208 (D. Mass. 2009); *HNOT v. Willis Group Holdings Ltd.*, 2007 WL 1599154 *1-4 (S.D.N.Y. 2007); *International Healthcare Exchange Inc. v. Global*, 470 F. Supp. 2d 345, 355 (S.D.N.Y. 2007); *Beck v. Boeing Company*, 2004 WL 5495670 *1-2 (W.D. Wa. 2004); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262-63 (N.D. Cal. 1997); *Flavel v. Svedala Industries, Inc.*, 875 F. Supp. 550, 557-58 (E.D. Wisc. 1994); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991).

Greenwald's Testimony Will Assist the Trier of Fact

The district court takes pains to discuss something undisputed and immaterial—the fact that Greenwald did not test any PGW supervisors using the IAT or interview any of PGW's supervisors or management employees. (A.60-61).

First, Rule 702 allows an expert such as Greenwald to present expert testimony on general principles without applying such principles to the facts of the case as long as the general principles themselves are relevant to the case and likely to assist the trier of fact. The Advisory Committee Notes for the 2000 Amendments to Rule 702 state:

> If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

F.R.E. 702 (advisory committee notes to 2000 amendments). Courts regularly admit expert opinion of this type. See e.g. *U.S. ACCU-Measurements, LLC v. Ruby Tuesday. Inc*., No. 2:10-5011 (KM), 2013 U.S. Dist. LEXIS 59888, at *29-31

(D.N.J. Apr. 26, 2013); *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, n.30 (D.N.J. 2002).

Greenwald's opinions explain how PGW's managers could have been unconsciously affected by bias against older employees while they were selecting employees for the RIF. This is something that is outside of the understanding of a typical juror and is relevant to the facts of this case. As the district court explained, in a disparate impact claim, "the employer utilizes employment practices that are facially neutral in their treatment of different groups but ... in fact fall more harshly on one group than another and cannot be justified by business necessity. *Rivera-Andreu v. Pall Life Sciences PR, LLC*, No. CIV. 14-1029 MEL, 2014 WL 5488409, at *3 (D.P.R. Oct. 29, 2014) (citing *Mullin v. Raytheon Co.*, 164 F.3d 696, 699-700 (1st Cir. 1999)). Greenwald's implicit bias explanation fits this case because it explains how managers, even when making facially neutral selections, might disfavor members of a particular protected group. This is exactly what Appellants claim that PGW allowed its managers to do.

The District Court Misconstrues Holdings of Other Cases Involving Greenwald

The district court cited two cases that it purported to be critical of Greenwald's opinions. However both are easily distinguishable. In *Pippen v. State of Iowa*, No. LACL107038 (D. Iowa Apr. 17, 2012), the court found after conducting a bench trial that Greenwald's implicit bias theory could not prove

discrimination standing alone. This is notable for two reasons: first, Greenwald's testimony was not barred under Rule 702—he was allowed to testify and his testimony was considered by the fact finder. *Id.* Second, the *Pippen* court did not opine as to the validity of Greenwald's core implicit bias theory, but, rather, made a more limited holding that his opinion could not prove that the employer's actions were caused by discrimination absent other evidence. *Id.* This is hardly surprising given that Greenwald does not claim his opinions prove causation, but instead that they are intended to:

> …provide a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the Plaintiffs' ages substantially motivated the defendants' actions outlined in the Complaint.

(A.413).

Similarly in *Jones v. Nat'l Council of Young Men's Christian Associations of the United States*, 2014 U.S. Dist. LEXIS 43866 (N.D. Ill. Mar. 31, 2014), the court found that Greenwald's opinions could not serve as the sole evidentiary support for the plaintiff's claim of discrimination. Since Appellants seek to present Greenwald's opinions in conjunction with other evidence, *Pippen* and *Jones* are not applicable here. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996, 1008-1009 (D. Minn. 2011),

relied upon by PGW, also allow the use of implicit bias expert testimony on these terms.

The principle that Greenwald's opinions should be permitted even if they cannot serve as the sole evidence of discrimination is well-established. In *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir. 1995), this Court explained that even if evidence is not sufficiently reliable or probative to hold "commanding weight, at trial, it may provide some relevant evidence of discrimination", in conjunction with other evidence.

Campion's HR Opinions are Based on Reliable Methodology

In addition to his statistical opinions, Campion offers a separate expert report on reasonable human resources practices. (A.256). Campion's reasonable HR practices "are the practices that are recommended by the practice literature, supported by the research literature, or clearly implied by one of these literatures. Also, these are the practices that are taught in the MBA courses by [him]." (A.264). To gather this list of reasonable HR practices, Campion explains that he reviewed volumes of publications, yielded eighty-four relevant articles and books on reasonable HR practices during RIFs, and identified what he judged to be a representation of "the most common advice in the professional and scientific HR literature." (A.264-266).

Campion is well-published in academic literature on human resources practices. (See generally A.328-365). These publications include a 2011 peer-reviewed journal article that summarizes the research leading to the formation of the opinions expressed by Campion in this case. (A.335; Campion, M. A., Posthuma, R. A., & Guerrero, *Reasonable Human Resource Practices for Making Employee Downsizing Decisions*, ORGANIZATIONAL DYNAMICS, 40, 174-180 (2011)).

Incongruously, the district court dismisses all of this in conclusory statements that Campion's reasonable HR practices are "unreliable," "invented", and an "untested hypothesis." (A.74-75). The district court's position is indefensible in light of the fact that Campion's opinions satisfy four of the eight non-exclusive factors set forth in *Meadows* to determine reliability of an expert—namely that Campion's opinions have been published in a peer-reviewed journal, are generally accepted in the HR management community, that he uses his reasonable HR practices for non-judicial purposes, and because the district court concedes that Campion is highly qualified in his field.

Campion's HR Opinions will Assist the Trier of Fact

The district court's chief criticism of Campion is that like Greenwald, he bases his opinions on deposition excerpts selected by counsel for him to review. (A.75). For the reasons stated above, this imposes a harsh and unworkable rule on parties relying on expert testimony.

Further, Campion's opinions are relevant. Their purpose is to show that PGW failed to use reasonable human resources practices to prevent unconscious biases from operating against its older employees. Because PGW has invoked the ADEA's Reasonable Factors Other than Age (RFOA) defense and claims that its managers made reasonable management decisions in selecting Appellants for termination, Appellants should be able to introduce expert testimony showing that such decisions were unreasonable.

In its Opinion, the district court relied on PGW's proposed RFOA, relating to "its financial situation coupled with the decline in the U.S. economy and its effect on the automotive industry in 2008 and 2009." (A.73, at n.18). This as a matter of law is not a reasonable factor other than age—it would allow employers to ignore the ADEA whenever there is an economic downturn. *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997) ("A RIF is not an open sesame to discrimination"). Appellants do not challenge the notion that it may have been necessary to make some reductions in PGW's workforce. Rather, Appellants

challenge PGW's practice of selecting the older workers for reduction. Campion's reasonable HR factors are relevant to determining whether PGW acted reasonably in determining whom would be selected.

CONCLUSION

The district court erred in overturning the law of the case on fifty and older disparate impact claims, excluding Appellants' statistical analysis, decertifying the collective action, and excluding Appellants' social science experts. These decisions by the district court should therefore be reversed.

Dated: April 6, 2016

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COMBINED CERTIFICATION OF COMPLIANCE

I, Bruce C. Fox hereby certify as follows:

5. The Brief submitted in this matter on behalf of Appellants complies with the type-volume limitation of Rule 32(a)(7)(B(i) because it contains no more than 14,000 words; complies with Rule 32(a)(5)(A) because it uses a 14 point Times New Roman font; and complies with Rule 32(a) because it is double spaced, with required margins on appropriate 8.5 by 11.0 inch paper.

6. The electronic version of this Brief is identical to the hard copy of said Brief. The electronic version of this Amicus Brief was checked for computer viruses using Kaspersky prior to transmittal.

7. This Brief was electronically filed with the Court and served it on counsel of record for all parties via the CM/ECF Filing System

8. I am a member in good standing of the Court of Appeals for the Third Circuit.

I hereby certify subject to the penalties of perjury that the foregoing statements made by me are true.

Bruce C. Fox

IN THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-3435

RUDOLPH A. KARLO, ET AL,

Appellants,

v.

PITTSBURGH GLASS WORKS, LLC,

Appellee.

On Appeal from the United States District Court For the Western District of Pennsylvania Case No. 10-CV-1283

JOINT APPENDIX – VOLUME I
(Pgs. A.1-129)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, and MARK K., MCLURE	)	Civil Action no. 10-1283
	)	Judge Terrence F. McVerry
Plaintiffs,	)	
v.	)	
PITTSBURGH GLASS WORKS, LLC,	)	ELECTRONIC FILING
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs in the above-captioned case, hereby appeal to the United States Court of Appeals for the Third Circuit from an order entered in in this Action on the 2nd day of October, 2015, entering judgment against Plaintiffs and for Defendant on Plaintiffs' discrimination claims pursuant to F.R.C.P. 54(b).

Dated: October 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Notice of Appeal to be electronically filed with the United States District Court for the Western District of Pennsylvania. Notice of this filing will be sent by operation of the Court's Electronic Filing System to counsel of record.

/s/Andrew J. Horowitz

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, DAVID MEIXELSBERGER, BENJAMIN D. THOMPSON and RICHARD CSUKAS, ***on behalf of themselves and all others similarly situated,***[1]	)	**2:10-cv-1283**
Plaintiffs,	)	
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF COURT

Pending before the Court is a MOTION FOR DECERTIFICATION OF THE PROPOSED COLLECTIVE ACTION (ECF No. 288) filed by Defendant Pittsburgh Glass Works, LLC ("PGW" or "Defendant") with a redacted (ECF No. 289) and a sealed (ECF No. 293) brief in support. Plaintiffs filed a brief in opposition (ECF No. 300); PGW filed a reply (ECF No. 307); and Plaintiffs filed a surreply (ECF No. 315). The factual record with regard to this motion has been thoroughly developed via the submission of PGW's redacted (ECF No. 290) and sealed (ECF No. 294) statement of facts and accompanying exhibits; and Plaintiffs' numerous appendices and attached exhibits. The Court heard oral argument on September 10, 2013. (ECF No. 342). Afterward, Plaintiffs filed a post-argument brief (ECF No. 337) with leave of Court (ECF No. 338); and PGW filed a memorandum in response (ECF No. 341) with leave of Court (ECF No. 340).

1. As discussed in greater detail below, Representative Thompson and Csukas have settled their claims in this action. On July 1, 2013, counsel indicated that he would file a motion to amend the caption to reflect the settlements. (ECF No. 292 at 10). Plaintiffs filed a Renewed Motion for Leave to File Second Amended Complaint (ECF No. 299) on July 15, 2013, which PGW opposes in part (ECF No. 308). This Memorandum Opinion is dispositive of that motion.

The Court also has the following six motions pending in this matter:

(1) PLAINTIFFS' RENEWED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (ECF No. 299) in which they incorporate by reference their earlier briefs in support of their prior motion for leave to amend (ECF Nos. 251, 255) and which PGW opposes (ECF No. 308);

(2) DEFENDANT'S MOTION TO BAR PROPOSED EXPERT TESTIMONY OF ANTHONY G. GREENWALD RELATED TO PURPORTED IMPLICIT SOCIAL BIAS (ECF No. 316);

(3) DEFENDANT'S MOTION TO BAR DR. CAMPION'S EXPERT OPINION ON REASONABLE HUMAN RESOURCE PRACTICES (ECF No. 317);

(4) DEFENDANT'S MOTION TO BAR DR. MICHAEL CAMPION'S STATISTICAL ANALYSIS (ECF Nos. 318, 321);

(5) DEFENDANT'S MOTION TO BAR EXPERT OPINION OF DAVID DUFFUS REGARDING THE O'DONOGHUE EXPERT REPORT (ECF Nos. 319, 322); and

(6) PLAINTIFFS' MOTION TO STRIKE MOTIONS TO BAR EXPERT TESTIMONY (ECF Nos. 323, 324) which PGW opposes (ECF No. 333); Plaintiffs have filed a reply brief (ECF No. 336).

The issues have been fully briefed and well-argued on behalf of the parties. Accordingly, the motions are ripe for disposition.

For the reasons that follow, the Court will grant in part and deny in part PGW's motion for decertification; grant in part and deny in part Plaintiffs' renewed motion for leave; and deny as moot and without prejudice Defendant's expert challenges and Plaintiffs' motion to strike the motions to bar expert testimony.

I. Background

This case arises from the March 2009 reduction in force ("RIF") by PGW which resulted in the termination of approximately one-hundred of its salaried employees. The gravamen of the First Amended Complaint is that the terminations were the result of age discrimination.

Plaintiffs Rudolph A. Karlo, Mark K. McLure, William S. Cunningham, Jeffrey Marietti, David Meixelsberger, Benjamin D. Thompson, and Richard Csukas (the "Representative Plaintiffs") initiated this action against PGW on behalf of themselves and all others similarly situated. Eleven individuals were later permitted to opt-in to this lawsuit: Michael Breen, Matthew Clawson, Colleen Conway, John DeAngelis, Robert Diaz, Charles Fellabaum, Paul Marcelonis, Stephen Shaw, John Titus, Charles Voetzel, and Ronald Wickire (the "Opt-in Plaintiffs"). Of those eighteen party-plaintiffs, nine remain in this litigation: Representative Plaintiffs Karlo, McLure, Cunningham, Marietti, and Meixelsberger; and Opt-in Plaintiffs Breen, Clawson, Shaw, and Titus.

A. Factual Background

The following background is taken from the Court's independent review of the motions, the filings in support and opposition thereto, and the record as a whole.[2]

1. The Formation and Corporate Structure of PGW

PGW was formed on October 1, 2008 from PPG Industries, Inc.'s ("PPG") auto-glass assets. PPG initially retained a forty-percent ownership in PGW; Kohlberg & Company ("Kohlberg"), a private equity firm, owned the remaining sixty-percent and later acquired the remainder of PPG's interest in the venture. James Wiggins, a Kohlberg principal, was named

2. The United States Court of Appeals for the Third Circuit has noted that the certification analysis does not require a court to recite the facts as set forth by the plaintiff(s); however, it has done so "to demonstrate that, even reciting the facts to Plaintiffs' benefit, [they] are unable to meet their burden for certification." *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 538 n.7 (3d Cir. 2012).

Chairman and CEO of PGW.[3] Unless otherwise noted, the remaining PGW employees transitioned from PPG to PGW.

One of PGW's core businesses is the production of automotive glass to car and truck manufacturers as an original equipment manufacturer ("OEM"). Aside from OEM, PGW consists of GTS Services, a software business ("GTS"); PGW Auto Glass ("AG"), an automotive-replacement-glass distribution business ("ARG"); LYNX Services, an insurance claims administrator ("LYNX"); and Aquapel, a glass treatment supplier. At a corporate level in Pittsburgh, Pennsylvnia, PGW's business share departments for finance, IT, and Human Resources, functions previously filled by PPG and provided to PGW by contract during a transition period.

Each business is comprised of additional stand-alone operations. PGW operates the ARG business, run by President Marc Talbert, through a nationwide network of approximately ninety branch facilities, each of which employs truck drivers, managers, and other support staff. Those branches rely on customer service representatives employed by PGW at centralized call centers in Irving, Texas and Ft. Myers, Florida. LYNX, headed by General Manger Gary Eilers and Director of Service Solutions John Wysseier, provides outsourced insurance cell-center operations to insurance companies from its base of operations in Ft. Myers and another location in Paducah, Kentucky. Most of its employees work as customer service representatives. GTS provides software products and services to glass manufacturers and retailers from a single facility in Portland, Oregon. Most of it employees are programmers and developers.

3. Wiggins did not perform any formal demographic assessment of PGW's employees when he came aboard, but recognized that the company had an older workforce. *See* Dep. of Wiggins, ECF No. 301-2 at 3-4 ("Q. Did you perceive that the company had an aging workforce? A. Yes. So that was obvious. Q. When you say it was obvious, why was it obvious to you? A. Well, I think, although we never did any particular analysis of the ages, I mean we had a senior work force. You could see that just from the people that you came in contact with. Q. Did that present any challenges? A. No. I think primarily it was a benefit. Long-standing experience and capabilities.").

2. The Decline of the Automobile Industry[4]

Around the time that PGW was formed, General Motors, Ford, and Chrysler (the North American "Big Three") appeared before the United States Congress to request bailout funds. Given the direction of the industry and economic forecast, PGW took several steps to combat deteriorating sales: it closed two manufacturing facilities in Canada and another in Evart, Michigan; consolidated distribution systems; identified about $100-$200 million of necessary capital expenditures; reconfigured its distribution strategy; commenced process improvement actions; and undertook supply chain optimization. PGW also terminated the employment of roughly ten to twelve percent of its salaried workforce in early December 2008. The decision for this RIF—not the subject of this litigation—was made by Wiggins in consultation with his leadership team, forty-five to fifty persons in senior management positions at PGW. The decisions regarding which positions to eliminate were, however, left to the discretion of the individual directors who were assigned a targeted percentage by which they had to reduce their workforce.

PGW undertook several additional measures in early 2009 to meet the challenges of lower demand: it put hourly employees on temporary layoff; it operated its largest plant only four of the thirteen weeks in the first quarter; it trained leadership at each plant in Lean Six Sigma principles; it suspended merit salary increases; it implemented a hiring freeze except for critical positions; it suspended a 401k matching contribution program and bonuses; and cut salaries company-wide.

4. Plaintiffs take issue with PGW's "Statement of Facts," including its "purported economic justifications for doing the RIF." *See* Pls.' Br. in Opp. at 2 nn.1, 3. ("Plaintiffs [ ] do not dispute that adverse economic conditions may have justified some reduction in the work force, in some form. Rather, the issue is whether the RIF was carried out in a discriminatory manner."). The Court finds that the record supports PGW's recitation of the adverse economic conditions at the relevant time but expresses no view on whether the RIF disparately impacted older workers or whether they were disparately treated.

3. The March 2009 RIF

Kevin Cooney became Acting HR Director for PGW after the then-Vice President of Human Resources resigned from the company sometime in late-2008 or early-2009.[5] Around mid-February 2009, Wiggins asked Cooney to take a "fresh look" at the organization and formulate a reorganization plan.

Cooney enlisted the assistance of a consultant, Ed Dunn, an organizational specialist to make recommendations regarding the restructuring of the company into a more lean and effective organization. Dunn later prepared an "Organization Assessment" presentation and a summary of his observations/recommendations, which Cooney reviewed before they were finalized. *See* Mem. from Dunn to Cooney, ECF No. 303-5. In his memorandum, Dunn noted that "[m]arket conditions continue to deteriorate and more cost reductions are required as soon as possible[,] and this would include certain organization changes;" that "[i]t would not be efficient or effective at this time to undertake a formal or time-consuming organization study or process;" and that "[i]nstead, the Executive Team . . . would do an ASAP organization assessment and identify cost-saving organization structure changes to be made that are in addition to the changes and reductions already identified." *Id.* at 3. *See also id.* ("The mindset needs to be: Be bold and aggressive. Risk going too far, too fast . . . verses the opposite. We can revisit and re-load as needed when conditions and results improve.") (ellipses in original). These suggestions were not binding on PGW, and Dunn had no role in the decision-making process or implementation of later reductions.

5. The record is somewhat unclear as to when Cooney assumed his interim role, but it appears that he was only involved in the March 2009 RIF and not the December 2008 RIF. *See* Dep. of Cooney, ECF No. 301-1 at 4-5; Dep. of Wiggins, ECF No. 301-2 at 5-6; *see also* Dep. of Cooney, ECF No. 88-5 at 4. Robert McCullough permanently filled the position in September 2009.

By early-March 2009, PGW decided to conduct another RIF. *See generally* Dep. of Cooney, ECF No. 301-1 at 7 ("THE WITNESS: [I]t became clear that the target was going to be about a 30-percent reduction in jobs, not people, but jobs. . . . And it was to – to [Wiggins'] explanation was that, you know, that business was off 30 percent, plants, we're going to lose 30 percent of our plants and so forth."). Although this decision was made by Wiggins and upper management, the employees were again selected for termination on a decentralized basis.

More specifically, upper management relied on the individual directors of each functional unit to identify the work that needed to be done and the personnel that were necessary to perform that work. As Cooney recounted,

> [t]he instructions were, what Jim Wiggins said is that we want to have an organization that we can, you know, it's going to be a small organization, but it's got to be one that we can do the work that must be done. So you get the best people that you can get, the people with the most experience and the breadth of experience and education and so forth to - - to populate the company.

Dep. of Cooney, ECF No. 301-1 at 9. Cooney likewise cited "[e]ducation, background, breadth of experience, and so forth" when asked what the "general criteria" were in selecting employees for the RIF. *See id.* at 17.

PGW did not specifically train its directors with regard to the RIF or employ any written guidelines or policies as to how they were to conduct the RIF. The upper management instead issued a generalized directive for each department to cut a targeted percentage from their budget, a downsizing with which each unit director had to comply. *See, e.g.*, Dep. of Keith Holmes, [Plant Manager at the Evansville plant], ECF No. 290-13 at 6-7 ("Q. You were just told, essentially, you need to find a way to cut out 20 percent in SG&A [Sales, General and Administration] cost. A. That's generically the truth. That's exactly where we were, and how we got that done was sort of up to us. But you can only cut so many paper clips and different

things before you, obviously, have to get to more meat of the issue . . . . Q. Who gave you that direction that you needed to cut 20 percent? Was that Mr. Stas [the then-Executive Vice President of Operations and COO at PGW] or Mr. Wiggins or both of them? A. That information came through Mr. Stas to me."); Decl. of David King [the then-Director of Enterprise Excellence & Quality], ECF No. 290-39 at 3 ("¶ 9. I did not receive any specific direction from upper management regarding any individual employees who should be terminated, but did determine that I would need to include headcount reductions to achieve the necessary savings."); Dep. of Mark Bulger, ECF No. 301-4 at 3-4 ("Q. Were you given any RIF guidelines for the March, 2009, RIF? A. No. The only instruction I received was we had to reduce one person that was under my supervision."). Thus, the unit directors in the company were afforded broad discretion in determining which of their reports to select for the RIF. *See generally* Decl. of Joseph Stas, ECF No. 290-2.

On March 31, 2009, PGW terminated approximately one-hundred salaried employees. This RIF affected over forty locations and/or divisions of PGW, including the sites in the OEM, ARG, and LYNX businesses at which the nine remaining party-plaintiffs worked. Moreover, as PGW highlights, the RIF impacted almost every part of the company with the widespread job cuts: forty-four from ARG at over twenty locations; twenty-four from OEM including individuals from Creighton, Pennsylvania, Crestline, Ohio, Evansville, Indiana Tipton, Pennsylvania and O'Fallon, Missouri plus seven from Manufacturing Technology, one from Satellite Engineering, and two from Enterprise Excellence; thirteen from ARG Truckload & Services; eight from the company's sales organization; and one from New Product Development. *See* PGW's Br., ECF Nos. 289 at 4. PGW also closed the Evart, Michigan plant on March 31, 2009, leading to the elimination of eighteen salaried employees.

As part of the RIF, a Human Resources employee of PGW with a long tenure at PPG, Diana Jaden, was tasked by Cooney to consolidate data from various locations and unit managers, calculate the amount of severance, identify those who were impacted, and prepare paperwork for the exit interviews. The paperwork included a cover letter that explained that the individual was being terminated and outlined the severance being offered; a "Separation Agreement and Release" that employees could sign to receive certain benefits in exchange for waiving their right to bring a claim against PGW; and two multipage documents with Decisional Unit Matrices ("DUMs") per the Older Workers' Benefit Protection Act ("OWBPA").[6] *See* Def.'s Answer to First Am. Compl., ECF Nos. 73-1; 73-2; 73-9.

4. The Terminations of the Remaining Party-Plaintiffs

Relevant here, six unit managers across five locations made the decisions to include the nine remaining party-plaintiffs in the RIF: Gary Cannon, Jason Skeen, Keith Holmes, Gary Eilers, John Wysseier, and Todd Fencak.[7]

a. Cannon (Karlo, McLure, Cunningham, Marietti & Meixelsberger)

In early 2009, Cannon was the Director of Manufacturing Technology for PGW's Manufacturing Glass Technology Department ("Manufacturing Technology") in Harmarville, Pennsylvania at which the five remaining Representative Plaintiffs worked. *See* PowerPoint Presentation – Operations Organization Restructuring March 2009, Revised 3/25/09, ECF No.

6. Plaintiffs submit that the DUM attached to PGW's Answer "is not the incomplete version that runs afoul of the OWBPA that was supplied to Plaintiffs at their termination sessions." Pl.'s Br. in Opp., ECF No. 300 at 5 n.9. As Plaintiffs contend, the DUMs provided to them were missing every other page, and therefore, the waivers in the Separation Agreements are invalid and unenforceable as to their claims. *See* First Am. Compl., ECF No. 54 at 28.

7. PGW makes reference to an additional four managers, for a total of ten decision-makers regarding the RIF selections: David King, Director of Enterprise Excellence and Quality in Evansville, IN; Tom Casey, Manager of Advanced Production at a Satellite manufacturing facility located near PGW's Crestline, OH plant; Craig Barnette, Plant Manager at the Creighton, PA facility; and Pete Dishart, Director of New Production Development in PGW's OEM Glass New Product Research and Development group in Harmarville, PA. Those individuals made the RIF-related decisions for, respectively, Csukas, Marcelonis, DeAngelis, and Voeltzel, who are no longer participants in this action.

290-7 at 36. Before the RIF, Manufacturing Technology was comprised of twenty-seven salaried associates. *Compare id.* (depicting the organizational structure of Manufacturing Technology before the RIF) *with id.* at 38 (depicting same after the RIF).

Six employees were selected by Cannon for termination in the RIF, which included Karlo, McLure, Cunningham, Marietti and Meixelsberger who were all part of his group. Cannon had worked with each of these individuals for many years at PPG and had full knowledge of their job-related skills, performance, and capabilities. *See* Decl. of Cannon, ECF No. 290-38 at 3; Dep. of Cooney, ECF No. 290-39 ("Gary Cannon, you know, had intimate knowledge with all of the technology people in his organization, and he alone was qualified to determine what, you know, what the technical -- because the work was going to still be there."). According to Cannon, he did not receive any specific direction from upper management regarding how he was to arrive at his decisions or any assistance from other PGW employees with the exception of Jarden who only put together the severance packages for the terminated individuals.

Rather, Cannon contends that he objectively evaluated the group as a whole and independently decided to release certain employees based on the needs of his department. Cannon did not use a forced ranking for his department which was previously compiled with the support of his direct reports: Jim Willey; F.M. Hagan; Jim Schwartz, who supervised Cunningham; David Perry, who supervised Marietti; Phillip Sturman, who supervised Karlo and Meixelsberger; and Julie Bernas, who supervised McLure. Based on those rankings, Cannon testified that two other employees ranked lower than some of the plaintiffs, but that they were retained based on their specialized skills and knowledge which he deemed vital to his group.

Cannon further insists that he never considered the age of an employee in arriving at his decision. As compared to the Representative Plaintiffs, Cannon is older than Karlo, Cunningham and Meixelsberger and one to two years younger than Marietti and McLure—all of whom were in their fifties at the time.

i. Karlo

Karlo began working for PPG in its automotive glass division in 1978 as a Construction and Maintenance Research Specialist II. Throughout his thirty-year career, he received several promotions: to Senior Technical Assistant in 1990, to Engineering Specialist in 1995, and finally to Senior Engineering Specialist in 2001, a position he held until his termination. His job duties included working in and later supervising the "mold shop" in which tools for bending glass are built. Karlo also helped to develop eight shared patents and received commendations, pay increases, and bonuses, as well as positive reviews in his annual employee evaluation process, referred to as the Performance & Learning Plan ("P&LP) at PPG. Compliance with the P&LP process waned at PPG in the three years before the RIF, particularly as the sale of its glass assets drew near. *See* Dep. of Cannon, ECF No. 301-12 at 3. PGW did not reinstitute the P&LP evaluation process, but earlier documents dating back to 1992 demonstrate that Karlo "meets" or "meets +" expectations or "Exceeds Requirements."

Cannon testified that Karlo was terminated because most of his work was already being outsourced to other firms and that two other PGW employees could pick up his ongoing tasks. Those employees, Irv Wilson and John Bender, are both older than Karlo.

Karlo recalls that he questioned Cannon after the termination session as to why he was included in the RIF. Cannon allegedly responded that the retained employees were more "adaptable" and remarked that "we don't see you moving forward with the company as it moves

forward." *See* Dep. of Karlo, ECF No. 290-43 at 3-4. Cannon claims that he does not remember the specifics of this conversation. *See* Dep. of Cannon, ECF No. 290-34 at 11-13. Nevertheless, from Karlo's perspective, these remarks demonstrate that Cannon and the other PGW managers charged with making the termination decisions "held age biases" and "acted with discriminatory intent in selecting Plaintiffs for termination."[8]

Six months after the RIF, PGW rehired Karlo as a contract employee through a placement agency and assigned him to the Creighton facility. Karlo was terminated from that position in July 2010, allegedly at the behest of Vice President of HR Robert McCullogh in retaliation for filing an EEOC charge relating to the RIF.

ii. McLure

McLure started his career with PPG as a contractor at the Glass Research & Technology Laboratory ("GRTL") in 1975 and became a full-time employee the following year. In 1980, McLure was terminated when PPG closed that facility. PPG rehired McLure in 1981 to work at its Fiberglass Research facility in O'Hara Township at which he was promoted to Senior Technician in 1990. PPG closed that facility in 1999 and slated McLure for a transfer to North Carolina. McLure instead pursued another opportunity within PPG at its Harmarville facility where he eventually rose to become Senior Technical Assistant. As an employee in this division, McLure was responsible for conducting validation testing, traveling to satellite facilities, and providing customer support and technical services at the facilities. Throughout his thirty-four-

8. Plaintiffs attempt to construe this comment regarding "adaptability" as part of a broader directive. *See* Pls.' Br. in Opp. at 6 ("Aside from the directive that employees be terminated who were not deemed to be sufficiently 'adaptable,' the senior managers had total discretion in making termination decisions, and did not rely upon past performance of the employees, or other objective standards for rating and ranking them."); *see also id.* at 1-2. A review of the testimony appended to the filings reveals that "adaptability" was not part of upper managements' directive. *See* Dep. of Cooney, ECF No. 301-1 at 17 ("Q. So were you looking for people that you thought would be adaptable, that would have the potential to carry out the obligations for those new positions that were being created? A. It was actually people that – that could step in the first day and be able to take it – the broader responsibilities."). The question of whether those statements allegedly made by Cannon give rise to an inference of age discrimination is left for another day.

year career, McLure received positive P&LP evaluations, regular salary increases, bonuses and commendations and worked as a named contributor on a patent developed for PPG.

Much as with Karlo, Cannon testified that McLure was terminated because validation work was being outsourced to another facility and Wilson / Bender could take over McLure's ongoing tasks. Wilson is older than McLure; Bender is only months younger.

In April 2009, McLure returned to PPG through a third-party placement agency. Three months later, in July 2009, McLure was approached by a PGW employee to return to the company. McLure agreed and split his time between PPG and PGW as a contract employee until he was released from PGW in September 2010, allegedly at the direction of McCullogh in retaliation for pursuing an EEOC charge.

iii. Cunningham

Cunningham joined PPG's Glass Research & Development Center in Harmarville as a contract employee and became a full-time employee in 1996. The majority of his time was initially devoted to the Laminated Glass Project on which he worked from its validation study through testing until the final product, known as Sungate Coated Laminate, was ready for manufacture at PPG's facilities in Crestline and Tipton. Based on his contributions to this project, Cunningham was promoted in 2004 to Senior Technical Assistant in the OEM New Product & Process Development Group. His job duties in this capacity were to preform measurements of glass, process and variables; analyze the data; and compile reports. Throughout his career, Cunningham received positive P&LP evaluations, annual salary increases, and merit bonuses.

Cannon testified that Cunningham was terminated because his work as a technician and his ongoing tasks could be absorbed by other employees, Schwartz, Mike Fecik, and Tom Cleary. Fecik and Clearly are both older than Cunningham; Schwartz is a year younger.

iv. Marietti

Marietti began his career at PPG as a contract employee in the construction and maintenance shop at its Harmarville automotive glass facility in 1984 and transferred to the Mold Shop in 1990. In 1994, Marietti became a direct PPG employee and obtained the title of Construction & Maintenance ("C&M") Research Specialist II. Marietti was promoted in 1996 to C&M Research Specialist I and again in 2002 to Senior C&M Specialist Tooling & Instrumentation in the OEM Technology Transfer Group. Although his job title remained the same, Marietti was given greater responsibility sometime in 2003 when he began to perform the job functions of a Technical Assistant, a role in which he continued until the RIF. His job duties were to perform measurements of glass, process and variables; analyze the data; and compile reports. Throughout his career, Marietti received positive P&LP evaluations.

Cannon testified that Marietti was terminated because tooling was being outsourced and the other work assigned to him could be absorbed by Fecik, Schwartz, and Cleary. Cleary and Fecik are both older than Marietti; Schwartz is four years younger.

v. Meixelsberger

Meixelsberger started at PPG in 1987 and became known as an industry-leader in the windshield bending process over the next twenty-two years. Throughout his career, Meixelsberger received positive P&LP reviews and commendations, including when Cannon hand-selected him to service in a specialized manufacturing group comprised of five employees. His last position was as Senior Technical Assistant Windshield Bending in which his duties

included working on windshield on the bending lehr, developing sample parts for customers, and troubleshooting in the field where his services were in high demand.

Cannon testified that Meixelsberger was terminated because his work could be absorbed by Wilson and Bender. Wilson and Bender are both older than Meixelsberger.

b. Skeen (Breen)

Breen joined PPG in 1972 and later became Production Supervisor at Crestline Plant. His job duties were to supervise the hot and cold ends of a production line. At the time of the RIF, his Shift Supervisor was Rodney Auck.

Skeen began his career with PPG in 1996 as a research engineer and assumed the position of plant manager at Crestline in 2008. At the start of 2009, Skeen began to interact with Breen on a daily basis and held meetings with him weekly.

Skeen made the decision to terminate Breen for "performance reasons," testifying that he did not consider age in the process. Instead, Skeen received input from the lower level managers at the plant through a forced ranking in 2008 facilitated by Jim Phillips, Crestline's HR Manager. *See* Crestline Forced Ranking, ECF No. 294-67 at 4. The forced ranking required the managers to individually rank the non-managerial salaried employees at the Crestline facility. Breen placed near the very bottom of the list. A compilation of these forced rankings recirculated among the managers in early-March 2009 as a starting point for RIF-related discussions.

In conjunction with Breen's termination, Philips compiled a DUM that listed the ages of the other production supervisors at the time of the RIF. According to Breen, he was replaced by Mike Cowan, Rick Woogerd and Denny Boyce, all of whom are one to three years his junior.

c. Holmes (Clawson)

Clawson started with PPG in 1979 at its Crestline plant as a process engineer and moved to its Evansville facility around 1984. As a Project Engineer in the maintenance department, his primary job duties were installing new equipment and/or revising and improving existing equipment. His direct supervisor was Michael Scolar.

PGW hired Holmes in January 2009 to serve as the Plant Manager at its Evansville facility. Holmes made the decision to terminate Clawson in consultation with local managers and the HR Director for Evansville, Sarah Leider, as part of a larger reorganization plan to flatten its structure and integrate the maintenance department into the value stream lines. Holmes testified that Clawson was selected based on projections that future operation would require electrical engineering experience which Clawson lacked as a mechanical engineer and that the plant had an oversupply of glass due to a strike bank.[9]

In conjunction with Clawson's termination, Leider compiled a DUM that listed the job titles and ages of the other engineers at the time of the RIF. Rick Mullin and Kurt Steinbacher, two other plant employees who are both older than Clawson, assumed many of his duties.

d. Eilers & Wysseier (Shaw)

Shaw was hired by PPG in 1983, and he worked as a Marketing Manager for LYNX from PGW's headquarters in Pittsburgh. His duties included managing participant programs, supervising management teams responsible for retailer database administration and glass program enrollment, and serving as LYNX's industry representative for windshield repair. Shaw's direct supervisor was Paul McFarland.

9. In late 2008, the Evansville plant built a three-month strike bank to protect against any work stoppage related to a union certification process. Once demand shrunk, it held enough inventory to stock the facility for eight to nine months without operating.

From October 2008 through March 2009, Eilers was the General Manager of ARS & Services with a supervisory role over the entire LYNX business in which Shaw worked. Wysseir, the then-Director of Service Solutions of LYNX, reported to Eilers and was responsible for the day-to-day business operations. Eilers and Wyssier were responsible for Shaw's termination. Eilers is older than Shaw; Wyssier is six years younger.

Eilers and Wyssier did not receive any specific direction from upper management to arrive at their decision, but instead jointly selected Shaw for the RIF as part of their efforts to flatten the organization and reallocate duties into preexisting roles. Sandy Frazier, the HR manager for the department, assisted Eilers and Wyssier in assembling a document outlining job duties department-wide. Based on their assessment, Eilers and Wyssier decided to reallocate and distribute Shaw's duties to McFarland and Susan Avis. According to Shaw, another employee six years his junior, Alba Rosati, also assumed some of his job responsibilities after the RIF.

e. Fencak (Titus)

Titus became a PPG employee in 2000 when his prior employer merged into PPG Auto Glass, LLC. Titus was the Area Services Manager at the AG warehouse in Irving, and his direct supervisor was Mark Summersett.

Fencak was the Territory Director in 2009, and he worked in PGW's Area Services – Texas division. Around December 2008, Fencak received training from PGW human resources employees Jaden and Karen Lindsey on issues relating to restructuring and forced rankings. Fencak received additional training around January 2009 by Talbert and David Goldstein who explained that the termination decision should be based on position, location and performance.

Fencak testified that he followed his training on how to select employees for termination and decided to consolidate Titus' position with the call center manager position held at the same

location by Donna Bernard. To reach his decisoin, Fencak consulted with Summersett and Mary Ramsaur, Bernard's direct supervisor. Bernard was selected to remain based on her skill set and warehouse experience, while Titus would have required six to nine months of specialized training to learn how to manage the call center. Bernard is ten years younger than Titus.

5. Alleged RIF Practices Related to Plaintiffs' Adverse Impact Theory

Plaintiffs allege that several of PGW's RIF practices in March 20009 adversely impacted its older workers. *See* First Am. Compl., ECF No. 54 at 3, ¶¶ 12(a)-(h); *see also* Proposed Second Am. Compl., ECF No. 299-1 at 4-6, 15-23. Among those acts and omissions with which Plaintiffs take issue are the absence of an adverse impact analysis by Jaden, Cooney, or Dunn; the nonuse of RIF guidelines by PGW that were in place at PPG; the absence of objective standards for the managers to use in deciding who to terminate; the lack of credit given to an employee's tenure, seniority or their historical performance ratings; the "grossly understaffed" HR department; the lack of formal EEO training or HR oversight beyond administrative support; the dearth of written records that explain the individual termination decisions; and the failure of PGW to revive PPG's yearly evaluation process. *See id.*; *see also* Pls.' Br. in Opp., ECF No. 300 at 5-9; Ex. QQQ, ECF No. 303-16 (RIF Guidelines, Oct. 30, 2000). Plaintiffs further submit that PGW never apprised its terminated employees of the factors relied upon in selecting them for the RIF, revealed the method by which they were chosen, nor offered a truthful explanation for the decision. According to Plaintiffs, these (in)actions depart from reasonable industry standards, flout sound HR practice, and violate federal employment laws.

B. Procedural History

Representative Plaintiffs each filed charges of employment discrimination based on age against PGW with the Equal Opportunity Employment Commission ("EEOC") in late January

2010. *See* Compl., Ex. A., ECF No. 1-3. Thereafter, they each received a Dismissal and Notice of Rights from the EEOC. *See id.* at Ex. B., ECF No. 1-4. This lawsuit followed.

Representative Plaintiffs initiated this action on behalf of themselves and all others similarly situated against PGW on September 29, 2010 by filing a three-count "Collective Action Complaint" in which they allege (1) disparate treatment as to the putative collective in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, ("ADEA"); (2) disparate impact as to the putative collective in violation of the ADEA; and (3) retaliation as to only Karlo and McLure in violation of the ADEA. Notably, the ADEA incorporates by reference the representative enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*, and thus expressly permits collective actions. *See* 29 U.S.C. §§ 216(b), 626(b).

PGW filed its responsive pleading on November 29, 2010 in which it asserts counterclaims for breach of contract and unjust enrichment against each Representative Plaintiff. (ECF No. 8 at 78-83). PGW avers that at the time of their terminations, each Representative Plaintiff was offered a "Separation Agreement and Release" which provided that they would receive severance benefits and payments to which they otherwise were not entitled in exchange for releases of any claims against PGW. Further, PGW avers that each Representative Plaintiff executed those Releases and never revoked their acceptance of the terms, but that each now asserts claims in this action which they otherwise waived.[10]

PGW also filed a Motion to Dismiss Count Three of the Complaint – *i.e.*, the retaliation claim brought as to only Karlo and McLure – on November 29, 2010. (ECF No. 9). Plaintiffs

10. According the PGW, it paid the following severance amounts: $52,549.00 to Karlo; $44,591.00 to McLure; $19,218.00 to Cunningham; $25,505.00 to Marietti; and $37,940.00 to Meixelsberger.

opposed this motion.[11] (ECF No. 32). Judge Fischer held a hearing on the motion on February 7, 2011. The minute entry for that hearing indicates that "the parties and court agreed that in the interest of justice, Plaintiffs should proceed with the filing of an amended complaint." (ECF No. 46). Accordingly, the court denied the motion without prejudice.

Plaintiffs filed a Motion to Dismiss PGW's Counterclaim on December 22, 2010 in which they argued that the Releases are invalid and unenforceable. (ECF No. 24). The same day, Plaintiffs filed a Motion to Strike Certain of PGW's Affirmative Defenses based on their position that the defenses fail as a matter of law, that they are in contravention of controlling law and/or that they fail to conform to the federal pleading standards. (ECF No. 26). PGW opposed both motions. (ECF Nos. 33, 34).

Judge Fischer held a hearing/argument on February 7, 2011 regarding PGW's Motion to Dismiss Count Three of the Complaint. The minute entry from that hearing states that "the parties and court agreed that in the interest of justice, Plaintiffs should proceed with the filing of an amended complaint" and that "[t]he Court held in abeyance argument related to Plaintiffs' motion to dismiss and motion to strike as they are not completely briefed." (ECF No. 46). Judge Fischer entered an appropriate Order the following day. (ECF No. 48).

Plaintiffs filed a First Amended Complaint on February 15, 2011. (ECF No. 54). PGW renewed its Motion to Dismiss Count Three on March 1, 2011. (ECF No. 59). Plaintiffs again opposed the motion. (ECF No. 63).

Judge Fischer held a hearing/argument on March 23, 2011 regarding the Motion to Dismiss Defendant's Counterclaim, Motion to Strike Certain of PGW's Affirmative Defenses,

11. The Court notes that reply briefs and surreply briefs were commonplace in the motion practice throughout this action, but that it will not specifically reference them unless relevant to those matters now pending. *See, e.g.*, Mem. Order, ECF No. 69 at 1 ("The parties have briefed each motion extensively . . . . *See* Dockets Nos. 24, 25, 26, 27, 33, 34, 50, 53, 57, 59, 60, 63, 64, 65.").

and Motion to Dismiss Count Three of the Complaint. The minute entry for that hearing notes that "[t]he Court denied said motions on the record." (ECF No. 68). A Memorandum Order memorializing that ruling was entered the following day. (ECF No. 69).

PGW filed its Answer to the First Amended Complaint and its Amended Affirmative Defenses and Counterclaim on April 14, 2011. (ECF No. 73). Count One of the Amended Counterclaim set forth a claim for breach of contract against all Representative Plaintiffs except for Thompson; Count Two of the Amended Counterclaim pled an unjust enrichment/restitution claim against all Representative Plaintiffs. Plaintiffs filed their Answer and Affirmative Defenses to the Amended Counterclaim on May 4, 2011. (ECF No. 77).

On April 18, 2011, Judge Fischer entered a Case Management Order (ECF No. 75) in which she initially granted Plaintiffs approximately three months to engage in some preliminary discovery and file their motion for conditional certification. Judge Fischer routinely held status conferences regarding discovery with the parties and ultimately extended the deadline for Plaintiffs to file their motion for conditional certification to early October 2011.

On October 3, 2011, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint (ECF No. 87). PGW opposed the motions. (ECF Nos. 92). By Memorandum Opinion dated October 31, 2011, Judge Fischer found that the Plaintiffs did not show good cause as required by Rule 16 and denied the motion for leave without prejudice. (ECF Nos. 98, 99).

Plaintiffs also filed a Motion for Conditional Certification and Court-Facilitated Notice on October 3, 2011. (ECF No. 88). PGW filed its response in opposition on November 14, 2011. (ECF No. 106). Four days earlier, on November 10, 2011, PGW filed a Motion for

Summary Judgment on [the] Collective Action Allegations and Disparate Impact Claim.[12] (ECF No. 101). Plaintiffs likewise opposed that motion. (ECF No. 123). Judge Fischer held a hearing/argument on the Motion for Conditional Certification on December 19, 2011, took the matter under advisement, and ordered supplemental briefing. (ECF Nos. 131, 132).

On January 13, 2012, the parties filed a Joint Motion to Stay Rulings on Motions Pending Completion of Mediation scheduled for February 2, 2012 before the Hon. Donald E. Ziegler (ret.). (ECF No. 141) The motion was granted on January 17, 2012. (ECF No. 145). A mediation session was held on February 2, 2012, but the case was not resolved. (ECF No. 149). A status conference was held on February 24, 2012 during which the parties discussed additional mediation options, including the possibility of a conference with the court. (ECF No. 156).

The parties also supplemented the summary judgment record with additional citations to authority per Court Order after their mediation did not resolve this matter. (ECF Nos. 153, 154, 158). Based upon those filings, Judge Fischer held a second hearing/argument on the Motion for Conditional Certification on March 12, 2012. (ECF No. 161). Afterward, the parties agreed that their positions relative to that motion and the motion for summary judgment were substantially similar such that another hearing/argument would be unnecessary. (ECF Nos. 162).

By Memorandum Opinion and Order of Court dated May 9, 2012, Judge Fischer granted in part the motion for conditional certification and denied the motion for summary judgment. (ECF Nos. 179, 180). The Order of Court specified (1) that Plaintiffs shall pursue discovery as to the proposed class of employees who were, on or about March 30 and 31, 2009, (a) 50 years of age or older; (b) who were employed by PGW; (c) who were members of the salaried workforce; and (d) who were terminated from employment with PGW by the RIF implemented

12. Contrary to PGW's motion, the disparate impact claim is pled at Count Two rather than Count One of the First Amended Collective Action Complaint. *Compare* First Am. Compl, ECF No. 54 at 38 *with* Mot. for Summ. J., ECF No. 101 at 1.

on March 30 and 31, 2009; (2) that the Motion for Conditional Certification was denied to the extent that Plaintiffs sought approval of their proposed notice; and (3) that the Motion for Summary Judgment was denied without prejudice. (ECF No. 180).

The parties met and conferred regarding the nature and form of a proposed notice. On May 14, 2012, Judge Fischer accepted their agreed-upon form after some modification and ordered Plaintiffs to send it to the putative members of the collective by June 1, 2012 with an opt-in deadline of July 16, 2012. (ECF No. 184). Notice was thereafter sent to fifty-nine former PGW employees.

PGW filed a Motion to Certify for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) on May 23, 2012 in which it sought to appeal whether sub-grouping is permitted in disparate impact claims under the ADEA; whether court should apply *Wal-Mart Stores Inc. v. Dukes* at each stage of the collective action certification process; and whether the "modest factual showing" standard includes a modest showing that the proposed class members can present a claim for disparate impact. (ECF No. 186) Plaintiffs opposed the motion. (ECF No. 195). Judge Fischer denied the motion without prejudice on July 20, 2012 in which she noted that the court only *conditionally* certified a collective action and reminded PGW that it could address its concerns at the final certification stage. (ECF No. 205).

The consents to opt-in were filed of record in late July and early August 2012. (ECF Nos. 206-221. 223, 224). Those persons included the seven Representative Plaintiffs and the eleven (of the fifty-nine potential over-50 claimants) Opt-in Plaintiffs.[13] The parties thereafter engaged in significant discovery.

13. Representative Plaintiffs Thompson, Karlo, Csukas, Marietti and McLure and putative opt-in Marilyn Workinger all untimely submitted their opt-in form. Judge Fischer permitted the Representative Plaintiffs to move forward as part of the conditionally-certified collective action but disallowed Workinger the same opportunity. (ECF No. 232).

At a status conference hearing held on October 26, 2012, the parties discussed the possibility of a settlement conference. (ECF No. 239). PGW objected to Judge Fischer presiding over any such matter, and the parties discussed the possibility that another district judge or magistrate judge would preside. *Id.* On November 20, 2012, Plaintiffs filed a Motion for Settlement Conference in which they requested that Judge Arthur J. Schwab of this District Court preside if he was so available. (ECF No. 243). PGW objected to the motion as premature and submitted that it would be more appropriate for the parties to engage a third-party mediator rather than any district court judge should Plaintiffs' request be granted. (ECF No. 245). Judge Fischer denied the motion on November 29, 2012, but directed the parties at a March 5, 2013 status conference to meet and confer to discuss a possible settlement conference. (ECF Nos. 246, 249). During the pendency of that matter, Plaintiffs filed a stipulation of dismissal on behalf of three of the opt-ins: Conaway, Diaz and Fellabaum. (ECF Nos. 247, 248).

Plaintiffs filed a Motion for Leave to File a Second Amended Complaint on March 18, 2013 in which they sought to add facts developed in discovery, narrow the focus of their claims, and make miscellaneous stylistic and organizational revisions. (ECF No. 251). PGW opposed the motion. (ECF No. 252). On April 30, 2013, Plaintiffs renewed their Motion for Settlement Conference. (ECF No. 262). PGW yet again opposed the motion. (ECF No. 263). Judge Fischer granted the motion on May 7, 2013 in which she noted the following:

> This case was filed nearly 3 years ago in September 2010. In the three years since that filing, there have been several amended complaints, motions practice, numerous court conferences, conditional class certification, and protracted discovery. Now that fact discovery has finally closed, and before an onslaught of projected dispositive motions, the Court finds the matter ripe for settlement negotiations . . . .

(ECF No. 264). Judge Fischer also found that the interests of the parties were well-served if Judge Schwab presided over the conference(s). The motion for leave was denied without prejudice for resubmission after the settlement conferences. (ECF No. 268).

Judge Schwab held a Settlement Conference on May 8, 2013 during which parties reached a settlement as to Representative Plaintiff Thompson and Opt-in Plaintiff Wickwire. (ECF Nos. 266, 269, 325, 326). After that proceeding, Judge Schwab scheduled another conference for June 13, 2013 to further discuss the potentiality of settlement with the thirteen remaining Plaintiffs. (ECF No. 267). That conference proceeded as scheduled and continued into the following day. (ECF Nos. 279, 286). The case was not resolved. (ECF No. 281).

Judge Fischer entered a Scheduling Order on June 14, 2013 with regard to PGW's anticipated motion for decertification and vacated all deadlines for Motions for Summary Judgment and *Daubert* challenges until the resolution of said motion. (ECF No. 280). On June 26, 2013, this action was transferred to the undersigned.

PGW proceeded as expected and filed its motion for decertification on June 28, 2013. (ECF No. 288). Plaintiffs renewed their Motion for leave to File a Second Amended Complaint on July 15, 2013 in which they note that Representative Plaintiffs Csukas and Thompson and Opt-in Plaintiffs Wickwire, Marcelonis, Voeltzel, and DeAngelis have settled. (ECF No. 299).[14]

Additional motions soon followed. Plaintiffs filed a Motion for Leave to File Amicus Brief of Professor Sandra Sperino on July 3, 2013, which the Court later denied. (ECF Nos. 295, 296, 320). PGW filed four expert challenges on August 2, 2013, and Plaintiffs filed a Motion to

14. The Court is only in receipt of Stipulations of Dismissal for Conaway, Diaz and Fellabaum (ECF Nos. 247, 248); Thompson (ECF Nos. 325, 329), and Wickwire (ECF Nos. 326); however, the parties have not yet filed stipulations for Csukas, DeAngelis, Marcelonis, and Voetzel despite counsels' repeated representations that those parties have settled their claim(s) in this action. *See* Pls.' Renewed Mot. for Leave to File Sec. Am. Compl., ECF No. 299 at 2; Pls.' Br. in Opp., ECF No. 300 at 2, n.2. Based on those representations, the Court will treat Csukas, DeAngelis, Marcelonis, and Voetzel as having been dismissed.

Strike the expert challenges on August 5, 2013. (ECF Nos. 316, 317, 318, 319). The parties have fully briefed the issues with regard to the motion to strike, but the Court has not yet ordered Plaintiffs to file a substantive response to the expert challenges given the procedural posture of this action and the pendency of these various motions. (ECF No. 333, 336).

The Court heard oral argument on September 10, 2013, and a transcript of that proceeding has been filed of record. (ECF No. 342). The parties thereafter filed additional briefs, all of which the Court has taken into consideration. (ECF No. 337, 338, 339, 341).

II. Legal Standard

There are two applicable legal standards at this stage: the decertification/final certification mechanism(s) under the FLSA, as incorporated by the ADEA; and Rule 15 of the Federal Rule of Civil Procedure which governs amendments to pleadings.

A. "Decertification"

The "collective action" mechanism set forth in 29 U.S.C. § 216(b) provides that one or more employees alleging an FLSA violation may bring suit "for and in behalf of . . . themselves and other employees similarly situated." *See Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 192 (3d Cir. 2011)*, rev'd on other grounds*, 133 S. Ct. 1523 (2013). To decide whether a suit brought under § 216(b) may move forward as a collective action, courts within the Third Circuit follow a two-step approach. *See Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) ("In *Symczyk*, we noted that this two-tier approach, while 'nowhere mandated . . . appears to have garnered wide acceptance.' We implicitly embraced this two-step approach, and we affirm its use here.") (quoting *Symczyk*, 656 F.3d at 193 n.5).[15]

15. Citing to this Court's opinion in *Moore v. PNC Bank, N.A.*, 2:12-CV-1135, 2013 WL 2338251 (W.D. Pa. May 29, 2013), PGW suggests that "*Zavala* has been interpreted by district courts in the Third Circuit as creating a new heightened standard." PGW's Br. in Support, ECF No. 289 at 11. PGW is mistaken. First, *Moore* dealt solely with conditional certification. *Moore*, 2013 WL 2338251, at *2. Second, the citations to *Zavala* in *Moore* are little more

At the first stage, "the court makes a preliminary determination whether the employees enumerated in the complaint can be provisionally categorized as similarly situated to the named plaintiff." *Symczyk*, 656 F.3d at 192. The level of proof required at this stage is fairly lenient: a "'modest factual showing' that the proposed recipients of opt-in notices are similarly situated." *Id.* at 192-93 (citation omitted). Under this standard, "a plaintiff must produce some evidence, beyond pure speculation, of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Id.* at 193 (citation and quotation marks omitted).

"If the plaintiffs have satisfied their burden, the court will 'conditionally certify' the collective action for the purpose of facilitating notice to potential opt-in plaintiffs and conducting pre-trial discovery." *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013) (citing *Zavala*, 591 F.3d at 536). *See Symczyk*, 656 F.3d at 194 (observing that "[a]bsent from the text of the FLSA is the concept of 'class certification'" despite the "judicial gloss" on § 216(b) in which many courts "have used the vernacular of the Rule 23 class action for simplification and ease of understanding when discussing representative cases brought pursuant [to the FLSA]"); *see also Zavala*, 691 F.3d at 534 (noting that the "decertification" terminology was "misleading"). A putative member must then affirmatively opt-in by filing express, written consents with the court to become party-plaintiffs, a feature that distinguishes collective actions from the opt-out mechanism unique to class actions brought under Rule 23. *Id.* at 242-43. "After discovery and with the benefit of a much thicker record than it had at the notice stage," a district court following this approach will ultimately turn to the step two of this process.

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than fleeting references in the standard of review. *See id.* at **2-3. Third, the *Zavala* Court does not purport to raise the bar to final certification but instead held that plaintiffs must satisfy their burden at the second stage by a preponderance of the evidence and that courts must follow the ad-hoc approach rather than those derived from Rule 23. 691 F.3d at 536-37.

Symczyk, 656 F.3d at 193 (citation and quotation marks omitted). "This step may be triggered by the plaintiffs' motion for 'final certification,' by the defendants' motion for 'decertification,' or commonly, by both." *Camesi*, 729 F.3d at 243 (citing *Symczyk*, 656 F.3d at 193).

At the second stage, the court "'makes a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff.'" *Id.* (quoting *Symczyk*, 656 F.3d at 193). *See also Zavala*, 691 F.3d at 536 ("It is clear from the statutory text of the FLSA that the standard to be applied on final certification is whether the proposed collective plaintiffs are 'similarly situated.'") (internal citations omitted). The law in this circuit requires that, in making this determination, the court follow the ad-hoc approach in which the court "considers all the relevant factors and makes a factual determination on a case-by-case basis." *Zavala*, 691 F.3d at 536.

The burden rests with the plaintiffs to establish by a preponderance of the evidence that they satisfy the similarly situated requirement. *Id.* at 537 (citations omitted). *See also Symczyk*, 656 F.3d at 193 ("[T]he second stage is less lenient, and the plaintiff bears a heavier burden."). Stated differently, the lead plaintiffs must at least get over the line of "more likely than not" in showing that the opt-in plaintiffs are in fact "similarly situated" to those named plaintiffs. *See Zavala*, 691 F.3d at 537 (citing *Myer v. Hertz Corp*., 624 F.3d 537 at 555 (2d Cir. 2010); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009)). Should the plaintiffs meet that level of proof, the case may proceed to trial on the merits as a collective action. *Symczyk*, 656 F.3d at 193. If the collective members do not satisfy their burden, "the court will decertify the group, dismiss the opt-in plaintiffs without prejudice, and permit any remaining plaintiffs to move on to the trial stage of litigation." *Andrako v. U.S. Steel Corp.*, 788 F. Supp. 2d 372, 378 (W.D. Pa. 2011) (citing *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 299-300 (E.D. Pa.

2010)). *See also* 7B THE LATE CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. 2010).

B. Amendments to Pleadings

Federal Rule of Civil Procedure 15 provides, in relevant part, that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." This liberal approach to pleading is not unbounded, and the decision whether to grant or to deny a motion for leave ultimately rests within the sound discretion of the trial court. *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). Certain basic principles guide the exercise of this discretion. *See Lincoln Gen. Ins. Co.*, 1:11-CV-1195, 2013 WL 214634, at **4-5. A district court may deny leave to amend a complaint where "it is apparent from the record that (1) the moving party has demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000) (citation omitted).

Among the equitable Rule 15 considerations, the United States Court of Appeals for the Third Circuit has "consistently recognized [ ] that 'prejudice to the non-moving party is the touchstone for the denial of an amendment.'" *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (quoting *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993)). In determining what constitutes prejudice to the non-moving party, the Court must consider whether the assertion of an additional claim would "'(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the [party] from bringing a timely action in another jurisdiction.'" *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)). *See Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001)

("The issue of prejudice requires that we focus on the hardship to the defendants if the amendment were permitted.") (citation omitted); *Dole*, 921 F.2d at 488 ("In order to make the required showing of prejudice, regardless of the stage of the proceedings, [Defendant] is required to demonstrate that its ability to present its case would be seriously impaired were amendment allowed."). Merely claiming prejudice is insufficient. *Dole*, 921 F.2d at 487. "In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz*, 1 F.3d at 1414 (citation omitted).

III. Discussion

The Court will discuss PGW's Motion for Decertification and Plaintiffs' Renewed Motion for Leave to File Second Amended Complaint seriatim.

A. Decertification

The parties' legal arguments are wide-ranging and heavily briefed, but the legal issues can be distilled into three discrete categories: the "sub-grouping" of an over-fifty-years-old disparate impact collective action under the ADEA; the ad-hoc approach to the "similarly situated" analysis; and the affect (if any) of the disparate treatment count in the First Amended Complaint. After careful consideration of the motion, the filings in support of and in opposition thereto, the relevant case law cited by the parties, and the Memorandum Opinion conditionally certifying this action, the Court concludes that decertification is appropriate at this stage.

1. "Subgrouping" Under the ADEA

As a threshold matter, the parties dispute whether an over-fifty-years-old subgroup is cognizable under the ADEA. The Court of Appeals for the Third Circuit has yet to address this novel question, but every court of appeals to face the issue has declined to recognize this theory

with regard to disparate impact claims. *See E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Smith v. Tennessee Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999).

For example, in *McDonnell Douglas*, the Court of Appeals for the Eight Circuit declined to "expand [its] recognition of disparate-impact claims under the ADEA to include claims on behalf of subgroups of the protected class." 191 F.3d at 950. There, the proposed subgroup was employees aged fifty-five and older who were terminated in a RIF. *Id.* As the court explained, "if such claims were cognizable under the statute, a plaintiff could bring a disparate-impact claim despite the fact that the statistical evidence indicated that an employer's RIF criteria had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees outside the protected group. Congress could have intended such a result." *Id.* at 951. The court of appeals further recognized "that if disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in a RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force." *Id.* Thus, as the court concluded, the "[a]doption of such a theory [ ] might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes." *Id.*

Several district courts have followed this approach. *Rudwall v. Blackrock, Inc.*, C09-5176TEH, 2011 WL 767965, at **10-11 (N.D. Cal. Feb. 28, 2011); *Schechner v. KPIX-TV*, C 08-05049 MHP, 2011 WL 109144, at *4 (N.D. Cal. Jan. 13, 2011) ("Every court of appeals

decision addressing this issue has concluded that it is improper to distinguish between subgroups of employees over the age of 40 and that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger."); *Kinnally v. Rogers Corp.*, CV-06-2704-PHX-JAT, 2009 WL 597211, at **9-10 (D. Ariz. Mar. 9, 2009); *see also Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1131 n.156 (D. Kan. 2013). The Court is aware of only two district court decisions beyond the context of this action that have explicitly taken a contrary view. [16] *See Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3-5 (D. Me. 1994).

But every court to decide this matter has done so within the context of a summary judgment ruling—*i.e.*, not at the decertification stage.[17] The parties have not cited and the Court has not found any case in which a motion for decertification was the proper procedural vehicle to challenge this theory. *C.f. McDonnell Douglas*, 191 F.3d at 951 ("More importantly, in this case the EEOC itself maintains that McDonnell Douglas relied on criteria such as retirement eligibility, salary, and seniority in making its layoff decisions . . . . We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup."). The United States Court of Appeals for the Third Circuit has instructed district courts to follow the ad-hoc approach at this stage. This Court will, of course, follow that mandate.

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16. Plaintiffs also cite *Morrow v. City of Jacksonville, Ark.*, 941 F. Supp. 816, 823 (E.D. Ark. 1996) for the proposition that it "consider[ed] subgroup of officers over age fifty." Pls.' Br. in Opp., ECF No. 300 at 18 n.23. However, that court did not decide the subgrouping issue on the merits. *Morrow*, 941 F. Supp. at 824 ("The plaintiff urges the Court to only consider those over 50 when taking the test. Without commenting on whether using this more narrow age group is proper under the law, the Court will simply say that to do so makes no difference."). Later, Plaintiffs cite three disparate treatment cases, *Marshall v. Sun Oil Co. (Delaware)*, 605 F.2d 1331 (5th Cir. 1979); *Sheerin v. New York State Div. of Substance Abuse Servs.*, 844 F. Supp. 909 (N.D.N.Y. 1994); and *Moore v. Sears, Roebuck & Co.*, 464 F. Supp. 357 (N.D. Ga. 1979), and a Thomson Reuters/West Settlement Summary, *EEOC v. CENTRAL FREIGHT LINES INC.*, JVR No. 1208230029, 2012 Wl 3611427 (N.D. Tex. 2012), as authority supporting ADEA subgroups. Those citations have little persuasive value.

17. A "motion to decertify collective action" was pending in *Fulghum*, but the resolution of the motion for summary on the ADEA disparate impact claim rendered it moot. 938 F. Supp. 2d at 1130-31, 1134.

2. "Similarly Situated"

The ADEA expressly incorporates the "powers, remedies and procedures" available in the FLSA, including its collective action mechanism for the enforcement of fair labor standards. 29 U.S.C. § 626(b) (citing 29 U.S.C. § 216(b)). Section 216(b) permits a collective action to go forward only if the Court determines that those who have opted in are in fact "similarly situated" to the representative plaintiffs. *See Camesi*, 729 F.3d 243 (quoting *Symczyk*, 656 F.3d at 193); *Myers*, 624 F.3d at 555; *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008). Neither the FLSA nor the ADEA define the term "similarly situated." *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 388 n.17 (3d Cir. 2007). *See also Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000) ("Although the FLSA does not define the term 'similarly situated,' courts generally do not require prospective class members to be identical.") (citations omitted).

The United States Court of Appeals for the Third Circuit has identified relevant factors to consider as part of this analysis: "whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment." *Zavala*, 691 F.3d at 536-37 (citing *Ruehl*, 500 F.3d at 388 n.17). *See also Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (noting that different geographical location is not by itself conclusive but finding that plaintiffs were similarly situated when they all held the same job title throughout several locations). This list is not exhaustive, and our court of appeals has identified many other relevant factors: age variance, type of termination, the company division in which they worked, employment status, supervisors and salaries, factual and employment settings, individual defenses, fairness and procedural considerations, reliance on common evidence, and the presence of filings. *See id.* at 537 (citing

45C Am. Jur. 2d Job Discrimination § 2184).[18] "Being similarly situated does not mean simply sharing a common status. Rather, it means that one is subjected to some common employer practice that, if proved, would help demonstrate a violation of the FLSA." *Id.* at 538.

Plaintiffs allege that older workers were disparately impacted by a single, company-wide RIF that was implemented at the behest of top-level management of PGW, particularly President and CEO Wiggins, to reduce employee headcount. Plaintiffs further allege that the nonuse of PPG's RIF guidelines constitutes a company-wide policy directed by PGW's top management and that Wiggins and his management team directed senior managers to make wholly subjective and entirely undocumented determinations as to which employees to terminate.

At face value, a number of factors unify the remaining party-plaintiffs and support the use of a collective action: that they all advance similar claims with the exception of the retaliation counts; that they all seek compensatory damages and injunctive relief; that they were all terminated as part of the March 2009 RIF; and that they all shared a common status of being over fifty-years-old at that time. But these factors do not tip the scales upon further consideration.

The Court finds that Plaintiffs have not met their burden to show that they are similarly situated. The remaining nine Plaintiffs held seven different titles with varied job duties in two separate divisions of PGW and across five locations in which no less than six decision-makers independently included them in the RIF. *See* PGW's Br. in Support, ECF No. 289 at 12-15. To be sure, the five Representative Plaintiffs are only representative of the impact that the RIF had in Harmarville where none of the four Opt-in Plaintiffs worked.

18. The *Zavala* Court seemingly cited to a former edition of this source, as § 2184 in the more recent volume provides an overview of pro se complaints. Nonetheless, that provision is now set forth in § 2142. *See* 45C Am. Jur. 2d Job Discrimination Correlation Table at 2.

More specifically, Karlo was a Sr. Engineering Specialist; McLure, Meixelsberger, and Cunningham were Sr. Technical Assistants in, respectively, soldering, windshield bending and the sidelight process; and Marietti was a Sr. C/M Specialist in Tooling & Instrumentation. By contrast, the four remaining Opt-in Plaintiffs had varying employment circumstances: (1) Breen worked under Skeen in OEM at the Crestline Plant as a Production Supervisor; (2) Clawson worked under Holmes in OEM at the Evansville Plant as a Project Engineer; (3) Shaw worked under Wysseier in ARG at LYNX's Pittsburgh location as a Marketing Manager; and (4) Titus worked under Fencak in ARG at PGW Auto Glass in Irving, TX as an Area Services Manager. Simply put, "[t]he similarities among the proposed plaintiffs are too few, and the differences among the proposed plaintiffs are too many" to justify final certification. *Zavala*, 691 F.3d at 537-38.

As the record makes clear, neither the high-level management decision to implement the RIF nor its purported flaws provide the necessary factual nexus to move forward as a collective action. Plaintiffs were each selected for termination on a decentralized basis at the discretion of local unit managers. Many of the RIF deficiencies cited by Plaintiffs varied from manager to manager and location to location. And, while the nonuse of PPG's RIF guidelines was universal, that perceived shortcoming is not sufficient to bind the collective together in light of the substantial dissimilarities between the Representative and Opt-in Plaintiffs.

The existence of individualized defenses and procedural concerns likewise favor decertification. *See Zavala*, 691 F.3d at 537 ("Plaintiffs may also be found dissimilar based on the existence of individualized defenses."); *see also Aquilino v. Home Depot, U.S.A., Inc.*, CIV.A. 04-04100 PGS, 2011 WL 564039, at **8-11 (D.N.J. Feb. 15, 2011); *Lugo*, 737 F. Supp. 2d at 316. For example, PGW may have legitimate, non-discriminatory reasons for each

termination and representative testimony would do little to streamline this action when individual determinations would still remain. In the end, the so-called similar claims would actually require nine separate inquiries into liability as well as individual damages calculations as to each Plaintiff given their differing ages and salaries.

Plaintiffs simply have not shown, by a preponderance of the evidence, that the Opt-in Plaintiffs are similarly situated to the Representative Plaintiffs. As other courts have recognized, substantial variances among plaintiffs' day-to-day job duties and employment settings weigh in favor of decertification. *See, e.g.*, *Kuznyetsov v. W. Penn Allegheny Health Sys.*, Inc., CIV.A. 10-948, 2011 WL 6372852, at **4-5 (W.D. Pa. Dec. 20, 2011). This Court faces a similar record. *See also Martin v. Citizens Fin. Grp., Inc.*, CIV.A. 10-260, 2013 WL 1234081, at **5-6 (E.D. Pa. Mar. 27, 2013)*; Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 356-57 (D.N.J. 1987). Accordingly, the Court will decertify the putative collective action.

3. Disparate Treatment

Claims brought under the ADEA may proceed pursuant to a disparate impact or a disparate treatment theory. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 232-43 (2005). In the First Amended Complaint, Plaintiffs assert a claim for disparate treatment at Count One and a claim for disparate impact at Count Two.

PGW submits that Plaintiffs cannot salvage their collective action by characterizing it as a disparate treatment case, arguing that they failed to develop in discovery how the RIF was intended to target older workers – a necessary element of this theory. *See* PGW's Br. in Support, ECF no. 289 at 27; *see generally Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). PGW also maintains that this action was conditionally certified only on the disparate impact claim, foreclosing Plaintiffs ability to proceed with a collective action on a disparate treatment theory.

Plaintiffs contend that conditional certification was granted on both grounds. Although they recognize that disparate treatment is never discussed in the Memorandum Opinion, Plaintiffs suggest that the court must have meant to certify this action on both grounds because the Order is silent as to the theory upon which conditional certification was granted. Plaintiffs also identify what they developed in discovery to support this claim: "evidence about age bias in PGW's corporate culture, stemming both from PPG and Kohlberg."[19]

This Court disagrees. First, conditional certification was granted only as to the disparate impact claim. There, the court carefully noted the different context of impact and treatment case authorities to which it cited. *See, e.g.*, Mem. Op., ECF No. 179 at 12 ("Although that case was, admittedly, decided in the context of a disparate treatment claim . . . ."). Second, counsel for Plaintiff has characterized the collective action as only a disparate impact claim on multiple occasions. As counsel argued at the hearing on the motion for conditional certification:

> Your honor, there's no blending. We simply allege that there is disparate impact in this case in large measure because of the nature of the organization, history of the organization, the fact that the corporate down-sizer came in, and said to the senior managers just go ahead, terminate employees. You don't have to look at performance history. You don't have to look at tenure. You don't have to apply any objective HR standards. You don't have to do a disparate impact analysis. You can just pick whoever you please, except make sure they're adaptable going forward. That was the guidance that was given, Your Honor. We think that states a disparate impact claim that's totally distinct from a disparate treatment claim.

Oral Arg. Tr., ECF No. 176 at 34. *See also* Status Conf. Tr., ECF No. 291, at 28 ("[Counsel for Plaintiffs]: Your Honor, we can make an attempt to do that certainly, but it really is not a fair

19. Plaintiffs make frequent reference to Kohlberg, Kravis and Roberts ("KKR"), Kohlberg, and PPG throughout their filings. By way of background, KKR is a global investment firm apparently known for its leveraged buy-outs. Among others, KKR was founded by Jerome Kohlberg Jr. who later left to start Kohlberg & Co. Plaintiffs contends that the so-called "traditions" established by KKR continued at Kohlberg and that Wiggins began to institute its purported practice of "packaging and 'flipping' a company for a quick profit" after Kohlberg acquired PPG's automotive glass assets. *See generally* Pls.' Br. in Opp., ECF No. 300 at 3 n.5.

question directed at Plaintiffs. It's not relevant to their theory the case. Their theory of the case was that there was disparate impact in this massive RIF that was performed . . . .").

Most importantly, even if the court had conditionally certified an over-fifty disparate treatment collective, Plaintiffs would still need to show by a preponderance of the evidence that they were "similarly situated." They have not done so. Plaintiffs bring forward insufficient evidence to bind the putative collective together and instead rely upon isolated comments and unsupported assertions about other companies and society in general. Moreover, PGW highlight that Plaintiffs have yet to depose or seek discovery from PPG or Kohlberg to support their alleged claim of an ageist corporate culture. At this stage of the proceedings, this dearth of factual support is not sufficient to support final certification.

4. Effect of Decertification

The law makes clear that, upon decertification, the opt-in plaintiffs are dismissed without prejudice. *See Myers*, 624 F.3d at 555 (citing *Family Dollar*, 551 F.3d at 1261; *Hipp*, 252 F.3d at 1218). Should the Opt-in Plaintiffs refile their cases as individual actions, they must be mindful of how the single filing rule may impact their claim, *see Ruehl*, 500 F.3d at 382-91, and cognizant of statute of limitations issues, *see Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir. 1998). Accordingly, the Court will dismiss the claims of Breen, Clawson, Shaw and Titus without prejudice.

The Court will not, however, dismiss the Representative Plaintiffs' claims. *See Alvarez v. City of Chicago*, 605 F.3d 445, 450 (7th Cir. 2010) ("When a collective action is decertified, it reverts to one or more individual actions on behalf of the named plaintiffs."); *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008) (affirming decertification of an FLSA collective action, dismissal of the opt-in plaintiffs without prejudice, and severance of each of the

named plaintiffs into separate individual actions); *see also Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012); *White v. Baptist Mem'l Health Care Corp.*, 08-2478, 2011 WL 1883959, at *4 (W.D. Tenn. May 17, 2011) (collecting cases). Therefore, Karlo, McLure, Cunningham, Marietti, and Meixelsberger may proceed with their claims.

B. Renewed Motion for Leave to Amend

Plaintiffs move for leave of Court to file their Second Amended Complaint in which they seek to make certain stylistic and organizational revisions, conform their pleading to the evidence developed in discovery, and remove allegations relating to Plaintiffs who have settled.

PGW opposes the substantive aspects of the motion on three grounds. First, it argues that the proposed amendments include irrelevant material regarding nonparties KKR and Kohlberg. Second, PGW alleges that Plaintiffs include new allegations that are controverted by the evidence developed in discovery. Third, PGW attacks Plaintiffs' attempt to insert disparate treatment claims as part of the collective action.

The Court will grant in part and deny in part the renewed motion for leave to amend. Of course, counsel may clean up the pleadings, remove the parties no longer part of this litigation, and conform their complaint(s) to this Memorandum Opinion. The same applies for the Opt-in Plaintiffs who may choose to refile suit. Plaintiffs may not, however, include irrelevant averments regarding KKR or Kohlberg. *See, e.g.*, Pls.' Proposed Sec. Am. Compl., ECF No. 299-1 at 4, ¶¶ 19, 20 ("19. Kohlberg is a Chicago-based private equity firm with $8.0 billion in assets. It was founded by Jerome Kohlberg, Jr., the investment banker who is the son of one of the founders of KKR (Kohlberg, Kravis and Roberts), the leveraged buy-out firm notorious for its controversial practices involving downsizing of companies acquired by it in the junk-bond era. Those traditions established by KKR continued at Kohlberg."). Plaintiffs also may not

expand the scope of this litigation by amendment, which would only further delay the resolution of this case. The disparate treatment theory was not part of the collective action conditionally certified, and this Court will not restart that aspect of this case on new grounds.

Whether Plaintiffs may maintain disparate treatment claims in their individual capacity presents a more difficult question. PGW adamantly maintains that "there is no evidence in the record that [it] engaged in a single 'intentionally discriminatory' practice that affected each of the Plaintiffs," that there is no evidence that it engaged in a "pattern or practice" of intentional discrimination, and that allowing Plaintiffs leave to file the Second Amended Complaint will further complicate this litigation requiring further briefing. *See* Resp. in Opp. ECF No. 308 at 7-8. PGW is free to file dispositive motions on the disparate treatment claim(s).

The remaining disputes are over Paragraphs 41, 50, 57, 63, 89-91, and 98. Paragraphs 41, 50, 57, 63 pertain to Plaintiffs' view that the P&LP's were "suspended" during the three years before the March 2009 RIF. PGW opposes this characterization and attaches documentary evidence that shows a review for Clawson weeks before his termination. To the extent that Plaintiffs' broad attribution does not apply across-the-board, they should further amend their allegations regarding the "suspension" of the P&LP's. Paragraphs 89-91 concern Plaintiffs' contention that they were given incomplete DUMS in connection with their severance agreement, and Paragraph 97 sets forth the alleged RIF deficiencies. These matters are disputed issues of fact, which the Court cannot decide at this time.

Accordingly, the motion for leave will be granted in part and denied in part. The Named Plaintiffs shall file their pleading(s) on or before April 21, 2014.

IV. Conclusion

For the reasons hereinabove stated, the Court will grant in part and deny in part PGW's motion for decertification; grant in part and deny in part Plaintiffs' renewed motion for leave to file a Second Amended Complaint; and deny as moot and without prejudice Defendant's expert challenges and Plaintiffs' motion to strike motions to bar expert testimony.

An appropriate Order follows.

McVerry, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, DAVID MEIXELSBERGER, BENJAMIN D. THOMPSON and RICHARD CSUKAS, ***on behalf of themselves and all others similarly situated*****,**	)	**2:10-cv-1283**
Plaintiffs,	)	
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 31st day of March, 2014, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

(1) DEFENDANT'S MOTION FOR DECERTIFICATION OF THE PROPOSED COLLECTIVE ACTION (ECF No. 288) is **GRANTED IN PART AND DENIED IN PART** and the claims of Opt-in Plaintiffs Michael Breen, Matthew Clawson, Stephen Shaw, and John Titus are **DISMISSED WITHOUT PREJUDICE**;

(2) PLAINTIFFS' RENEWED MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (ECF No. 299) is **GRANTED IN PART AND DENIED IN PART**;

(3) DEFENDANT'S MOTION TO BAR PROPOSED EXPERT TESTIMONY OF ANTHONY G. GREENWALD RELATED TO PURPORTED IMPLICIT SOCIAL BIAS (ECF No. 316) is **DENIED AS MOOT AND WITHOUT PREJUDICE**;

(4) DEFENDANT'S MOTION TO BAR DR. CAMPION'S EXPERT OPINION ON REASONABLE HUMAN RESOURCE PRACTICES (ECF No. 317) is **DENIED AS MOOT AND WITHOUT PREJUDICE**;

(5) DEFENDANT'S MOTION TO BAR DR. MICHAEL CAMPION'S STATISTICAL ANALYSIS (ECF No. 318) is **DENIED AS MOOT AND WITHOUT PREJUDICE**;

(6) DEFENDANT'S MOTION TO BAR EXPERT OPINION OF DAVID DUFFUS REGARDING THE O'DONOGHUE EXPERT REPORT (ECF No. 319) is **DENIED AS MOOT AND WITHOUT PREJUDICE**; and

(7) PLAINTIFFS' MOTION TO STRIKE MOTIONS TO BAR EXPERT TESTIMONY (ECF No. 323) is **DENIED AS MOOT AND WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the caption in this matter is hereby **AMENDED** as follows:

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and DAVID MEIXELSBERGER,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

BY THE COURT:

s/Terrence F. McVerry
United States District Judge

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(via CM/ECF)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and DAVID MEIXELSBERGER,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF COURT

Pending before the Court are the (1) DEFENDANT'S RENEWED MOTION TO BAR PROPOSED EXPERT OPINION OF ANTHONY G. GREENWALD RELATED TO PURPORTED IMPLICIT SOCIAL BIAS (ECF No. 380); (2) DEFENDANT'S RENEWED POST-DECERTIFICATION MOTION TO BAR DR. MICHAEL CAMPION'S STATISTICAL ANALYSIS (ECF No. 381); (3) DEFENDANT'S RENEWED MOTION TO BAR DR. CAMPION'S EXPERT OPINION ON REASONABLE HUMAN RESOURCE PRACTICES (ECF No. 382); and (4) DEFENDANT'S MOTION TO BAR PURPORTED REBUTTAL EXPERT OPINION OF DAVID DUFFUS (ECF No. 383), all of which were filed on behalf of Pittsburgh Glass Works, LLC ("PGW"). The issues have been fully briefed and well-argued by the parties in their memoranda and attached exhibits (ECF Nos. 392, 393, 394, 395, 413, 414, 415, 416, 423, 427, 428, 429). The Court heard oral argument on January 13, 2015 at which counsel for Plaintiffs Rudolph A. Karlo, Mark K. McLure, William S. Cunningham, Jeffrey Marietti, and David Meixelsberger presented additional authority in support of their position;

PGW has since filled a RESPONSE TO SUPPLEMENTAL AUTHORITY PRESENTED BY PLAINTIFFS AT ORAL ARGUMENT (ECF No. 432-1). The motions are ripe for disposition.

I. Background

The Court has previously detailed the background of this action in its forty-four page Memorandum Opinion and Order issued on March 31, 2014, and it need not be reprised here. *See* Mem. Op., ECF No. 343 at 3-26. Since that time, PGW has filed three motions for summary judgment relating to the individual disparate impact and disparate treatment claims of Karlo, McLure, Cunningham, Marietti and Meixelsberger as well as the individual retaliation claims of Karlo and McLure; and four renewed motions to bar Plaintiffs' experts, Anthony G. Greenwald, Ph.D., Michael Campion, Ph.D., and David Duffus, CPA/ABV/CFF, CFE. This Memorandum Opinion will address only the renewed expert-related motions, which the Court will now address.

II. Legal Standard

"Under the Federal Rules of Evidence, a trial judge acts as a 'gatekeeper' to ensure that 'any and all expert testimony or evidence is not only relevant, but also reliable." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (citing *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997)). Thus, whenever a party seeks to admit expert testimony at trial, the district court must make an initial preliminary determination "that the requirements of Fed. R. Evid. 702 have been met." *Magistrini v. One Hour Martinizing Dry Cleaning*, 68 F. App'x 356, 356 (3d Cir. 2003) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)).

Federal Rule of Evidence 702 provides that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based

on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Moreover, the United States Court of Appeals for the Third Circuit has interpreted Rule 702 as having "three major requirements: (1) the proffered witness must be an expert, i.e., must be qualified; (2) the expert must testify about matters requiring scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact." *Pineda*, 520 F.3d at 244 (citing *Kannankeril*, 128 F.3d at 806). Our Court of Appeals has also "interpreted the second requirement to mean that 'an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable.'" *Id.* (citing *Kannankeril*, 128 F.3d at 806 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994)).

The qualification prong of Rule 702 "requires 'that the witness possess specialized expertise.'" *Id.* (citing *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003)). The Court of Appeals has "interpreted [this] requirement liberally." *Id.* (citing *Schneider*, 320 F.3d at 404; *Paoli*, 35 F.3d at 741). It has explained that "a 'broad range of knowledge, skills, and training'" can suffice to "'qualify an expert.'" *Id.* (quoting *Paoli*, 35 F.3d at 741). "This liberal policy of admissibility extends to the substantive as well as the formal qualifications of experts." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008) (citing *Paoli*, 35 F.3d at 741). The Court of Appeals has repeatedly "stated that 'it is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most appropriate.'" *Kannankeril*, 128 F.3d at 809 (quoting *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3d Cir. 1996)).

"The second requirement is that of reliability." *Meadows v. Anchor Longwall & Rebuild, Inc.*, 306 F. App'x 781, 788 (3d Cir. 2009). In evaluating whether a particular methodology is reliable, the Court of Appeals has identified several factors district courts should consider:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Id. (citing *Paoli*, 35 F.3d at 742 n.8). However, these factors "'are neither exhaustive nor applicable in every case.'" *Id.* (quoting *Kannankeril*, 128 F.3d at 806-07). Whether they are relevant "depend[s] on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). This inquiry remains inherently "flexible." *Pineda*, 520 F.3d at 247 (quoting *Daubert*, 509 U.S. at 594). The question "is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research." *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000). The goal is simply "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Therefore, the focus must remain "on principles and methodology, not on the conclusions generated by the principles and methodology." *In re TMI Litig.*, 193 F.3d at 665 (citing *Kannankeril*, 128 F.3d at 806).[1]

1. Even so, "'conclusions and methodology are not entirely distinct from one another.'" *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000) (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). On the contrary, when assessing reliability, an expert's conclusions must be examined to decide "'whether they could reliably flow from the facts known to the expert and the methodology used.'" *Id.* (quoting *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 153 (3d Cir. 1999)). If there is a "'too great a gap between the data and the opinion proffered,'" the opinion should be excluded. *Id.* (quoting *Joiner*, 522 U.S. at 519). The Court is thus

"'The analysis of the conclusions themselves is for the trier of fact when the expert is subjected to cross-examination.'" *Id.* (quoting *Kannankeril*, 128 F.3d at 806).

"The third element under Rule 702, namely, whether the expert testimony would assist the trier of fact, "goes primarily to relevance.'" *Meadow*, 306 F. App'x at 790 (*quoting Lauria v. Amtrak*, 145 F.3d 593, 599 (3d Cir. 1998). This element requires that "[t]he expert's testimony must 'fit' under the facts of the case so that 'it will aid the jury in resolving a factual dispute.'" *Id.* And "[t]he standard for the factor is not high; it is met when there is a clear 'fit' connecting the issue in the case with the expert's opinion that will aid the jury in determining an issue in the case." *Id.* (citing *Lauria*, 145 F.3d at 600 (quoting *Paoli*, 35 F.3d at 745)); *see also In re TMI Litig.*, 193 F.3d at 670 ("[A]dmissibility depends, in part, on a connection between the expert opinion offered and the particular disputed factual issues in the case.") (citation omitted). Therefore, "expert testimony based on assumptions lacking factual foundation in the record is properly excluded" under the fit requirement in addition to the reliability requirement. *Meadows*, 306 F. App'x at 790 (citing *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir. 2002)).

III. Discussion

A. Dr. Anthony G. Greenwald (Implicit Social Bias)

Dr. Anthony G. Greenwald, Ph.D is a tenured faculty member at the University of Washington in its Department of Psychology, where he has been an active member of its teaching and research faculty since 1986. Previously, Dr. Greenwald served as a tenured faculty member at The Ohio State University in its Department of Psychology from 1965 to 1986. Among the many accomplishments throughout his career, Dr. Greenwald has published more

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not required to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146.

than one-hundred-and-eighty refereed journal articles and book chapters in the areas of social psychology, cognitive psychology, and research methodology; received six awards for career research achievements; and served on journal editorial boards of prominent publications.

Dr. Greenwald has been retained by Plaintiffs' counsel to provide his opinion "in the area of social psychological research on attitudes, prejudices, and stereotypes," which includes the topic of implicit bias—*i.e.*, "a lay designation for mental processes that function outside of conscious awareness." Greenwald Exp. Rep. at 2, ECF No. 380-5. In that capacity, Dr. Greenwald has authored an expert report in which he uses the term "implicit bias" as "an informal reference to the relevant scientific work on attitudes and stereotypes." *Id.* at 4. Citing to that report, Plaintiffs submit that they offer Dr. Greenwald's opinion to "'provide a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the Plaintiffs' ages substantially motivated the defendants' [sic] actions outlined in the Complaint.'" Pls.' Br. in Opp. at 4 (quoting Greenwald Exp. Rep. at 6, ECF No. 395-2).

Moreover, in his report, Dr. Greenwald explains that his original research in the area of implicit social cognition includes the "invention and development of a specific research method—the Implicit Association Test ('IAT')." Greenwald Exp. Rep. at 2, ECF No. 380-5. One district court has described the IAT in a race-based employment discrimination action as follows:

> [I]t is a computerized exercise based on automatic word associations that test subjects make when shown pictures of individuals of various genders, races, and ethnicities. The photos are displayed for only milliseconds; then the test subjects are asked to make an association. If a test-taker responds more quickly, say, to the pairing of photographs of African–American faces with negative character trait words than to the pairing of European–American faces with the same

> negative traits, the test-taker is said to exhibit an implicit negative stereotype toward African–Americans.

Jones v. Nat'l Council of Young Men's Christian Associations of the United States of Am., 34 F. Supp. 3d 896, 899 (N.D. Ill. 2014) (internal citation and quotation marks omitted). The IAT is apparently "considered an 'implicit' measure because it infers the strength of a mental association that links a social category (such as race, gender, or age group) with a trait (i.e., a stereotype) from testing procedures that are influenced by those associations in a manner not discerned by the respondents." Greenwald Exp. Rep. at 2, ECF No. 380-5. According to Dr. Greenwald, the IAT has "been successfully used as an implicit measure for a wide variety of mental associations that underlie stereotypes and social attitudes," with his own research including the "study of implicit biases involved in age attitudes."[2] *Id.*

After outlining his credentials, Dr. Greenwald discloses that he based his "opinions rendered in this case on the results of [his] own research as well as on [his] knowledge of published works of many others who have conducted research relevant to the conditions of this case." *Id.* at 5. Dr. Greenwald also has "become acquainted with the conditions of this case by reading the Complaint statement prepared by Plaintiffs' attorneys" and has "read the depositions of Kevin Cooney in full, as well as a collection of excerpts from the depositions of James Wiggins, Gary Cannon, Diana Jarden, Paul McFarland, Sarah Leider, Tom Casey, Craig

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2. Dr. Greenwald also describes the IAT as a well-known and well-respected research method:

> The psychometric properties of IAT measures have been validated with tens of thousands of participants in laboratory research results. Variations of the IAT have been taken more than 14 million times at the on-line educational site, www.implicit.harvard.edu/implicit. Many social cognition experts have used the IAT as a method in their own research. No method for measuring implicit bias is more widely used than the IAT. IAT measures have been subjected to repeated empirical testing and peer review. There exists near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurements of attitudes and stereotypes.

Greenwald Exp. Rep. at 4, ECF No. 380-5. Dr. Greenwald has apparently extrapolated that the "strongest bias that has been demonstrated in extensive Internet data collections using the [IAT]" is "that substantial majorities of Americans associate young (more than old) with positive characteristics." *Id.* at 13.

Barnette, John Wysseier, Mark Bulger, Anthony Canil, Myrtle Smith, David V. King, Ed Dunn, Peter Dishart, and Gary Eilers."[3] *Id.* at 5-6. In sum, Dr. Greenwald opines "that there are a number of research findings regarding implicit biases that bear on this case." *Id.* at 6.

Dr. Greenwald's report then "summarizes [his] opinions based on research-established findings that bear on the case." *Id.* Those opinions include the following:

> ¶ 13. Implicit biases are pervasive, often observed in more than 70% of Americans, most of whom regard themselves as unprejudiced . . .
>
> ¶ 14. In contrast to the small percentages of survey respondents who express self-reported ("explicit") bias based on age, approximately 80% of all research participants hold implicit (sometimes called "unconscious") bias based on age . . .
>
> ¶ 15. Implicit bias is scientifically established as a source of discriminatory behavior in employment . . .
>
> ¶ 16. Discretion-affording personnel evaluations that permit subjectivity in decision making are open to influence by implicit bias . . .

Id. at 6-8. Dr. Greenwald continues: "[t]he next five paragraphs (¶¶ 17-21) describe prominent recent articles by economists, organizational psychologists, and legal scholars, based on their consideration of research on the roles of subjectivity and discretion in personnel decision making" and "[t]he seven paragraphs after those (¶¶ 22-28) summarize the articles' conclusions in language intended to be more accessible to non-scientists." *Id.*

Following his review of the literature, Dr. Greenwald attempts to apply his research to the facts of this case. Paragraph twenty-nine states:

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3. Notably, many of these individuals had nothing to do with the employment situations of the remaining Plaintiffs at PGW's facility in Harmarville, Pennsylvania at which they worked. As this Court has previously detailed at length, Paul McFarland was the direct supervisor of Opt-in Plaintiff Stephen Shaw who worked as a Marketing Manager for LYNX from PGW's headquarters in Pittsburgh; Sarah Leider was the HR Director at the Evansville, IN facility where Opt-in Plaintiff Matthew Clawson worked; Tom Casey was the Manager of Advanced Production at a Satellite manufacturing facility located near PGW's Crestline, OH plant; Craig Barnette was the Plant Manager at the Creighton, PA facility; John Wysseier served as the Director of Service Solutions for LYNX and was responsible for Shaw's termination along with Gary Eilers, the General Manager of ARS & Services with a supervisory role over the entire LYNX business; and David King was the Director of Enterprise Excellence and Quality in Evansville, IN.

> Plaintiffs' counsel asked me to examine the deposition of Kevin Cooney, and to review portions of several other depositions in which deponents were queried about procedures used in termination decisions affecting Plaintiffs. My objective in examining this material was to form an opinion as to whether the procedures could qualify as applying objective criteria in making the decisions or, alternately, whether the procedures that were used permitted substantial subjectivity in termination decisions. Most remarkable in the deposition material I examined were a collection of absences: First, absence of existing performance appraisals that could be used to inform termination decisions[footnote]; second, absence of systematic procedures for obtaining new data that might provide justifiable bases for those decisions; third, absence of procedures for reviewing decisions before they became final, and if any, they were arbitrary and not systematic; and fourth, absence of procedures for monitoring whether termination decisions had adverse impacts on protected classes of employees.[footnote]

Id. at 15-16. The footnotes further qualify his conclusion(s): first, Dr. Greenwald asserts, without explanation, that "[a]lthough there was some conflicting deposition testimony on whether performance appraisals were available to be used in the decision-making process, [he] believe[s] the evidence established that there was an absence of recent performance appraisals and that most managers did not even consult whether performance reviews were available;" and, second, he notes that "the conclusions of [his] present report draw on Dr. [Michael] Campion's expert appraisal of the deposition material he examined." *Id.* at n.7.[4]

4. In its entirety, Dr. Greenwald's latter footnote states as follows:

> Plaintiffs' counsel made available to me Dr. Michael Campion's expert evaluation of the Human Resources (HR) practices employed by Defendant in the reduction in force decisions that could potentially affect Plaintiffs. I read in entirety the main section of Dr. Campion's report, titled "Review of Human Resources (HR) Practices". Dr. Campion was able to give considerably greater attention than I did to the available deposition material. His opinion also was based on greater expertise than I have in appraising the details of management practices described by the deponents. Accordingly, the conclusions of my present report draw on Dr. Campion's expert appraisal of the deposition material he examined.

Greenwald Exp. Rep. at 16 n.7, ECF No. 380-5. PGW characterizes Dr. Greenwald's use of Dr. Campion's analysis as a proverbial game of telephone between plaintiffs' purported experts, sufficiently flawed on its own to bar his testimony. *See* Def.'s Br. at 6, ECF No. 380 ("Dr. Campion never made any findings about discrimination, did not offer any opinions on causation, and did not have complete data. Like [Dr.] Greenwald, he did not even know the Plaintiffs' names. So, for [Dr.] Greenwald to rely on [Dr.] Campion is like adding 0+0 and then proclaiming the total is greater than zero.").

PGW now seeks to exclude Dr. Greenwald as an expert, arguing that his opinions "should be barred because they lack any relation to the facts of this case and because his methodology is unreliable." Def.'s Br. at 2, ECF No. 380. In addition, PGW contends that Dr. Greenwald lacks the requisite qualifications to offer any opinion about a reduction in force ("RIF") and that his proffered testimony regarding corporate culture and generalized stereotyping in the workplace is inadmissible under Federal Rule of Evidence Rule 404.

For their part, Plaintiffs maintain that PGW's criticism of Dr. Greenwald rings hollow. In doing so, Plaintiffs dispute each of PGW's positions and contend that Dr. Greenwald's testimony about implicit bias is relevant to both their disparate impact and disparate treatment claims by providing the jury with the "framework" referenced above. Pls.' Br. in Opp. at 4, ECF No. 395. Plaintiffs also submit that "[c]ourts throughout the country have routinely admitted similar expert testimony regarding implicit bias and stereotyping in intentional discrimination cases."[5] *Id.* at 5. This issue is not, however, as straightforward as Plaintiffs suggest.

This Court is not the first to decide a motion to bar Dr. Greenwald as an expert witness. For example, in *Jones v. Nat'l Council of Young Men's Christian Associations of United States of Am.*, a United States Magistrate Judge reviewed a motion to strike the report and testimony of Dr. Greenwald in a Title VII disparate impact suit, challenging the defendants' practices for performance evaluations, compensation, and promotion/job assignments of African-American employees. 2013 WL 7046374 (N.D. Ill. Sept. 5, 2013). There, the plaintiffs offered Dr.

5. Plaintiffs cite several cases for this proposition: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996 (D. Minn. 2011); *Tuli v. Brigham & Women's Hosp., Inc.*, 592 F. Supp. 2d 208 (D. Mass. 2009); *Hnot v. Willis Grp. Holdings Ltd.*, No. 01 CIV 6558 GEL, 2007 WL 1599154 (S.D.N.Y. June 1, 2007); *Int'l Healthcare Exch., Inc. v. Global Healthcare Exch., LLC*, 470 F. Supp. 2d 345 (S.D.N.Y. 2007); *Beck v. Boeing Co.*, No. C00-0301P, 2004 WL 5495670 (W.D. Wash. May 14, 2004); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257 (N.D. Cal. 1997); *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550 (E.D. Wis. 1994); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). Of course, the only case binding on this Court is *Price Waterhouse*, which "held that a woman who was denied a promotion because she failed to conform to gender stereotypes had a claim cognizable under Title VII as she was discriminated against 'because of sex.'" *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009).

Greenwald as an expert to "explain the scientific principles demonstrating a phenomenon many do not understand: people who are not overtly racist (and even many African-Americans) subconsciously consider race in decision-making to the detriment of African-Americans, particularly when subjective criteria are involved." *Id.* at *4. The court began by assessing whether Dr. Greenwald had met the requirements of Rule 702; it concluded that he had not. *Id.* In doing so, the court highlighted that Dr. Greenwald "did not visit the Y's offices, speak with a current or former employee of the Y, or read any of the employee declarations," that "[h]e did not have IAT data for any Y manager," that he d[id] not even recall seeing the Y's equal employment opportunity policy or its diversity policy," that" [h]e did not critique any Y policy," and that "[h]e has no opinion as to what sort of performance evaluation criteria are used at the Y." In fact, "only one paragraph in [Dr. Greenwald's] report discusse[d] the Y, and that paragraph came from his review of Plaintiffs' statistical expert . . . ." *Id.* To the court, "Dr. Greenwald ha[d] done nothing that would reliably equip an expert to say something meaningful about employment practices at the Y." *Id.* at *9. Accordingly, "[i]n light of the fact that Dr. Greenwald did not consider the facts of th[e] case or give a scientific basis to apply his general theories based on the IAT testing to the decisions managers make in a workplace setting, th[e] [c]ourt recommend[ed] that the report and testimony of Dr. Greenwald be stricken . . . ." *Id.*

The district court adopted the recommendation of the magistrate judge, but it also wrote separately on this issue. *Jones*, 34 F. Supp. 3d at 896. As an initial matter, the district court rejected the plaintiffs' suggestion that they offered Dr. Greenwald for the limited purpose of educating the jury and found that they sought to rely on his opinion and testimony as evidence of causation—an endeavor which was rejected because his "six-page report [fell] far short of providing a reliable basis to support an opinion that implicit bias of the Y's managers caused any

disparity in performance evaluations, pay, or promotions at the Y." *Id.* at 899. Yet "[e]ven at the level of general principles," the district court also "[wa]s not persuaded that Dr. Greenwald's testimony and opinions are adequately tied to the facts of this case to be useful to a jury" because those general principles did not "fit" the case. *Id.* at 900. Instead, his opinions were "derived solely from laboratory testing that d[id] not remotely approximate the conditions that apply in th[e] case specifically or more generally in the context of an employer's decisions about employee compensation and work assignments." *Id.* And "[n]either Dr. Greenwald nor the plaintiffs establish[ed] a logical connection between the principle that hidden bias may be manifested in the absence of any other information and the premise that hidden bias says anything about the results of employment decisions made by supervisors and managers who are armed with abundant data and are personally invested in the results of the process." *Id.* Accordingly, the district court overruled the objections to the magistrate judge's recommendation.[6] *Id.* at 901.

One district court has, however, reached a contrary conclusion. *See Samaha v. Washington State Dep't of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012). In *Samaha*, the district court denied the defendants' motion to exclude Dr. Greenwald from offering expert testimony about implicit bias, rejecting their challenges to the reliability and

6. At least one state court has also discussed the opinion(s) of Dr. Greenwald, in a disparate impact case brought under Title VII of the Civil Rights Act of 1964, as well as the Iowa Civil Rights Act of 1965. *See Pippen v. State*, No. LACL107038, 2012 WL 1388902 (Iowa Dist. Ct. April 17, 2012). In *Pippen*, the trial court considered and rejected Dr. Greenwald's opinion regarding implicit social bias following a non-jury trial. *See id.* ("Even more significant is the fact that neither [Dr. Greenwald] nor Dr. Kaiser offered a reliable opinion as to how many, or what percentage, of the discretionary subjective employment decisions made by managers or supervisors in the State employment system were the result of 'stereotyped thinking' adverse to the protected class. The closest Dr. Greenwald came to such an opinion was extrapolating data from an internet based site relating to the IAT."). Moreover, the *Pippen* Court specifically found that the implicit bias evidence offered in that case could not prove causation. *See id.* ("Both social scientists seem to operate from the assumption that every three out of four subjective discretionary employment decisions made in the State's hiring process were the result of, or tainted by, an unconscious state of mind adverse to African-Americans. The Supreme Court has noted this is a fatal flaw in the proof of a social scientist in a case of this nature and is 'worlds away from "significant proof"' that an employer 'operated under a general policy of discrimination.' In legal parlance, this is an opinion of conjecture, not proof of causation.") (quoting *Wal-Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S. Ct. 2541, 2554 (2011)).

fit prongs in an employment discrimination case in which the plaintiff (an individual of Arab descent) alleged a disparate treatment claim. 2012 WL 11091843, at *4. The district court first disagreed that "the [IAT] on which Dr. Greenwald bases his testimony amount[ed] to mere 'statistical generalizations about segments of the population,'" by reiterating that the IAT has been validated, peer-reviewed, and subjected to repeated empirical testing, and therefore, it was "satisfied that Dr. Greenwald's opinions [were] sufficiently 'ground[ed] in the methods and procedures of science.'" *Id.* at *3 (quoting *Daubert*, 509 U.S. at 597); *see also supra* n.1.

The *Samaha* Court also disagreed that Dr. Greenwald's testimony would be neither relevant nor helpful to the jury, finding that the Advisory Committee Notes to the 2000 Amendments to Rule 702 contemplated an expert such as Dr. Greenwald—*i.e.*, one who "conclude[d] that his 'research findings regarding implicit bias . . . bear on this case' even though he d[id] not provide a conclusion as to whether his findings are consistent with the alleged actions of [the] [d]efendants."[7] *Id.* at *4. Similarly, the district court found that Dr. Greenwald satisfied each factor of the "four-step test to determine the admissibility of expert testimony that does not apply the principles and methods to the facts of the case," set forth in The Advisory Committee Notes for the 2000 Amendments to Rule 702: "that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony 'fit' the facts of the case." *Id.*

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7. The passage of the Advisory Committee Notes for the 2000 Amendments to Rule 702 cited by the *Samaha* Court is as follows:

> Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

2012 WL 11091843, at *4.

Unlike the *Samaha* Court, the undersigned cannot conclude that Dr. Greenwald satisfies the requirements of Rule 702. Dr. Greenwald's opinion is not based on sufficient facts or data. It is not the product of reliable methods. And it would not assist the factfinder in resolving an issue in this case. To be sure, the Court views *Jones* as instructive.

As in *Jones*, Dr. Greenwald did not visit PGW at its Harmarville plant or speak with any current or former employee, interview the managers who took part in the March 2009 RIF, or subject any of those individuals to his self-invented IAT—hardly sufficient facts and data on which to base an opinion. Nor did Dr. Greenwald perform any independent, objective analysis on whether implicit biases played any role in the decisions to terminate the remaining Plaintiffs. Instead, Dr. Greenwald recites his credentials, reviews the literature, and attempts to highlight flaws in the employment practices of PGW (its so-called "collection of absences") which he gathered after reviewing one deposition in full and excerpts of others—all of which were selected and supplied to him by counsel for Plaintiffs. *See* Dep. of Greenwald at 9, ECF No. 413-1; *see also E.E.O.C. v. Bloomberg L.P.*, No. 07 CIV. 8383 LAP, 2010 WL 3466370, at *14 (S.D.N.Y. Aug. 31, 2010) ("Relying solely on the information fed to him by the EEOC without independently verifying whether the information is representative undermines the reliability of his analysis."); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 CIV, 8272 (RPP), 2003 WL 22124991, at *3 (S.D.N.Y. Sept. 15, 2003) ("[A]ny expert should be aware that a party and counsel in a litigation have an interest in the outcome and that an expert study should not be dependent on the information they supply."). Worse yet, Dr. Greenwald filtered his analysis through the lenses of Dr. Campion's purported "expert appraisal of the deposition material he examined." This sort of superficial analysis of the data underlying his opinion is not expert material; it is the say-so of an academic who assumes that his general conclusions from the IAT

would also apply to PGW.[8] Simply put, the data underlying his opinion is unreliable and cannot withstand scrutiny in this Court's function as a gatekeeper.

The Court also finds that Dr. Greenwald's methodology is unreliable, to the extent that the IAT informed his analysis and provided a basis for his opinion that most people experience implicit bias. Although taken more than fourteen million times, Dr. Greenwald cannot establish that his publicly available test was taken by a representative sample of the population—let alone any person or the relevant decision-maker(s) at PGW. Dr. Greenwald also fails to show that the data is not skewed by those who self-select to participate, without any controls in place to, for example, exclude multiple retakes or account for any external factors on the test-taker. Perhaps to compensate for these shortcomings, Dr. Greenwald explains that his test is widely-used by "[m]any social cognition experts as a method in their own research" and that "[t]here exists near unanimous agreement among social psychologists as to the validity of the IAT as a method for implicit measurement of attitudes and stereotypes." Be that as it may, the IAT still says nothing about those who work(ed) at PGW.

Additionally, the Court finds that Dr. Greenwald's opinion does not "fit." Although Plaintiffs submit that "Dr. Greenwald does not claim his opinions prove causation," Pls.' Br. in Opp. at 6, ECF No. 395, his own report calls this suggestion into question, in which he states that "[t]hese findings [regarding implicit bias] provide a framework that can aid a judge or jury in evaluating the facts of this case . . . . *to determine whether the Plaintiffs' ages substantially motivated the defendants' [sic] actions outlined in the Complaint*." Greenwald Exp. Rep. at 2, ECF No. 380-5. This is the sort of "substantial disconnect" between the abstract principle from which his general principle is derived and the facts of this case, which was fatal to his opinion in

8. As Dr. Greenwald testified: "Q: Did you try and do anything in this case to determine whether or not any of the decisions made at PGW were actually based on unrecognized mental association? A. Yeah. As I explained earlier, I was not asked to do that. I did not try to do it." Def.'s Br., Ex. 1 at 27, ECF No. 380-3.

Jones. Even so, it is the wrong standard; a disparate impact claim under the ADEA "requires a showing that 'age was the "but-for" cause of the employer's adverse action,'" while Title VII claims can be maintained with the lesser showing that an improper consideration was a motivating factor for the employer's action." *Gladden v. Vilsack*, 483 F. App'x 664, 665 (3d Cir. 2012) (quoting *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167 (2009)); *c.f. Smith v. CH2M Hill, Inc.*, 521 F. App'x 773, 774-75 (11th Cir. 2013) (per curiam) (in alleging that the plaintiff's termination was "substantially motivated" by age, the plaintiff had not "allege[d] sufficient facts" to allow the court to "reasonably infer that [his employers] violated the but-for standard set forth in the ADEA"). If anything, Dr. Greenwald's opinion is more likely to confuse a jury rather than elucidate the issue(s) for the factfinder. Dr. Greenwald may be renowned in his field, "but if he cannot explain how his conclusions satisfy Rule 702's requirements, then he is not entitled to give expert testimony." *E.E.O.C.*, 2010 WL 3466370, at *15.

One final point bears mentioning: the Court doubts that Dr. Greenwald's testimony regarding implicit bias is even relevant in deciding ADEA disparate impact or disparate treatment claims, which are analytically distinct from each other. *See generally Jensen v. Solvay Chemicals, Inc.*, 625 F.3d 641, 660 (10th Cir. 2010) ("In general, disparate treatment occurs when an 'employer simply treats some people less favorably than others' because of a certain characteristic, such as race or age; disparate impact, on the other hand, 'involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.'") (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). Where, as here, a plaintiff asserts a disparate treatment claim, he or she must "prove that intentional discrimination occurred at th[e] particular [employer], not just that gender stereotyping or intentional

discrimination is prevalent in the world." *E.E.O.C. v. Wal-Mart Stores, Inc.*, No. CIVA 6:01-CV-339-KKC, 2010 WL 583681, at *4 (E.D. Ky. Feb. 16, 2010). Moreover, disparate treatment claims require proof of a discriminatory motive, which seems incompatible with a theory in which bias may play an unconscious role in decision-making. In a disparate impact claim, evidence of implicit bias makes even less sense, particularly because a plaintiff need not show motive. *See generally Rivera-Andreu v. Pall Life Sciences PR, LLC*, No. CIV. 14-1029 MEL, 2014 WL 5488409, at *3 (D.P.R. Oct. 29, 2014) ("'The linchpin of a disparate treatment claim is proof of the employer's discriminatory motive. Not so in a claim of disparate impact: that type of claim is predicated not on proof of intentional discrimination, but, rather, on proof that the employer utilizes employment practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity.'") (quoting *Mullin v. Raytheon Co.*, 164 F.3d 696, 699-700 (1st Cir. 1999)). Accordingly, the Court finds that Dr. Greenwald's opinion does not meet the requirements of Rule 702, and therefore, it will bar his testimony at the trial of this action.

B. Dr. Michael Campion

Dr. Michael Campion, Ph.D. holds a doctoral degree in Industrial and Organizational Psychology, a "discipline that conducts most of the scientific research on employee staffing and other Human Resources ("HR") topics." Campion Revised Statistical Analysis at 2, ECF No. 381-4. Dr. Campion presently serves as the Herman C. Krannert Chaired Professor of Management at Purdue University, where he has been a faculty member since 1986. In addition, Dr. Campion "consults regularly to industry and government on staffing and related HR projects," conducting over eight-hundred projects for more than one-hundred-and-ten private and public sector clients, with half of those projects focusing on topics related to employee staffing

and even more involving statistical analyses. *Id.* at 2-3. Before joining the Purdue faculty, Dr. Campion worked for four years at IBM Corporation and another four years at Weyerhaeuser Company in HR analyst and management positions "researching, developing, statistically analyzing, and administering a wide range of personnel systems especially hiring and staffing systems." *Id.*

Throughout his career, Dr. Campion "has published over 120 articles in scientific and professional journals and given over 200 presentations at professional meetings," half of which "have been on employee staffing-related topics such as testing, interviewing, validation, job analysis, fairness, adverse impact and turnover." *Id.* Among his many other academic achievements, Dr. Campion served for six years (1990-1996) as editor of the journal Personnel Psychology, a scientific publication that is the primary outlet for research on employee staffing. Dr. Campion also served as the President of the Society for Industrial and Organizational Psychology ("SIOP") from 1995-1996, which conferred upon him its most prestigious lifetime contribution award in 2010. According to Dr. Campion, approximately only one-percent of Industrial/Organizational Psychologists "have the honor of editing an 'A-Class' journal or serving as president of SOIP, let alone both honors." *Id.* at 3.

Dr. Campion has been retained by Plaintiffs' counsel to provide: (1) a (revised) statistical analysis "to examine whether there is any evidence of adverse impact by age in the reduction in force ('RIF') conducted at [PWG] on March 31, 2009," ECF No. 381-4 at 2;[9] and (2) a report detailing human resource practices during a RIF, the purpose of which was "to review the RIF procedures followed, the relevant documents in the case [citation omitted] and the deposition testimony of the [HR] Managers and line managers who made the termination decisions to

9. Dr. Greenwald conducted a "preliminary" statistical analysis on December 2, 2011 and submitted a revised report on May 7, 2013 "based on an updated dataset provided by PGW." Campion Revised Statistical Analysis at 2, ECF No. 381-4.

evaluate whether the procedures conformed to reasonable HR principles and procedures for conducting RIFs based on the research and practice literature in HR," ECF No. 382-3 at 3.

PGW now seeks to bar Dr. Campion's statistical analyses as well as his opinion on reasonable human resources practices. The Court will address the expert challenges seriatim.

a. Statistical Analysis

The motion to bar Dr. Campion's statistical analysis is complex to say the least. By way of background, the parties undertook fact discovery following the grant of conditional certification, during which they sought business records to establish what employees were selected for inclusion in the March 2009 RIF. At the time of the RIF, PGW distributed with its severance documents a decisional unit matrix ("DUM") (pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. § 623, *et seq.*) that listed employees' job titles and birth date. In order to match employees to the DUM, the parties sought and received personnel records that were in control of non-party PPG, which continued to provide PGW with payroll system services under a then-existing transition agreement. The payroll data did, however, demonstrate errors in the DUM: certain individuals listed in the DUM were not in fact terminated; others were not included in the RIF but were subject to PGW's earlier decision to close a plant in Evart, Michigan (the "Evart Terminees").[10] Ultimately, the parties developed an agreed-upon dataset for the March 2009 RIF.[11] The parties did not conduct discovery (other than incidentally) regarding other RIFS, retirements, or separations at PGW.

10. The errors in and data missing from the DUM form(ed) the basis for Plaintiffs' attempt(s) to invalidate the Separation Agreements and Releases.

11. PGW contends that the parties agree on two facts: (1) that the Evart plaint closing was not part of the March 2009 RIF; and (2) all but six Evart employees were terminated before March 31, 2009. Moreover, PGW asserts that "even though the payroll records and the DUM showed virtually the same number of employee 862 or 863 – 13 entries on the DUM could not be matched with payroll records" and that "[t]he Agreed Data Set reflects those uncontested facts and is the proper basis for any statistical analysis." Def.'s Br. at 3, ECF No. 381.

In his report, Dr. Campion conducted six analyses, some of which purport to use the Agreed Data Set (Analysis 1) while others go beyond the March 2009 RIF (Analyses 2-6). As Dr. Campion explains:

> Although the employees terminated as part of the RIF were identified by PGW in the spreadsheet, several additional analyses were conducted to fully understand the data. Analyses were conducted with and without the December 2008 RIF, and analyses were conducted including retirements and other terminations with severance at the time of the RIF. Published research on employee turnover has shown that retirement is often coded as the reason for termination in HR databases, but employees will independently report different reasons. For example, previous research by the author found that the HR database in a large organization reported that nearly 22% of turnover was retirement, while employees themselves independently reported that only 13% of the turnover was retirement. Employees reported such reasons as dissatisfaction with working condition or supervision, poor health, or lack of promotion much more often than the "official" HR records (Campion, 1991). In the present context, it is possible that "retirement" was recorded, rather than "terminated," due to the RIF in some cases where the employee could qualify for retirement benefits in order to (intentionally or unintentionally) reduce the number of employees counted as terminations. The unusual spike in the number of retirements near the date of the RIF (March 31, 2009) seems coincidental without such an explanation.

Campion Revised Statistical Analysis at 7-8, ECF No. 381-4.[12] Dr. Campion also analyzed the potential of disparate impact on specific subgroups within the protected class—comparisons based on five-year increments (*e.g.*, under forty versus forty and over, under forty-five versus forty-five and over, etc.) beginning at age forty and ending at fifty-five—because (as he explained) "[a]ge is a continuous variable." *Id.* And to determine whether there was in fact a

12. The parties discussed Dr. Campion's reasoning for conducting multiple analyses at his June 25, 2013 deposition, during which the following exchange occurred:

> Q. Okay. Your Analysis 1 analyzes the RIF on March 31[ ], 2009, right? I'm asking what does your Analysis 2, which has a much larger population, tell us about the March 31[ ], 2009 RIF.
>
> A. Well, it – it would be relevant in the following way: That one could imagine thinking about this RIF as really a RIF that occurred over a six-month time period that began shortly after the acquisition of the company and includes both December and March. And if you conceive of the RIF as being this broader six-month thing, and I understand that you have come to some agreement that it's only the March RIF, but if you wanted to look at this broader context, that analysis would reflect that broader context within which the March RIF occurred.

Dep. of Campion at 182-83, ECF No. 381-5.

disparate impact on older employees, Dr. Campion cited "[t]wo indices" that "have emerged from governmental guidelines and court cases on equal employment opportunity: Adverse Impact Ratio [(the 80% or four-fifths rule from the EEOC Guidelines)] and Standard Deviation Difference [(the z-score approach)]."[13] *Id.* at 4; *see generally Stagi v. Nat'l R.R. Passenger Corp.*, 391 F. App'x 133, 137-141 (3d Cir. 2010) (discussing various tests of statistical significance). Against that backdrop, the Court turns to Dr. Campion's six analyses.

Analysis 1 "analyzes the base dataset produced by PGW; [t]hat is, it analyzes the adverse impact based on the terminations (n = 100) and the total number of employees (n = 876) as specified by PGW." Campion Revised Statistical Analysis at 8, ECF No. 381-4. In this Analysis, Dr. Campion does not examine the unit in which Plaintiffs worked—the Manufacturing Technology Group headed by Gary Cannon—but instead groups together all one-hundred terminated employees in his analysis. *C.f. Karlo v. Pittsburgh Glass Works*, LLC, No. 2:10-CV-1283, 2014 WL 1317595, at *3 (W.D. Pa. Mar. 31, 2014) ("Although this decision [to conduct the March 2009 RIF] was made by Wiggins and upper management, the employees were again selected for termination on a decentralized basis."). Be that as it may, Dr. Campion apparently starts with correct number of terminated employees when examining the RIF as a whole, adjusting downward from the 105 identified in the DUM in accordance with the Agreed Data Set. Dr. Campion did not, however, adjust the non-terminated employee data to exclude

13. In his report, Dr. Campion set forth his interpretation of the "80 percent rule" from the Equal Employment Opportunity Commission's ("EEOC") Uniform Guidelines on Employee Selection Procedures and the Federal Contract Compliance Manual, calling the former "[a] primary source of guidance on the analysis of adverse impact." Campion Revised Statistical Analysis at 4, ECF No. 381-4. According to Dr. Campion, for negative personnel action, "if the termination rate of the comparison group is less than 80% of the termination rate of the protected group, then adverse impact is presumed to have occurred thus establishing a prima facie case of discrimination." *Id.* at 5. As for the z-score approach—which indexes the difference in termination rates in terms of the number of standard deviations—Dr. Campion explains that "[w]hen the number of standard deviations is less than -2 (actually -1.96), there is a 95% probability that the difference in termination rates of the subgroups is not due to chance alone" and "[w]hen the number of standard deviations exceeds about -3 (actually -2.58), there is a 99% probability that the difference in termination rates of the subgroups is not due to chance alone." *Id.* at 6. For his analyses, "the values are reversed so negative values indicate adverse impact against the older group." *Id.*

the Evart Terminees from the RIF.[14] Analysis 1 reveals that "[a]ll adverse impact ratios are below .80," that the standard deviations exceed 2.0 (ranging from 2.15 to 2.46) at the 45, 50 and 55 levels," and that adverse impact ratio at the "40 level" is .69, with the standard deviation "fall[ing] just short of the 2.0 at 1.51, which is significant at the 13% level (two-tailed test)." *Id.* at 8-9. According to Dr. Campion, "[t]hese results suggest that there is evidence of disparate impact." *Id.* at 9.

Unlike Analysis 1, Dr. Campion considers data fragments from before and after the March 2009 RIF in Analyses 2-6. Analysis 2 "includes the December 2008 RIF, which increases the number of terminations to 173 (additional 73) and the total number of employees to 1,677 (additional 801)"—"[t]he total number of employees [wa]s radically increased because the actual comparators for the December RIF are not known, so all potential comparators [we]re included." *Id.* at 9. Analysis 3 "adds the December RIFs like Analysis 2, but also adds retirements (n = 16) and other apparent terminations due to the RIF (i.e., terminations with severance n = 7)." *Id.* Analysis 4 "adds retirements and other apparent terminations due to the RIF to Analysis 1 for the period one month pre and one month post the March 2009 RIF, [to] include[ ] February to April (n = 14). The larger total is again used because the potential comparators are unknown (n = 1,594)." *Id.* Analysis 5 "adds retirements and other apparent terminations due to the RIF to Analysis 1 from January to September (n = 18) because other terminations in the base dataset counted terminations in that time period as RIF related." *Id.* at 10. And "Analysis 6 adds all retirements up to September in 2009 (n = 16) to Analysis 1." *Id.* As with Analysis 1, Dr.

14. PGW also faults Dr. Campion for ignoring the Agreed Data Set by using "the ghost '876' population" from the DUM—which apparently included thirteen "unmatched" entries—rather than the 863 employees identified on the verified payroll records. At his deposition, Dr. Campion conceded that he did not look at the payroll records maintained by PPG to determine or verify the population set, but instead relied upon the data provided by PGW, presumably in the DUM. Dep. of Campion at 308-310, ECF No. 381-5 ("A: The only data that I [Dr. Campion] have analyzed is that document we described earlier that was produced to us by defendants. And we presumed if you guys produced it, it was accurate. So, I did not go back and review it and try to verify it again.").

Campion concludes that the results of Analyses 2-6 "suggest that there is evidence of adverse impact based on employee age in the RIF conducted at PGW." *Id.*

In its motion, PGW asserts that Dr. Campion's analyses contain several errors. To summarize, PGW contends that Dr. Campion, as a non-statistician, is not qualified to opine in the field of statistics, that Analysis 1 uses incorrect data, the wrong methodology and fails to specifically examine Plaintiffs, that Analyses 2-6 strays outside the March 2009 RIF to examine an ad hoc collecting of numbers predating and post-dating the RIF, that Dr. Campion engaged in data manipulation, and that he improperly draws his own inferences from the record and offers legal conclusions, usurping the role of the factfinder.

Plaintiffs disagree with PGW's criticisms and suggest that the Court should "avoid intervening in the battle of the experts" between Dr. Campion and Dr. James L. Rosenberger who has been retained by the defendant.[15] In support, Plaintiffs argue that "Dr. Campion's factual assumptions regarding the composition of the data set" and "[t]he proper statistical means to conduct [a] disparate impact analysis" are matters for the jury to decide. Pls.' Br. in Opp. at 3-4, ECF No. 393. Plaintiffs also cite to *Brand v. Comcast Corp., Inc.*, 302 F.R.D. 201 (N.D. Ill. 2014), a decision in which a district court rejected a challenge to Dr. Campion's qualifications.

15. Dr. Rosenberger holds a doctoral degree in Biometry (*i.e.*, "statistics with applications in biological fields"), which he earned from Cornell University in 1977. *See* Rosenberger Report at 2, ECF No. 381-6. Dr. Rosenberger is a Professor of Statistics at The Pennsylvania State University, holds the departmental positions of Director of the Statistical Consulting Center and Director of Outreach and Online Programs, served as the Department Head from 1991 to 2006 and Director of the Bioinformatics Consulting Center from 2002 to 2007, worked at the National Science Foundation as Statistics Program Director, and has held visiting academic positions at University of Leeds (UK), Stanford University, Swiss Federal Institute (Zurich), and Harvard University. *Id.* Among his many academic achievements, Dr. Rosenberger has been elected Fellow of the American Statistical Association and Fellow of the American Association for the Advancement of Science, received the Distinguished Service Award from the National Institute of Statistical Science and currently serves as vice president of the American Statistical Association. *Id.* In addition, Dr. Rosenberger has authored more than fifty refereed scientific publications in statistics related topics. *Id.* As part of this case, Dr. Rosenberger has authored an expert report in which he concludes that "based on the statistical evidence, it is [his] opinion as a statistician applying generally accepted principles in [his] field that there is no evidence of an adverse impact of the RIF." *Id.* at 13.

See id. at 209 ("Although Campion is not a statistician—he is a professor of management—he has a sufficient background in statistics to testify on the subjects covered in his report.").

The Court cannot agree that Dr. Campion meets the standards of Rule 702. Even assuming that Dr. Campion is qualified to opine on statistical matters of this sort—of which the Court is not convinced—his report is not based on sufficient data. That is, Dr. Campion includes the Evart Terminees as remaining with PGW after March 31, 2009 and relies on the erroneous DUM rather than the Agreed Data Set. For their part, Plaintiffs attempt to explain away this error: "Dr. Campion did a further analysis and determined that removing the Evart employees from the data set (and thus treating them as having been neither fired or retained in the RIF) had no effect on the outcome of [Dr. Campion's] statistical analysis." Pls.' Br. in Opp. at 4 n.4, ECF No. 393.

Even so, Dr. Campion's methodology is not reliable. To support his conclusion, Dr. Campion relies on the "four-fifths rule," the reliability of which has been criticized. *See Delgado v. Ashcroft*, No. CIV.A. 99-2311(JR), 2003 WL 24051558, at *8 (D.D.C. May 29, 2003) (collecting cases); *see also* Stagi, 391 F. App'x at 138 ("The '80 percent rule' or the 'four-fifths rule' has come under substantial criticism, and has not been particularly persuasive, at least as a prerequisite for making out a prima facie disparate impact case.") At the same time, Dr. Campion also offers a z-score approach. *See generally*, *Ogletree v. City of Auburn*, 619 F. Supp. 2d 1152, 1177 (M.D. Ala. 2009) ("[O]ne district court concluded that, at least where the sample size is relatively small (189 in that case), 'the 4/5ths Rule is recognized as a rule of thumb to be used in conjunction with standard deviation or other statistical evidence.'") (quoting *Jones v. Pepsi–Cola Metro. Bottling Co.*, 871 F. Supp. 305, 311 (E.D. Mich. 1994)). But that aspect of his analysis is also improper. Using that method, Dr. Campion claims to find evidence of

disparate impact in older subgroups despite not finding any statistical significance in the base forty-plus age-group analysis.[16] And in doing so, Dr. Campion does not apply any of the generally accepted statistical procedures (*i.e.*, the Bonferroni procedure) to correct his results for the likelihood of a false indication of significance. This sort of subgrouping "analysis" is data-snooping, plain and simple.[17]

Analyses 2-6 fare no better; they are rooted in rank speculation. In Analysis 2, Dr. Campion includes (inaccurate) data from a separate 2008 RIF on the assumption that the December and March terminations were a single employment decision. *See* Dep. of Campion at 190-194, ECF No. 190. There is no support in the record for this factual (and fanciful) theory. In Analyses 3-6, Dr. Campion proceeds to add retirees from 2008 and 2009 to Analysis 2 and considers them all as if they were involuntarily terminated. The parties took no discovery on this issue; this opinion evidence is yet again connected to the existing data only by the ipse dixit of Dr. Campion. To be sure, Dr. Campion simply cites his own research and opines that "it is possible that 'retirement' was recorded, rather than 'terminated.'" That sort of conjecture would hardly assist the factfinder in this case. Accordingly, the Court finds that Dr. Campion's statistical report does not meet the requirements of Rule 702, and therefore, it will bar his testimony regarding same.

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16. Of course, the subgrouping analysis would only be helpful to the factfinder if this Court held that Plaintiffs could maintain an over-fifty disparate impact claim. It has not done so. The Court instead notes that "[w]hile the Third Circuit does not appear to have considered the issue of subgroup disparate impact claims, [(that is[,] claims based upon evidence suggesting that a particular employment practice affected a subset of individuals within the protected class of those aged 40 or older)], the majority view amongst the circuits that have considered this issue is that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger, and therefore it is improper to distinguish between subgroups within the protected class."). *Petruska v. Reckitt Benckiser, LLC*, No. CIV.A. 14-03663 CCC, 2015 WL 1421908, at *6 (D.N.J. Mar. 26, 2015) (citations omitted).

17. Dr. Campion attempts to negate the "data-snooping" label in his rebuttal report. *See* ECF No. 381-8. That report is rife with inadmissible legal conclusions and relies upon an unreliable source: Wikipedia. *See id.* To be sure, "district courts prohibit experts from offering legal opinions because such testimony is not helpful to the trier of fact." *FedEx Ground Package Sys., Inc. v. Applications Int'l Corp.*, 695 F. Supp. 2d 216, 221 (W.D. Pa. 2010).

b. Reasonable Human Resource Practices

For this report, Dr. Campion conducted a review of the "RIF process followed by PGW based on depositions and documents to evaluate whether the procedures conformed to reasonable HR principles and procedures for conducting RIFs based on research and practice literature in HR." Campion HR Practices Report at 6, ECF No. 382-3. In his opinion, "PGW failed to follow reasonable HR practices in many different ways [(no less than nineteen)] when it conducted the RIF terminations." *Id.* To reach that conclusion, Dr. Campion evaluated "the actual practices at the company" that he gleaned from select deposition transcripts and compared them to a list of "reasonable HR practices" that he previously delineated.

"Reasonable HR practices," as Dr. Campion explains, "are the practices that are recommended by the practice literature, supported by the research literature, or clearly implied by one of these literatures. Also, these are the practices that are taught in the MBA courses by [him]." *Id.* at 9. According to Dr. Campion, "[t]hese are not 'best practices' because it is a reasonable expectation that they should have been used as opposed to being ideal standards." The "reasonable HR practices" include the following:

> (1) identify future work; (1.1) identify jobs and tasks to be performed; (1.2) identify skill, knowledge and experience requirements; (2) evaluate employees against future work; (2.1) consider past job performance heavily; (2.2); consider seniority; (2.3) emphasize job-related criteria (e.g., skills, knowledge, experience, etc.); (2.4) avoid inherently age-related criteria; (2.5) emphasize objective (vs. subjective) criteria; (2.6) base selections on accurate and complete information; (2.7) prevent exposure of demographic information to evaluators; (2.8) allow employees to compete for the remaining or new positions, or positions elsewhere in the organization; (2.9) use multiple independent evaluators to ensure reliability; (2.10) provide clear instruction and train evaluators on use of system, including equal employment considerations; (2.11) ensure adequate documentation; (2.12) allow appeal mechanism; (2.13) apply methodology in consistent manner; (2.14) communicate to employees and provide considerate interpersonal treatment; (3) analyze adverse impact; (3.1) conduct analyses in timely fashion; (3.2) take action if adverse impact is shown; (4) evaluate the process and outcomes; and (5) ensure an informed and independent human resources staff.

Id. at 12-52. To gather this list, Dr. Campion explains that he reviewed volumes of publications, yielded eighty-four relevant articles and books on reasonable HR practices during RIFs, and identified what he judged to be a representation of "the most common advice in the professional and scientific HR literature." *Id.* at 9-11. Dr. Campion later published an article in a peer-reviewed journal summarizing this research, some of which draws from "procedural justice"—*i.e.*, a reference to the "fairness of the procedures used to make decisions." *Id.* at 11.

Among its many challenges to Dr. Campion's report, PGW argues that his statements are merely *ipse dixit* conclusions that offer no information regarding the remaining Plaintiffs. PGW also challenges Dr. Campion's qualifications as well as the reliability of the data underlying his opinion(s) and his methodology. In addition, PGW submits that Federal Rule of Evidence 404(b) would also bar Dr. Campion from offering his opinion at trial.

For their part, Plaintiffs argue that "[Dr.] Campion's testimony is relevant to [their] disparate impact claims as it will be helpful to the jury in understanding how PGW's RIF—even if facially neutral—could have a disparate impact on employees fifty and older and how the RIF guidelines that had been the policy of the organization until a few months earlier would have prevented a disparate impact from occurring had they been applied." Pls.' Br. in Opp. at 1, ECF No. 392. Elsewhere, Plaintiffs assert that "Dr. Campion's opinions on reasonable [HR] practices will be relevant to rebut PGW's reasonable factors other than age [("RFOA")] defense."[18] Pls.' Sur-Reply at 2, ECF No. 429.

18. Plaintiffs submit that "PGW will argue at trial that the decisions it made in selecting who to terminate in the RIF and who to retain were reasonable." Pls.' Sur-Reply at 2, ECF No. 429. From that premise, PGW contends that "[s]ince ordinary jurors are not knowledgeable about reasonable [HR] practices—especially regarding industry-accepted best practices for large-scale reduction in force, they are unlikely to be able to effectively determine whether Plaintiffs' selections were in fact the result of reasonable factors other than age without expert guidance." *Id.* In its summary judgment brief(s), PGW asserts that its reasonable factor other than age defense relates to its financial situation coupled with the decline in the U.S. economy and its effect on the automotive industry in 2008 and 2009. *See* Def.'s Br. at 14-18, ECF No. 375.

At least one district court has excluded Dr. Campion from testifying about his reasonable HR practices in an ADEA action related to a RIF and based on a theory of disparate impact.[19] *See Powell v. Dallas Morning News L.P.*, 776 F. Supp. 2d 240, 247 (N.D. Tex. 2011), *aff'd*, 486 F. App'x 469 (5th Cir. 2012). There, in examining Defendants' RFOA defense, the district court held that Dr. Campion's "20 Reasonable HR Practices that Defendants allegedly should have known about and used during the RIF are irrelevant" because "Plaintiffs c[ould] rebut Defendants' RFOA defense only by demonstrating that the factors offered by Defendants [we]re unreasonable." *Id.* Moreover, the district court also reasoned that "Defendants have no duty to establish the lack of better alternatives because the RFOA inquiry does not require a determination as to 'whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class,'" and therefore, "[t]he fact that other RIF practices were available [wa]s not relevant to, and d[id] not rebut, Defendants' RFOA defense." *Id.* at 266 (quoting *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 243 (2005)).

The Court finds this decision instructive and persuasive. In addition, the Court does not consider Dr. Campion's opinion regarding his ideal (and invented) "reasonable HR practices" relevant in assisting the factfinder in understanding or deciding the disparate impact claim in this case: it sheds no light on the relationship between the alleged failures in the RIF and the impact on the remaining Plaintiffs, despite Plaintiffs' inconsistent statement to the contrary. *Compare* Pls.' Br. in Opp. at 2, ECF No. 392 ("Dr. Campion's opinions have a firm factual grounding and will assist the jury by providing a framework *to evaluate* whether Plaintiffs' age caused their selection for the RIF.") with Pls.' Sur-Reply at 2 ("As a threshold matter, Plaintiffs argue not that

19. The United States Court of Appeals for the Seventh Circuit has also stated that a district court "adequately considered and rejected the testimony of Dr. Michael Campion, who stated that the subjective decision-making process used provided the 'perfect atmosphere' for age stereotyping." *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1032 n.4 (7th Cir. 1998).

[Dr.] Campion's opinions are relevant to causation, but rather, that they are relevant in rebutting PGW's RFOA defense."). Nor does the Court consider Dr. Campion's opinion particularly reliable; he reviewed deposition excerpts selected by and provided to him by counsel for Plaintiffs and applied those factual snippets to an untested hypothesis. *See* Dep. of Campion at 92-93, 146-48 ECF No. 382-5; *accord supra* at 14. As with Dr. Greenwald, Dr. Campion may be well-respected in this particular field, "but if he cannot explain how his conclusions satisfy Rule 702's requirements, then he is not entitled to give expert testimony." *E.E.O.C.*, 2010 WL 3466370, at *15. Accordingly, the Court finds that Dr. Campion's report on "reasonable HR practices" does not meet the requirements of Rule 702, and therefore, his testimony regarding same will be barred.

C. David Duffus (Purported Rebuttal Expert)

David M. Duffus, CPA/ABV/CFF, CFE is a Partner in the Pittsburgh office of ParenteBeard LLC. Prior to this position, Mr. Duffus served as the President of Duffus & Associates (2003-2004), Senior Mangager at Sisterson & Company (2001-2003), Senior Manager, Financial Advisory Services at PricewaterhouseCoopers LLP (1992-1994, 1995-2011), Senior Associate at Linduist, Avey, McDonald, Baskerville (1994-1995), and Corporate Credit Analyst at Meridian Bank (1989-1991). Since 1992, Mr. Duffus "has specialized in working on complex litigation services, forensic accounting and valuation services assignments for businesses ranging from start-up entities to Fortune 100 companies." Duffus Report at 11, ECF No. 391-5. According to Mr. Duffus, "[h]is current responsibilities entail managing the firm's Forensic, Litigation & Valuation Services practice in Pittsburgh, where he oversees assignment planning, supervision of staff, performing analyses, discovery assistance, and expert testimony." *Id.*

Mr. Duffus has been retained by Plaintiffs to provide his expert opinion in this case and rebut PGW's certified expert in turnaround and restructuring practices, Thomas S. O'Donoghue, Jr. who presently serves as a Principal of Deloitte Financial Advisory Services LLP in Chicago, IL.

The timing of the competing expert reports is a core issue of the present dispute. Importantly, opening expert reports were due on or before May 10, 2013 and rebuttals thereto were due on or before May 30, 2013. *See* Revised Sch. Order, ECF No. 258; May 10, 2013 Text Order.

Mr. O'Donoghue submitted his expert report on May 10, 2013 in which he analyzes certain aspects of PGW's restructuring activities.[20] *See* Report of O'Donoghue, ECF No. 391. PGW also presented fact and opinion testimony of Scott Lyons, its Chief Financial Officer and James Wiggins, the Chairman of its Board and Chief Executive Officer, both of whom testified about the conditions of the automotive industry in 2008 and 2009, the circumstances of PGW during that time and the financial performance of the company.

Mr. Duffus also submitted an expert report on May 10, 2013, providing "an analysis of the financial damages that ha[d] been claimed by" the then-Plaintiffs. Report of Duffus at 2, ECF No. 391-3. Moreover, as Mr. Duffus stated in his report, "[t]he objective of [his] analysis [wa]s to determine the extent of economic damages accruing to the Class Members as a result of their alleged wrongful termination." *Id.*

Mr. Duffus submitted two additional expert reports on June 6, 2013. As detailed by Mr. Duffus, the first "report outlines [his] observations and opinions regarding Mr. O'Donoghue's

20. In Mr. O'Donoghue's opinion, PGW management approached the "evaluation of the business, development of turnaround strategies, and implementation of actions in a proactive, intentional manner using the best available information to improve the underlying business. As part of his analysis, Mr. O'Donoghue discusses the market dynamics of the automotive industry as well as the overall decline in the U.S. economy, often referred to as the "Great Recession."

Report," ECF No. 391-4 at 2, while the second report outlines his observations and opinions after having reviewed the expert disclosures of Mr. Lyons and Mr. Wiggins, ECF No. 391-5 at 2. In sum, Mr. Duffus concluded that "(1) Mr. O'Donoghue's analyses, and ultimately his opinions, have an overly narrow scope and ignore key information that is relevant to this matter" and the "opinions set forth in the O'Donoghue Report are based upon incomplete analyses that render his opinions unreliable," ECF No. 391-4 at 15; and (2) that "any expert opinions provided by either Mr. Lyons or Mr. Wiggins suffer from a lack of independence, integrity, and objectivity, thereby rendering the purported expert opinions unreliable," ECF No. 391-5 at 7. Mr. Duffus also concluded "that the disclosures offered with respect to the proposed testimony of Mr. Lyons and Mr. Wiggins are overly broad and lack specificity with respect to the opinions that each holds, and fail to identify in any level of specificity the documents, other information, principals, methodologies and approaches used by each to develop their purported expert opinions." ECF No. 391-5 at 7.

PGW now seeks to bar the purported rebuttal expert opinion of Mr. Duffus due primarily to the late submission by Plaintiffs' counsel and based on its contents being "new, affirmative matter." In the alternative, PGW submits that "at a minimum, [Mr. Duffus' expert reports] should be limited to a rebuttal case[,] and PGW should be given leave to respond." Def.'s Br. at 6, n.5, ECF No. 383; Def.'s Reply at 3, n.1, ECF No. 416. For the reasons that follow, the Court will adopt this latter approach.

PGW's squabbles regarding the untimeliness and affirmative nature of Mr. Duffus' purported rebuttal reports elevates form over substance and does little to advance this five-year-old case. Although the Court certainly does not countenance late submissions it is reluctant to resolve a critical issue based on a procedural technicality rather than the merits of the claims.

Regarding the substantive aspects of PGW's motion—*i.e.*, its attacks on Mr. Duffus' qualifications, credibility, methodology, *etc.*—the Court finds that they too are without merit. Mr. Duffus is not unqualified as PGW repeatedly suggests based on snippets of his deposition in which he reiterates that he is not a "restructuring expert" or "turnaround guy." Plaintiffs offer Mr. Duffus to rebut PGW's RFOA defense—the 2008-2009 economic downturn and its financial condition—rather than to testify about manner in which the RIF was conducted. Mr. Duffus has recently been qualified to render an expert opinion on similar matters by a member of the United States Court of Appeals for the Third Circuit, presiding over a trial in the Western District of Pennsylvania. *See U.S. Fire Ins. Co. v. Kelman Bottles LLC*, No. 11CV0891, 2014 WL 3890355, at *5 (W.D. Pa. Aug. 8, 2014). As Judge Fisher stated:

> To the extent that Belack and Duffus will testify about Kelman's financial condition during the time period leading up to March 15, 2011 based upon financial records and other documentation that they have reviewed, that testimony will be permitted. Such testimony may include the opinion that Kelman was in financial distress during that time period. The Court notes that Belack and Duffus' backgrounds as certified public accountants qualifies them to testify about Kelman's financial condition, particularly where their testimony is based upon financial records that they have reviewed and incorporated in their expert reports. Such testimony is therefore sufficiently based in fact to meet the standard set forth in Rule 702.

Id. The Court finds no legitimate reason to stray from that ruling. Additionally, the Court is not persuaded by PGW's repeated suggestion that Mr. Duffus' qualifications are to be measured solely against those of Mr. Donoghue. In essence, PGW asks this Court to pronounce that less qualified means unqualified. The Court declines to do so.

The Court also cannot agree with PGW's attacks on the reliability of Mr. Duffus' opinion or his methodology. PGW cherry-picks aspects of Mr. Duffus' rebuttal of O'Donoghue with which it disagrees—*i.e.*, his discussion of the Platinum Equity offer, the strategies of private equity firms, and PGW's post-RIF financials—and claims that Mr. Duffus' entire report is

unreliable. Once again, disagreement between experts about the scope of a financial analysis is not a proper basis to grant a *Daubert* motion. To the extent that Mr. Duffus opines on matters that this Court has already ruled to be irrelevant, PGW may submit a motion in limine to limit his testimony at the appropriate time. *See, e.g.*, *Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-CV-1283, 2014 WL 1317595, at *21 (W.D. Pa. Mar. 31, 2014) ("Plaintiffs may not, however, include irrelevant averments regarding KKR or Kohlberg," such as "'19. Kohlberg is a Chicago-based private equity firm with $8.0 billion in assets. It was founded by Jerome Kohlberg, Jr., the investment banker who is the son of one of the founders of KKR (Kohlberg, Kravis and Roberts), the leveraged buy-out firm notorious for its controversial practices involving downsizing of companies acquired by it in the junk-bond era. Those traditions established by KKR continued at Kohlberg.'") (quoting Pls.' Proposed Sec. Am. Compl., ECF No. 299–1 at 4, ¶¶ 19, 20).

Finally, the remainder of the motion—its Rule 404(b) challenges to Mr. Duffus' commentary on corporate culture and his apparent personal attacks on Mr. Wiggins and Mr. Lyons—are also more appropriate for pre-trial motions in limine by PGW. At this time, however, the Court will specifically limit the testimony of Mr. Duffus regarding Mr. O'Donoghue, Mr. Wiggins and Mr. Lyons to rebuttal and grant PGW leave to respond. Plaintiffs untimely submitted their rebuttal reports, which deprived PGW of the opportunity to reply. The Court will issue a scheduling order after it rules on the pending motions for summary judgment, assuming they are not granted. Accordingly, the motion to bar the rebuttal expert opinion of Mr. Duffus will be granted in part and denied in part.

IV. Conclusion

For the reasons hereinabove stated, the Court will grant PGW's motions to bar the testimony of Dr. Greenwald and Dr. Campion; and grant in part and deny in part its motion to bar the rebuttal expert reports of Mr. Duffus. An appropriate Order follows.

McVerry, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and DAVID MEIXELSBERGER,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 13th day of July, 2015, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that as follows:

(1) DEFENDANT'S RENEWED MOTION TO BAR PROPOSED EXPERT OPINION OF ANTHONY G. GREENWALD RELATED TO PURPORTED IMPLICIT SOCIAL BIAS (ECF No. 380) is **GRANTED**;

(2) DEFENDANT'S RENEWED POST-DECERTIFICATION MOTION TO BAR DR. MICHAEL CAMPION'S STATISTICAL ANALYSIS (ECF No. 381) is **GRANTED**;

(3) DEFENDANT'S RENEWED MOTION TO BAR DR. CAMPION'S EXPERT OPINION ON REASONABLE HUMAN RESOURCE PRACTICES (ECF No. 382) is **GRANTED**; and

(4) DEFENDANT'S MOTION TO BAR PURPORTED REBUTTAL EXPERT OPINION OF DAVID DUFFUS (ECF No. 383) is **GRANTED IN PART AND DENIED IN PART**, and the Court will limit the testimony of Mr. Duffus regarding Mr. O'Donoghue, Mr. Wiggins and Mr. Lyons to rebuttal and permit PGW leave to respond, with a scheduling order to issue after the Court rules on the pending motions for summary judgment.

BY THE COURT:

s/Terrence F. McVerry
Senior United States District Judge

cc: All counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and DAVID MEIXELSBERGER,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF COURT

Pending before the Court are a MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' INDIVIDUAL DISPARATE TREATMENT CLAIMS (ECF No. 372); a MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' INDIVIDUAL DISPARATE IMPACT CLAIMS (ECF No. 374); a MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF KARLO'S AND PLAINTIFF MCLURE'S RETALIATION CLAIMS (ECF No. 377); and a COMBINED MOTION TO STRIKE UNSUPPORTED FACTS AND DEEM IMPROPERLY CONTESTED FACTS ADMITTED (ECF No. 417), filed by Defendant Pittsburgh Glass Works, LCC ("PGW"). The issues have been fully-briefed by Plaintiffs Rudolph A. Karlo, Mark K. McLure, William S. Cunningham, Jeffrey Marietti, and David Meixelsberger and Defendant PGW in their memoranda (ECF Nos. 373, 375, 378, 386, 387, 396, 400, 401, 408, 409, 411, 418, 422, 424, 425, 426). Also, the factual record has been thoroughly developed via their respective Concise Statements of Material Facts ("CSMF"), Responsive/Counter Statements of Facts ("RSOF"/"Counter-CSMF"), appendices and exhibits

(ECF Nos. 376, 379, 388, 389, 390, 397, 398, 402, 403, 404, 405, 410, 412).[1] Accordingly, the motions are ripe for disposition.

I. Background[2]

A. Factual Background

The following background is taken from the Court's independent review of the motions for summary judgment, the filings in support and opposition thereto, and the record as a whole.

1. The parties filed one set of Concise Statements of Material Facts and Responsive/Counter Statements of Facts with regard to the disparate treatment and disparate impact claims and another set with regard to the retaliation claims. The Court will distinguish between these filings where appropriate.

2. PGW moves the Court to strike unsupported facts and deem improperly contested facts admitted based on Plaintiffs' noncompliance with Local Civil Rule of Court 56, specifically their failure to support their statements and denials with citations to the record. For example, in numerous instances, Plaintiffs set forth a boilerplate objection, fail to include any citation to the record as mandated by the Local Civil Rules of Court, and incorporate by reference "general objection no. 2," which states as follows

> In particular, given even a modicum of scrutiny, Defendant's "undisputed" facts are, for the most part, impermissible suppositions and inferences based upon the self-serving testimony of Defendant defense [*sic*] witnesses, which should be disregarded even if uncontradicted to the extent that the jury is not required to believe them pursuant to *Hill v. City of Scranton*, 411 F.3d 118, 129 n.16 (3d Cir. 2005) (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000)).

Pls.' RSOF to Def.'s Suppl. CSMF at 2, ECF No. 404 (disparate treatment and disparate impact claims);; *see also*; Pls.' RSOF at 2, ECF No. 398 (retaliation claims); Pls.' RSOF re Def.'s Mot. for Decert. at 2, ECF No. 403 (disparate treatment and disparate impact claims). Elsewhere, Plaintiffs simply cite to their Complaint to support various paragraphs in their Counter-CSMF. *See, e.g.*, Pls.' Counter-CSMF at 1-4, ECF No. 402 (disparate treatment and disparate impact claims). To the Plaintiffs, "[n]othing about these paragraphs should impede the Court in deciding the pending Motions for Summary Judgment," for "[they] are in compliance with the applicable rules substantially (if not completely)." Pls.' Br. in Opp. at 4, ECF No. 418. The Court has a different view. To be sure, the Local Rules are not suggestions that may be disregarded at counsel's whim or convenience; they instead represent mandatory requirements which establish a fair and level playing field for all parties. *See* LCvR 56.B.1. ("A party *must* cite to a particular pleading, deposition, answer to interrogatory, admission on file or other part of the record supporting the party's statement, acceptance, or denial of the material fact."); LCvR 56.C.1.b ("[T]he opposing party shall file . . . A separately filed concise statement, which responds to each numbered paragraph in the moving party's Concise Statement of Material Facts by: . . . setting forth the basis for the denial if any fact contained in the moving party's Concise Statement of Material Facts is not admitted in its entirety (as to whether it is undisputed or material), *with appropriate reference to the record* (See LCvR 56.B.1 for instructions regarding format and annotation)) (emphasis added); *see also Bethea v. Roizman*, No. CIV. 11-254 JBS/JS, 2012 WL 4490759, at *7 (D.N.J. Sept. 27, 2012) ("Merely citing to the pleadings is insufficient to support a motion for summary judgment"). Be that as it may, the Court is reluctant to resolve the motions for summary judgment based on a procedural technicality rather than merits of the claims, and therefore, it will deny PGW's motion. Accordingly, the Court has conducted an independent review of the record and has included those facts that are material, supported by the evidence and otherwise admissible at trial.

As the law requires, all disputed facts and inferences are resolved in favor of Plaintiffs, the non-moving parties.

1. The Formation of PGW

PGW was formed on October 1, 2008 from the auto-glass assets of PPG Industries, Inc. ("PPG"). PPG initially retained a forty-percent ownership in PGW; Kohlberg & Company ("Kohlberg"), a private equity firm, owned the remaining sixty-percent and later acquired the remainder of PPG's interest in the venture. James Wiggins, a Kohlberg principal, became Chairman and CEO of PGW.

One of PGW's core businesses is the production of automotive glass for car and truck manufacturers as an original equipment manufacturer ("OEM"), for which it maintains a Manufacturing Glass Technology Department ("Manufacturing Technology") in Harmarville, Pennsylvania where the five Plaintiffs were employed. Aside from OEM, PGW consists of GTS Services, a software business ("GTS"); PGW Auto Glass ("AG"), an automotive-replacement-glass distribution business ("ARG"); LYNX Services, an insurance claims administrator ("LYNX"); and Aquapel, a glass treatment supplier. At the corporate level in Pittsburgh, Pennsylvania, PGW's businesses share departments for finance, IT, and Human Resources, functions previously staffed by PPG and provided to PGW by contract during a transition period.

2. The Decline of the Automobile Industry

Around the time that PGW was formed, General Motors, Ford, and Chrysler (the "Big Three" automobile manufacturers) appeared before the United States Congress to request bailout funds. Given the direction of the industry and economic forecast, PGW took several steps to combat deteriorating sales: it closed two manufacturing facilities in Canada and another in Evart, Michigan; consolidated distribution systems; identified about $100–$200 million of necessary

capital expenditures; reconfigured its distribution strategy; commenced process improvement actions; and undertook supply chain optimization. PGW also terminated the employment of roughly ten to twelve percent of its salaried workforce in early December 2008. The decision for this reduction in force ("RIF") was made by Wiggins in consultation with his leadership team, forty-five to fifty persons in senior management positions at PGW. The decisions regarding the positions to eliminate were, however, left to the discretion of the individual directors who were assigned a targeted percentage by which they were directed to reduce their workforce.

PGW undertook several additional measures in early 2009 to meet the challenges of the lower demand: it put hourly employees on temporary layoff; it operated its largest plant (Evansville) for only four of the thirteen weeks in the first quarter; it trained leadership at each plant in Lean Six Sigma principles; it suspended merit salary increases; it implemented a hiring freeze except for critical positions; it suspended a 401k matching contribution program and bonuses; and reduced salaries company-wide.

3. The March 2009 RIF

Kevin Cooney became Acting HR Director for PGW after the former Vice President of Human Resources resigned from the company sometime in late–2008 or early–2009.[3] Around mid-February 2009, Wiggins asked Cooney to take a "fresh look" at the organization and formulate a reorganization plan.

Cooney enlisted the assistance of a consultant, Ed Dunn, an organizational specialist to make recommendations regarding restructuring of the company into a more lean and effective organization. Dunn later prepared an "Organization Assessment" presentation and a summary of his observations/recommendations, which Cooney reviewed before finalization. In his

3. Robert McCullough permanently filled the position in September 2009. At PGW, McCullough (an attorney) performed certain legal duties that would normally have been carried out by general counsel in labor and employment matters.

memorandum, Dunn noted that "[m]arket conditions continue to deteriorate and more cost reductions are required as soon as possible[,] and this would include certain organization changes;" that "[i]t would not be efficient or effective at this time to undertake a formal or time-consuming organization study or process;" and that "[i]nstead, the Executive Team . . . would do an ASAP organization assessment and identify cost-saving organization structure changes to be made that are in addition to the changes and reductions already identified." Pls.' Counter-CSMF, App'x Ex. L at 1, ECF No. 405-12 (disparate treatment and disparate impact claims); *see also id.* ("The mindset needs to be: Be bold and aggressive. Risk going too far, too fast . . . verses the opposite. We can revisit and re-load as needed when conditions and results improve.") (ellipses in original). These suggestions were not binding on PGW, and Dunn had no role in the decision-making process or implementation of later reductions.

By early-March 2009, PGW decided to conduct another RIF. Although this decision was made by Wiggins and upper management, the employees were selected for termination by their respective managers and directors throughout the company's various operating units. PGW did not specifically train its directors with regard to the RIF, employ any written guidelines or policies as to how they were to conduct the RIF, conduct any disparate impact analysis of the RIF, review the prospective RIF terminees with in-house or outside counsel, or document why any particular employee was selected for inclusion in the RIF.[4] The upper management instead issued another generalized directive for each department to cut a targeted percentage from their

4. According to Plaintiffs, PPG had in place a company-wide system for conducting RIFs among its salaried employees, which PGW did not follow in conducting the March 2009 RIF. Citing to the deposition transcripts of Diana Jarden and Kevin Cooney, Plaintiffs further contend that PGW followed PPG's RIF guidelines three months earlier, in December 2008. PGW objects to the purported RIF guidelines as an unauthenticated third-party document and highlights that it is dated October 30, 2000, marked CONFIDENTIAL, and appears to be from a production in an unrelated action involving PPG. *See* Pls.' Counter-CSMF, App'x Ex. M, ECF No. 405-13 (disparate treatment and disparate impact claims). PPG also objects to Plaintiffs' suggestion that PGW followed the RIF guidelines in December 2008 because Plaintiffs fail to include the cited deposition transcripts in the record and otherwise misstate the cited testimony. Either way, the Court does not consider this disputed fact—whether PGW used the RIF guidelines of its former parent company in March 2009—as material.

budget, a downsizing with which each unit director had to comply. *See* Dep. of Cooney, July 26, 2011 at 40:12-14, ECF No. 405-9 ("[I]t became clear that the target was going to be about a 30-percent reduction in jobs, not people, but jobs."). Thus, the unit directors in the company were afforded broad discretion in determining which of their reports to select for the RIF.

On March 31, 2009, PGW terminated approximately one-hundred salaried employees, affecting over forty locations and/or divisions of the company. Moreover, the RIF impacted almost every part of the company with the widespread job cuts: forty-four from ARG at over twenty locations; twenty-four from OEM plus seven from Manufacturing Technology, one from Satellite Engineering, and two from Enterprise Excellence; thirteen from ARG Truckload & Services; eight from the company's sales organization; and one from New Product Development. PGW also closed the Evart, Michigan plant on March 31, 2009, leading to the elimination of eighteen salaried employees.

As part of the RIF, a PGW Human Resources employee with a long tenure at PPG, Diana Jaden, was tasked by Cooney to consolidate data from various locations and unit managers, calculate the amount of severance, identify those who were impacted, and prepare paperwork for the exit interviews. The paperwork included a cover letter that explained that the individual was being terminated and outlined the severance being offered; a "Separation Agreement and Release" that employees could sign to receive certain benefits in exchange for waiving their right to bring a claim against PGW; and two multi-page documents with Decisional Unit Matrices ("DUM(s)") per the Older Workers' Benefit Protection Act ("OWBPA").

4. The Manufacturing Glass Technology Department

Gary Cannon was the Director of Manufacturing Technology in March 2009. Within this group, Jim Schwartz supervised Cunningham; David Perry supervised Marietti; Phillip Sturman,

supervised Karlo and Meixelsberger; and Julie Bernas, supervised McLure. Otherwise, Schwartz, Perry, Sturman, and Bernas were all Cannon's direct reports.

Before the RIF, Manufacturing Technology was comprised of twenty-seven salaried associates. Of those employees, Cannon selected six for termination in the March 2009 RIF, which included Karlo, McLure, Cunningham, Marietti and Meixelsberger.

i. Karlo

Karlo began working for PPG in its automotive glass division in 1978 as a Construction and Maintenance Research Specialist II. Throughout his thirty-year career, he received several promotions: to Senior Technical Assistant in 1990, to Engineering Specialist in 1995, and finally to Senior Engineering Specialist in 2001, a position he maintained to his termination. His job duties included working in and later supervising the "mold shop" in which tools for bending glass are built. Karlo also helped to develop eight (8) shared patents, and he received commendations, pay increases, and bonuses, as well as positive reviews in his annual employee evaluation process, referred to as the Performance & Learning Plan ("P & LP"). Compliance with the P & LP process waned somewhat at PPG in the three years before the RIF, particularly as the sale of its glass assets drew near. PGW did not reinstitute the P & LP evaluation process, but earlier documents dating back to 1992 demonstrate that Karlo "meets" or "meets +" expectations or "Exceeds Requirements."

ii. McLure

McLure started his career with PPG as a contractor at the Glass Research & Technology Laboratory ("GRTL") in 1975 and became a full-time employee the following year. McLure later worked at PPG's Fiberglass Research facility in O'Hara Township during which he was promoted to Senior Technician in 1990. PPG closed that facility in 1999 and slated McLure for

a transfer to North Carolina. McLure instead pursued another opportunity within PPG at its Harmarville facility where he eventually became a Senior Technical Assistant. As an employee in this division, McLure was responsible for conducting validation testing, traveling to satellite facilities, and providing customer support and technical services at the facilities. Throughout his thirty-four-year career, McLure received positive P & LP evaluations, regular salary increases, bonuses and commendations and worked as a named contributor on a patent developed for PPG.

iii. Cunningham

Cunningham joined PPG's Glass Research & Development Center in Harmarville as a contract employee and became a full-time employee in 1996. The majority of his work effort was initially devoted to the Laminated Glass Project on which he worked from its validation study through testing until the final product, known as Sungate Coated Laminate, was ready for manufacture at PPG's facilities in Crestline and Tipton. Based on his contributions to this project, Cunningham was promoted in 2004 to Senior Technical Assistant in the OEM New Product & Process Development Group. His job duties in this capacity were to preform measurements of glass, process and variables; analyze the data; and compile reports. Throughout his career, Cunningham received positive P & LP evaluations, annual salary increases, and merit bonuses.

iv. Marietti

Marietti began his career at PPG as a contract employee in the construction and maintenance shop at the Harmarville automotive glass facility in 1984, and he transferred to the Mold Shop in 1990. In 1994, Marietti became a full-time PPG employee and became a Construction & Maintenance ("C & M") Research Specialist II. Marietti was promoted in 1996 to C & M Research Specialist I and again in 2002 to Senior C & M Specialist Tooling &

Instrumentation in the OEM Technology Transfer Group. Although his job title remained the same, Marietti was given greater responsibility in 2003 when he began to perform the job functions of a Technical Assistant, a role in which he continued until the RIF. His job duties were to perform measurements of glass, process variables; analyze the data; and compile reports. Throughout his career, Marietti received positive P & LP evaluations.

v. Meixelsberger

Meixelsberger started at PPG in 1987 and developed into an industry-leader in the windshield bending process over the next twenty-two years. Throughout his career, Meixelsberger received positive P & LP reviews and commendations, including having been hand-selected by Cannon to serve in a specialized manufacturing group comprised of five employees. His last position was as Senior Technical Assistant Windshield Bending in which his duties included working on windshield on the bending lehr, developing sample parts for customers, and troubleshooting in the field where his specialized services were in high demand.

5. The Termination of Plaintiffs

On March 31, 2009 Cannon held a meeting with the Plaintiffs and their respective supervisors to inform them of his decision. Throughout, Cannon apparently read from prepared notes (also referred to as the "script") and scrambled to collect the correct paperwork to distribute with their severance packets. Ultimately, Plaintiffs were provided a package of documents, which included an incomplete DUM.

After the meeting, Karlo spoke privately with Cannon to inquire into why he was selected for termination, during which Cannon allegedly made comments regarding Karlo's "adaptability." As Karlo later testified:

> I also feel that at the end of our meeting, in the conclusion of our termination meeting, I asked Gary Cannon if I could have a word with him, and he said, yes,

> you can, and we went out in the hallway and I asked him why I was being let go. Gary says, well, I don't see you -- we don't see you moving forward with the company as it moves forward, and he proceeds to say -- I'm trying to think his wording, how he said that -- younger employees -- he said, the employees that are left are more adaptable than you, which really upset me, and the first thing that crossed my mind is yeah, what he's referring to is probably the younger employees, they're more adaptable moving forward with the new company.

Dep. of Karlo, July 11, 2011 at 12:21-25–13:1-4, ECF No. 405-1; *see also* Dep. of Karlo, July 17, 2012 at 166:20-24, ECF No. 410-2 ("Well, exactly what Gary said to me when I talked to him in the hallway about, you know, he didn't see me moving forward and, you know, there's people left that's [*sic*] more adaptable. You know, this went on all the time.").[5] Cannon does not recall the specifics of this conversation. *See* Dep. of Cannon, Jan. 31, 2012 at 70 ("I may have used the word adaptable. I can't recall. If I used the word adaptable, the choice was that I had two gentlemen, Mr. Lampman and Mr. Nolan, who were both older and had engineering degrees and had breadth of process knowledge that I felt were greater than what Rudy [Karlo] had at the time.").

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5. Counsel for Plaintiffs' interpretation and use of Cannon's alleged comments about Karlo's so-called "adaptability" has been somewhat of a moving target. In his EEOC Charge, Karlo stated as follows: "We went out in the hall and I asked Gary why I was chosen and he simply said, 'I didn't fit in to the company's future' as they went forward and the people that were left were 'more adaptable than me.'" Pls.' Compl., Ex. A at 16, ECF No. 1-3. In their Second Amended Complaint, Plaintiffs state: "After his termination session, Karlo questioned his supervisor, Gary Cannon, why he was being let go. Cannon's response was that the retained employees were more 'adaptable' than him and that 'we don't see you moving forward with the company as it moves forward.'" Pls.' Sec. Am. Compl. at 8, ECF No. 344. More recently, however, in their summary judgment filings, Plaintiffs (re)-interpret Karlo's deposition testimony regarding his conversation with Cannon to mean that PGW "was seeking to retain employees who were considered to be younger and more 'adaptable' than him." Pls.' Counter-CSMF at 4, ECF No. 402 (disparate treatment and disparate impact claims). And in pursuing their narrative, Plaintiffs manufacture this statement by selectively quoting the transcript of Karlo's deposition testimony (and distort its meaning in doing so)—a tactic that does not create a genuine dispute of material fact. *See* Pls.' RSOF re Def.'s Mot. for Decert. at 16, ECF No. 403 (disparate treatment and disparate impact claims) ("Additionally, Karlo testified that Cannon specifically admitted to that him age was the criteria he used in selecting employees for termination: 'we don't see you moving forward the company as it moves forward, . . . – younger employees . . . that are left are more adaptable . . . .'") (ellipses in original); *see also* Pls.' Br. in Opp. at 3, ECF No. 401 ("By telling Karlo that he was selected for the RIF because he believed that younger employees were more adaptable, Cannon—the decision maker with respect to all Plaintiffs—was admitting that he selected Karlo for the RIF because of his age, direct evidence of illegal discrimination under the ADEA.") (emphasis in original) (citing Pls.' Counter-CSMF at 4, ¶¶ 19-20, ECF No. 402 (disparate treatment and disparate impact claims)); Pls.' Surreply at 2, ECF No. 425 ("Simply put, Karlo said that he was told by Cannon that younger employees were retained in the RIF because they were viewed as more adaptable."). In its effort to clarify Karlo's statement, PGW has submitted a video clip of the relevant testimony from his deposition. *See* Def.'s Reply Br. at 3, ECF No. 408.

For his part, Cannon contends that he objectively evaluated the group as a whole and independently decided to release certain employees based on the needs of his department, insisting that he never considered age in the process.[6] *See generally* Decl. of Cannon at 2, ECF No. 290-38, Dep. of Cannon, Jan. 31, 2012 at 49, ECF No. 290-35. Moreover, Cannon decided that Karlo could be terminated allegedly because most of his work was already being outsourced and the remainder of his ongoing tasks could be handled by Irv Wilson, an engineer in Manufacturing Technology, and John Bender, a technician in Manufacturing Technology with an expertise in instrumentation. *See generally* PowerPoint Presentation – Operations Organization Restructuring March 2009, Revised 3/25/09 at 35, 37 ECF No. 290-7 (depicting the organizational structure of Manufacturing Technology before and after the RIF). Cannon allegedly applied the same rationale—*i.e.*, Wilson and Bender could absorb the work—to McLure and to Meixelsberger. In addition, Cannon decided to include Cunningham and Marietti in the RIF allegedly because their ongoing tasks could be absorbed by engineers, Mike Fecik and Jim Schwartz along with Tom Cleary. *See generally id.*

As of the date of their (initial) terminations, Karlo was 51.36 years old, McLure was 54.83 years old, Cunningham was 52.58 years old, Marietti was 55.33 years old, and Meixelsberger was 52.73 years old. Irv Wilson (age 59.41) and John Bender (age 54.15) are older than (or nearly the same age as) Karlo, McLure, and Meixelsberger. Mike Fecik (age 57.73) and Tom Cleary (age 59.62) are older than Cunningham and Marietti; Jim Schwartz (age 51.24) is, respectively, one and four years their junior.

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6. According to Cannon, he did not receive any specific direction from upper management regarding how he was to arrive at his decisions or any assistance from other PGW employees with the exception of Jarden who only put together the severance packages for the terminated individuals. Cannon also did not use a forced ranking for his department which was previously compiled with the support of his direct reports, some of whom supervised the plaintiffs. Based on those rankings, Cannon testified that two other employees ranked lower than some of the plaintiffs, but that they were retained based on their specialized skills and knowledge which he deemed vital to his group.

Plaintiffs all point to a single, younger employee who was retained, Steve Horcicak (age 36.49), as the individual who (in their view) should be used as a comparator for their claims. According to Cannon, Horcicak was retained allegedly because he was the sole employee with an expertise in the area of fracture mechanics.

6. The Return of Karlo and McLure to PGW

Following the RIF, Karlo and McLure were engaged to work through a third-party contractor to work at PGW's facilities in Creighton and Harmarville. The facts regarding their respective experiences are as follows:

i. Karlo

On September 11, 2009, John Felker, HR Manager for PGW's Creighton facility and direct report to plant manager Craig Barnette, contacted Karlo to gauge his interest in a "temporary maintenance supervisor" contract position. After some negotiations regarding the hourly rate of his compensation, Karlo accepted the position.

Following their discussions, Felker arranged for Karlo to be brought on board through an outside, third-party contractor, Belcan Corporation, in its Tech Services Division.[7] Kathryn Robinson, a Belcan employee in its Pittsburgh, PA office, thereafter provided Karlo with employment documents, including a W-4 form, an I-9 form, the Employment Handbook, a Drug and Alcohol Policy and Agreement, a Confidential and Intellectual Property Agreement, an Accident Report form, a Direct Deposit Enrollment form, instructions regarding time cards and an Acknowledgement and Agreement Form, which specified that his employment was "at-will"

7. Non-party Belcan supplied PGW with "temporary personnel for the performance of certain services at/for certain of [its] facilities" pursuant to a written agreement. Def.'s App'x Ex. 6 at 3, ECF No. 379-7 (retaliation claims). The "Agreement for Temporary Personnel," effective as of January 1, 2009, provided that the "Supplier's relationship with the Buyer under th[eir] Agreement is that of an independent contractor," that the "Supplier shall be solely responsible for its employees, subcontractors and agents and for their benefits, contributions and taxes" and that Supplier's employees shall not be entitled to any of Buyer's employee benefits, including any group insurance, pension and benefit plans, nor shall any benefits be made available to Supplier." *Id.* at 16.

with Belcan. Aside from completing this paperwork, Karlo seemingly had no further contract with Belcan during the course of his employment at PGW's Creighton facility. Nevertheless, Belcan received from Karlo a weekly timesheet that was approved by PGW, withheld his income taxes, paid his compensation, and provided him with employee benefits.

Karlo commenced performing his prescribed serviced at PGW's Creighton facility on September 17, 2009, reporting to PGW Maintenance Manager, Bill Easterlin. Following a three-week orientation program during which he became acquainted with the glass bending lines, maintenance personnel, and the computer program used to track work orders, Karlo became the shift maintenance supervisor for Crew C on the PGW windshield production lines. In that capacity, Karlo oversaw four PGW maintenance employees, assigned work orders, and tracked equipment upkeep and repair. Roughly four months later, Karlo filed a charge of discrimination against PGW with the EEOC on January 22, 2010 related to his termination in the March 31, 2009 RIF.

Around February 1, 2010, Mark Soderberg replaced Barnette as the plant manager of the Creighton facility and implemented a supervisor and crew realignment. As part of the realignment, Karlo became the production supervisor in charge of windshield Line 1 at the plant. As such, he reported to PGW's Line 1 Value Stream Manager, Tom Showers. In his capacity, Karlo's responsibilities included coordinating the production of a marketable windshield, ensuring that the line was properly staffed, and maintaining the equipment and supplies—some of which carried over from his position as a shift maintenance supervisor.[8] From Showers' perspective, Karlo performed his duties in a "thorough and competent fashion." Dep. of

8. According to Showers, the realignment resulted in the elimination of maintenance supervisors, whose duties now "fell under the realm of the production supervisors," leading to enhanced responsibilities for individuals in those positions and, in general, everyone else in the facility due to "the new format." Dep. of Showers at 39, ECF No. 399-5.

Showers at 37, ECF No. 399-5; *see also* Dep. of Soderberg at 31, ECF No. 399-6 ("There was a lot of folks in the plant that felt that Rudy would be a good fit [to fill the supervisory opening].").

Sometime after July 1, 2010, Bob Pinchok, PGW's Line 2 Value Stream Manager at Creighton, allegedly approached Karlo following a routine shift meeting and indicated that he wanted to discuss an "issue." As Karlo initially described the interaction:

> A. Well, as you know, there was an EEOC claim filed, form filed, and I'll get right to the gist of it.
>
> When I was finished coming out of the supervisor's office giving information on a shift, Bob Pinchok approach me -- and this is after the EEOC closed our claim.[9] Bob approached me and said I'd like to talk to you. I said, okay. So we're walking up this little hallway there, and Bob said, well, what I'm about to tell you, I'll deny it all the way, arms going up and everything. He said, there's -- you know everybody want to hire you here, he said, but there's an issue hanging out here. I asked Bob, what are you talking about Bob? What's the issue? He said, you know what I'm talking about. There's an issue out there. I'll deny it all the way I ever even talked to you. And I said, is it the EEOC claim? I don't want to know anything about it.
>
> Maybe I'm getting too radical here.
>
> Mr. Fox: No.
>
> A. That's what the mannerisms were. And Bob said, you know, if they go away, you'd probably get -- everybody wants to hire you. All you need to do is talk to Mark Soderberg or John Felker. They're waiting to hear from you. I said, I'll think about it. We parted ways.

Dep. of Karlo, July 11, 2011 at 61-63, ECF No. 399-1.[10] However, Karlo later equivocated on whether there was any explicit mention of the EEOC claim during his conversation with Pinchok, first retracting his statement, *see id.* at 65-69 ("I would like to strike from the record

9. The EEOC issued its Dismissal and Notice of Rights letters on July 1, 2010. *See* Pls.' Compl., Ex. B. ECF No. 1-4.

10. Plaintiffs claim that Pinchok said "that Karlo just needed to make the whole thing go away'" and "indicated that, if Karlo wanted the job at the Creighton facility, Felker, the HR manager, or Soderberg, the plant manager, would be waiting to hear from Karlo and that Karlo 'knew what he had to do.'" Pls.' Counter-CSMF at 9-10, ECF No. 397 (retaliation claims) (quoting Dep. of Karlo, July 11, 2011 at 61:21-64:10; Pls.' Sec. Am. Compl. at 24-25, ¶¶ 125-126, ECF No. 344). Those purported quotations appear nowhere in Karlo's deposition, but are instead lifted from Plaintiffs' Second Amended Complaint.

that I said EEOC."), before returning to his original version of events, *see id.* at 71-72 ("I believe I mentioned the EEOC charge, yes.").

A "few weeks later," Karlo encountered his supervisor, Showers, in the midst of their workday, during which "Tom g[a]ve[ ] [him] a funny look" and asked him if he had spoken with Pinchok. *Id.* at 63. Karlo questioned whether he was referring to "the issue out there," and Showers responded, "yes, but I don't want to know anything about it." *Id.* Showers also asked Karlo if he had "talk[ed] to anybody" (presumably about "the issue"), and Karlo responded that he had not.

During a shift change "a week or so later," Pinchok approached Karlo to escort him to a meeting with Soderberg and Felker.[11] As they walked down the hallway toward Soderberg's office, Pinchok recounted that he had "tr[ied] to tell [Karlo] [about] this a couple weeks back," which Karlo understood to mean "dropping the lawsuit or dropping the EEOC claim, whatever they had in mind." *Id.* at 64.

At the July 12, 2010 meeting, which lasted only minutes, Soderberg allegedly suggested to Karlo that "you know why you're here" and informed him that "[his] services were no longer needed at PGW Creighton." *Id.* at 72. Soderberg also allegedly indicated that "downtown made the decision," without giving any additional information. *Id.* at 73. The record is, however, unclear as to how exactly Karlo's temporary assignment came to an end. *C.f.* Def.'s CSMF at 8, ECF No. 379 ("Mark Soderberg, the manager of Karlo's temporary assignment, made the decision to end Karlo's contract assignment and not to hire him for a non-contract position . . . . Both Soderberg and [Vice President of Human Resources, Robert] McCullough disliked the use

11. The Court recognizes that the timeline of events, as recounted by Karlo, does not "add up" so to speak. That is, Karlo testified that his run-in with Pinchok occurred after the EEOC closed Plaintiffs' claim on July 1, 2010, that his encounter with Showers occurred "a few weeks later," and that his meeting with Soderberg and Felker was "[a] week or so later"—all of which allegedly occurred before his last day on the job on Friday, July 11, 2010. Be that as it may, it is undisputed that this meeting with Soderberg and Felker occurred on July 12, 2012.

of contract supervisors and reasonably believed that hiring permanent, non-contract employees to supervise the hourly workers would be better for PGW."). After his assignment ended, Karlo received over $10,000 in unemployment benefits from Belcan from August through December of 2010.[12]

The same day, PGW brought in on a trial basis three temp-to-permanent production supervisors – Tracy Schaeffer, Raymond Dillard, and Wayne Foley – to replace Karlo, Ed Watson, and Hal Reader – who were filling that position. Among the new hires, Schaeffer left the Creighton facility within weeks, apparently due to its "strong union atmosphere." Dep. of Soderberg at 54, ECF No. 399-6. PGW thereafter posted a job opening on monster.com, which was cross-listed on the website of the Pittsburgh Post-Gazette, for a full-time production supervisor at the Creighton facility. The job posting listed several qualifications required for the position, including "a minimum of three years of manufacturing supervisory experience." Pls.' First Am. Compl., Ex. H, ECF No. 54-8.

Karlo was initially considered for a non-contract supervisor position, but was not hired after Soderberg concluded that he lacked the requisite supervisory experience to fill the role. As Soderberg testified at his deposition,

> The basis was production experience. The plant needed some strong supervisors. There was a need for greater strength in terms of supervision in that plant because of the union atmosphere that was in that plant . . . I felt Rudy did, he did a good job in the production area, or in the maintenance area. He had worked in the production role for -- how many months was it? Five months, maybe. But I honestly felt we needed some new blood, essentially, in the supervisor role.

12. Among their factual allegations, Plaintiffs proffer that "[a] few days after his conversation with Soderberg, Karlo was told by John Bender, a process engineer at PGW, that he was told by Irv Wilson that Wilson had a conversation with David Rayburn, where Rayburn informed Wilson that 'he know [*sic*] about the deal they were trying to make [Karlo] for the issue to go away,' that 'they offered [Karlo] something . . . and [Karlo] didn't accept it, so there's going to be a supervisory changing break.'" Pls.' Counter-CSMF at 12-13, ECF No. 397 (retaliation claims) (quoting Dep. of Karlo, July 11, 2011 at 152-153, ECF No. 399-1) (alterations in original). Not surprisingly, "PGW objects to this statement as inadmissible triple hearsay." Def.'s Resp. to Pls.' Counter-CSMF at 30, ECF No. 412 (retaliation claims) (citation omitted).

Dep. of Soderberg at 24, ECF No. 379-14. According to Plaintiffs, Soderberg's comment regarding "new blood" is a reference to Karlo's age.

Plaintiffs filed their Complaint in this Court on September 29, 2010. On October 1, 2010, glassBYTEs.com, an AGRR and insurance industry news website, published an article online which discussed the federal court filing. McCullough, Soderberg,[13] Showers, and Pinchok all allege that this article was the first instance in which they each learned about the EEOC charge or this litigation in general. At the same time, other PGW employees at the Creighton plant have recounted that rumors of the EEOC charge were "widespread" and that they "heard [through] the grapevine that something like that was going on." Other PGW have similarly reported that "the ongoing legal activities" were "talked about by people in Harmarville fairly often."

ii. McLure

On April 13, 2009, McLure began working for Carol Harris Staffing, LLC, ("Carol Harris"), a third-party employment agency that has provided services to PGW, among other employers. At the request of PPG, Carol Harris placed McLure within its aerospace division at the Glass Research Center in Harmarville, Pennsylvania. According to McLure, PPG's

13. Soderberg's testimony is inconsistent regarding when he learned of the EEOC charges and/or the Complaint. For example, the following exchange occurred at his deposition:

> Q. So you're aware that [Karlo] had instituted some sort of proceeding claiming age discrimination arising from the reduction in force that occurred back in March of 2009, right?
>
> A. My understanding was, yeah, that was what the group of individuals were filing.
>
> Q. And that's what was troubling you. That's what you were referring to earlier, correct?
>
> A. Again, what was troubling to me was the fact that he was working at my plant.
>
> Q. While simultaneously pursuing a claim for age discrimination?
>
> A. Yeah.

Dep. of Soderberg, April 10, 2012 at 18-19, ECF No. ECF No. 399-6.

aerospace division and PGW's automotive division are in the same building in Harmarville, PA and share workspace.

At some point that summer, Mark Bulger, a PGW employee who worked at the Harmarville facility, contacted McLure to inquire as to whether he wanted to preform "seasonal type work," such as model number testing, at PGW to fill the voids that existed in his workweek.[14] After negotiating an hourly rate, McLure indicated his willingness to perform the work and secured the temporary assignment at PGW through Carol Harris. As part of the arrangement, McLure worked three days per week at PGW and two days per week at PPG.

On June 7, 2010, McLure switched his staffing agency from Carol Harris to Belcan at the request of PGW, resulting in an increased hourly rate. As part of this transfer, McLure was required to complete various employment documents, execute agreements and acknowledgements, and submit time sheets to and receive paychecks from the agency. The purchase order agreement between Belcan and PGW specified that McLure's temporary position with PGW was scheduled to end on December 10, 2010 subject to early termination.

At PGW, McLure's work with Bulger included validation testing, sample preparation, and data recording. McLure also supported Peter Dishart and Bruce Bartrug with validation testing, and he assisted Julie Bernas on at least one project as well. By all accounts, McLure completed his various assignments in a competent fashion. Based on that performance, Bartug allegedly indicated his intention to hire McLure as a full-time technician and sent him to fork truck training that summer at the direction of Dishart. Even so, Bartug also allegedly suggested to McLure that he would only be hired "if it wasn't for this lawsuit" and/or "the situation" (it is

14. PGW conducts model number testing, which is "basically breaking glass," on an annual basis to verify that it meets certain thickness, color combination, and vinyl requirements for its tempered and laminated products.

unclear what term Bartug allegedly used). Regardless, PGW never hired anyone for this specific full-time technician position.

In August 2010, McCullough instructed Bulger that he "could no longer use McLure" in a contractor role and similarly informed Dishart that McLure's "temporary employment had to come to an end."[15] McCullough did not provide an explanation to either Bulger or Dishart. McLure was soon informed of this decision, and he pressed Bulger for details. In a series of e-mails later that month, Bulger offered few specifics but assured McLure that the decision was not performance-related, suggesting that there were instead "too many new people down town [*sic*]." Dep. of McLure, Ex. 27, ECF No. 399-14. According to McLure, Bulger later explained that "the contract was completed, that "the work had dried up," and that "the work just went away." When asked by McLure whether the lawsuit led to this decision, Bulger responded that he "could not say" and simply reiterated his explanation(s).

McLure's assignment ended with PGW on September 19, 2010. Afterward, McLure continued working at PPG through Belcan on a temporary basis.

B. Procedural History

The Court has detailed the extensive procedural history of this litigation in its March 31, 2014 Memorandum Opinion (ECF No. 343 at 18-26) and hereby incorporates that recitation by reference. Since that time, the Court has granted PGW's renewed motions to bar the proposed expert testimony of Anthony G. Greenwald, Ph.D. and Michael Campion, Ph.D. and granted in part its renewed motion to bar the rebuttal expert reports of David Duffus, CPA/ABV/CFF, CFE. At present, three motions for summary judgment are pending before the Court.

15. McCullough's testimony is inconsistent regarding when he learned of the EEOC charges and/or the Complaint. For example, McCullough testified that he did not learn of McLure's involvement in this litigation until the EEOC issued its Dismissal and Notice of Rights letters, even though he had been involved in preparing the response to the EEOC charge.

II. Legal Standard

Summary judgment must be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

To withstand a motion for summary judgment, the nonmoving party must show a genuine dispute of material fact for trial by citing to particular parts of material in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). *See Celotex Corp.*, 477 U.S. at 322 ("[T]he plain language of Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). A dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247–248. *See Matsushita*, 475 U.S. at 586 ("When the moving party has carried its burden under Rule 56[ ], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."); *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) ("To survive summary

judgment, a party must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue.").

The parties must support their position by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," Fed. R. Civ. P. 56(c) (1)(A), or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact," Fed. R. Civ. P. 56(c)(1)(B). In reviewing all of the record evidence submitted, the court must draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

The court is not permitted to weigh evidence or to make credibility determinations at this stage. *Anderson*, 477 U.S. at 255. Those functions are for the jury, not the court. *Id.* The court is thus limited to deciding whether there are any disputed issues and, if so, whether they are both genuine and material. *Id.*

III. Discussion

PGW moves for summary judgement on Plaintiffs' individual disparate treatment and disparate impact claims as well as the retaliation claims brought by Karlo and McLure. The Court will address the motions seriatim.

A. Disparate Treatment

Under the Age Discrimination in Employment Act ("ADEA"), it is "unlawful for an employer to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" when the individual is at least forty (40) years old. 29 U.S.C. § 623(a). Where,

as here, a plaintiff alleges a disparate treatment claim under this section of the ADEA, they "must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141-43, 147 (2000)). In other words, "[a] plaintiff can satisfy that burden in one of two ways—either by demonstrating with direct evidence that age was the 'but-for' cause of the employment action, or by using the *McDonnell Douglas* framework to establish that the employer's proffered reason for the employment action is a mere pretext for unlawful discrimination." *Cellucci v. RBS Citizens, N.A.*, 987 F. Supp. 2d 578, 587 (E.D. Pa. 2013) (citing *Smith v. City of Allentown*, 589 F.3d 684, 691 (3d Cir. 2009)). In this case, Plaintiffs argue that they can satisfy their burden under either method.

1. Direct Evidence

Plaintiffs first argue that Cannon's comments regarding Karlo's "adaptability" constitutes "powerful direct evidence" of age discrimination. Furthermore, Plaintiffs maintain that because Cannon also acted as the decision-maker who selected the remaining Plaintiffs for inclusion in the RIF, a reasonable jury could infer that he applied the same (allegedly) discriminatory selection criteria (*i.e.*, "adaptability") in his decision to terminate McLure, Cunningham, Marietti, and Meixelsberger. The Court cannot agree.

"In an age discrimination case, direct evidence must demonstrate that the decision would not have occurred without improper consideration of age." *Lewis v. Temple Univ. Health Sys.*, No. CIV.A. 13-3527, 2015 WL 1379898, at *9 (E.D. Pa. Mar. 26, 2015) (citing *Gross*, 557 U.S. at 177). Before the Supreme Court's decision in *Gross*, "proving discrimination by direct evidence was a 'high hurdle,' as it required that the evidence 'reveal a sufficient discriminatory

animus' to render any shift in the burden of production 'unnecessary.'" *Cellucci*, 987 F. Supp. 2d at 587 (quoting *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 248 (3d Cir. 2002)). *Gross* went a step further; it "made clear that such burden-shifting is inappropriate in age discrimination cases, and that the burden of persuasion remains with the plaintiff 'even when a plaintiff has produced some evidence that age was one motivating factor in [the] decision.'" *Id.* (quoting *Gross,* 557 U.S. at 180). "The *Gross* holding has therefore altered the direct evidence standard in age discrimination cases in two ways: (1) the plaintiff's direct evidence must do more than 'show that age played some minor role in the decision'—it must show that the decision would not have occurred without improper consideration of age; and (2) the defendant no longer bears the burden of proving that it would have taken the action regardless of age." *Id.* (citing *Kelly v. Moser, Patterson, & Sheridan, LLP,* 348 F. App'x. 746, 749 (3d Cir. 2009)).

Either way, direct evidence of discrimination remains "'evidence which, if believed, would prove the existence of the fact in issue without inference or presumption.'" *Bleistine v. Diocese of Trenton*, 914 F. Supp. 2d 628, 638 (D.N.J. 2012) (quoting *Torre v. Casio, Inc.*, 42 F.3d 825, 829 (3d Cir. 1994)); *see also Garcia v. Newtown Twp.*, 483 F. App'x 697, 704 (3d Cir. 2012) ("Direct evidence may take the form of a workplace policy that is discriminatory on its face, or statements by decision makers that reflect the alleged animus and bear squarely on the adverse employment decision."); *Byrd v. City of Philadelphia*, No. CIV.A. 12-4520, 2014 WL 5780825, at *4 (E.D. Pa. Nov. 6, 2014) (describing direct evidence as the "proverbial 'smoking gun'") (quoting *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994)). In contrast, "evidence is not direct 'where the trier of fact must infer the discrimination on the basis of age from an employer's remarks.'" *Bleistine*, 914 F. Supp. 2d at 638 quoting *Torre*, 42 F.3d at 829). "As a practical matter, 'only rarely will a plaintiff have direct evidence of discrimination.'"

Garcia, 483 F. App'x at 704 (quoting *Geraci v. Moody-Tottrup, Int'l, Inc.,* 82 F.3d 578, 581 (3d Cir. 1996)).

Against this backdrop, the Court cannot conclude that Plaintiffs have presented direct evidence of age discrimination: Cannon's comments regarding Karlo's "adaptability" require an inference to conclude that "adaptability" was a proxy for age (as opposed to his ability to fill multiple positions, work in a less-populated environment, obtain new skills, change job responsibilities, etc.). *See Scheick v. Tecumseh Pub. Sch.*, 766 F.3d 523, 531 (6th Cir. 2014). And here, there is no evidence that Cannon ever used "adaptability" as a shorthand reference to the younger employees that remained at PGW after the RIF.[16]

Nor is there any evidence that Cannon ever told Karlo that he was selected for the RIF because younger employees were more "adaptable" than him, notwithstanding Plaintiffs' attempts to construct this statement through their creative use of ellipses. *See supra* n.5.; *c.f. Beshears v. Asbill, Inc.*, 930 F.2d 1348, 1354 (8th Cir. 1991) (holding that a company president's statement "to the effect that older employees have problems adapting to changes and new policies," along with another decision-maker's statements that younger people were more adaptable, all made during the decisional process, amounted to direct evidence of age discrimination under the *Price Waterhouse* analysis). There also is no evidence that Cannon ever considered the "adaptability" of McLure, Cunningham, Marietti, and Meixelsberger in making his decision. Rather, Cannon discussed with Karlo (and Karlo alone) that the remaining employees were more adaptable than him as PGW moved forward with its new consolidated business model after the March 2009 RIF.

16. It is undisputed that of the twenty-one salaried associates in Manufacturing Technology not selected for the RIF, Karlo (age 51.36) was younger than twelve employees (ages 62.53, 60.47, 59.62, 59.41, 59.12, 58.96, 57.73, 55.67, 54.15, 53.99, 53.02, 52.64) and older than the other nine, with six of whom were within five-years of his age (ages 51.24, 49.49, 46.70, 46.55, 46.54, 46.16). *See* Pls.' RSOF re Def.'s Mot. for Decert. at 11-12, ECF No. 403 (disparate treatment and disparate impact claims).

At the very most, Cannon's remarks, as the decision-maker in the immediate aftermath of a termination meeting during which a thirty-year veteran of the company loses his job, are "in bad taste[,] bespeak a certain insensitivity, and provide circumstantial evidence of discrimination." *Byrd*, 2014 WL 5780825, at *5. More likely, they represent an unfortunate business reality. Be that as it may, his comments regarding Karlo's adaptability alone are not so revealing of discriminatory animus that a reasonable jury could conclude that age was the "but-for" reason for the adverse employment action. The Court will therefore proceed to analyze the disparate treatment claims under the alternative method of proof.

2. Circumstantial Evidence

Where a plaintiff seeks to prove his or her case through circumstantial evidence rather than direct evidence, the three-stage shifting burdens of proof developed for employment discrimination cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies. *See Smith*, 589 F.3d at 689 (holding that "the but-for causation standard required by *Gross* does not conflict with [its] continued application of the *McDonnell Douglas* paradigm in age discrimination cases."). In the initial phase of the analysis, a plaintiff must establish a prima facie case of discrimination which requires the plaintiff to demonstrate: (1) that he was a member of the protected age class; (2) that he was qualified to hold the position; (3) that he suffered an adverse employment decision; and (4) that he was replaced by a significantly younger individual or that younger employees received comparatively more favorable treatment to create an inference of age discrimination. *See Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 330 (3d Cir. 1995). Once the plaintiff establishes all four of the elements, the burden of production then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the unfavorable employment decision. *Smith*, 589 F.3d at 689-90. "If the employer does so,

the burden of production returns to the plaintiff to show that the employer's proffered rationale was merely a pretext for age discrimination." *Id.* at 690. The burden of persuasion, "including the burden of proving 'but for' causation or causation in fact," remains with the plaintiff at all times throughout this exercise.[17] *Id.*

i. Prima Facie Case

"When an employee is terminated during a [RIF] as is the case here, the fourth element becomes whether the employee can show 'that the employer retained someone similarly situated to him who was sufficiently younger.'" *Klinman v. JDS Uniphase Corp.*, 439 F. Supp. 2d 401, 405 (E.D. Pa. 2006) (quoting *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002)).

"In order to determine who might qualify as a similarly situated employee [courts] must look to the job function, level of supervisory responsibility and salary, as well as other factors relevant to the particular workplace." *Monaco v. Am. Gen. Assur. Co.*, 359 F.3d 296, 305 (3d Cir. 2004).[18] For example, "[a] manager is not similarly situated to her subordinates or to a non-

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17. Plaintiffs do not even address the first two prongs of the *McDonnell Douglas* framework anywhere in their filings. Rather, they skip to the pretext analysis, based on a pronouncement by the Fifth Circuit in *Palasota v. Haggar Clothing Co.*, which states as follows:

> A plaintiff must show that "(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) *otherwise discharged because of his age*."

342 F.3d 569, 576 (5th Cir. 2003) (emphasis in original) (quoting *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)); *see also Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 649-51 (3d Cir. 1998) (Pollak, J., concurring) (discussing the Fifth Circuit's formulation). The Court recognizes that the "fourth element must be relaxed in certain circumstances, as when there is a reduction in force," but the evidence that Plaintiffs rely upon is not supported by the record. *Torre v. Casio, Inc.*, 42 F.3d 825, 831 (3d Cir. 1994). That is, Plaintiffs rely upon their manufactured version of Cannon's comments to Karlo, *see supra* n.5, and continue to insist that PGW ignored long-standing RIF procedures, even though that company-wide system only existed at its predecessor, non-party PPG, *see supra* n.4. Accordingly, the Court will proceed to analyze whether Plaintiffs have shown "that the employer retained someone similarly situated to him who was sufficiently younger." *Anderson v. Consol. Rail Corp.*, 297 F.3d 242, 250 (3d Cir. 2002).

18 Although the plaintiff in *Monaco* brought his claim under the New Jersey Law Against Discrimination ("NJLAD") and not under the ADEA, the court of appeals "d[id] not suggest that the ['similarly situated'] standard would be different under the ADEA," but "merely recognize[d]" that the plaintiff's claim for age discrimination

manager." *Wimberly v. Severn Trent Servs.*, Inc., No. CIV.A.05 2713, 2007 WL 666767, at *4 (E.D. Pa. Feb. 26, 2007). Nor are employees in the same department or sub-department similarly situated when they have duties that are not comparable. *See Anderson*, 297 F.3d at 250. Ultimately, "[t]his determination requires a court to undertake a fact-intensive inquiry on a case-by-case basis rather than in a mechanistic and inflexible manner." *Monaco*, 359 F.3d at 305 (3d Cir. 2004) (citing *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999)).

As for what constitutes a "sufficiently younger" employee, the Court of Appeals for the Third Circuit has not adopted a bright-line rule, but it has provided some guidance. *See Steward v. Sears Roebuck & Co.,* 231 F. App'x. 201, 209 (3d Cir. 2007); *see also Barber v. CSX Distribution Servs.,* 68 F.3d 694, 699 (3d Cir. 1995) ("There is no magical formula to measure a particular age gap and determine if it is sufficiently wide to give rise to an inference of discrimination, however, case law assists our inquiry."). For example, in *Narin v. Lower Merion School District,* our court of appeals observed that the difference in age between a fifty-six-year-old employee and another who was forty-nine-years-old was not sufficient enough to allow an inference of discrimination. 206 F.3d 323, 333 n.9 (3d Cir. 2000). More recently, in *Showalter v. University of Pittsburgh Medical Center*, the Court of Appeals held that an eight year age differential was sufficient to satisfy the fourth element of a prima facie case. 190 F.3d 231, 236 (3d Cir. 2005). District courts in the Third Circuit have followed a similar trend. *See Fitzpatrick v. Nat'l Mobile Television,* 364 F. Supp. 2d 483, 491 (M.D. Pa. 2005) ("This four-year age difference is insufficient to raise an inference of discriminatory action."); *Lloyd v. City of Bethlehem,* C IV.A. 02–CV–00830, 2004 WL 540452, at *6 (E.D. Pa. Mar. 3, 2004) ("The caselaw in this Circuit consistently holds that an age gap of less than five years is, as a matter of

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arose solely under the NJLAD. *Monaco v. Am. Gen. Assur. Co.*, 359 F.3d 296, 306 n.12 (3d Cir. 2004); *see also Klinman v. JDS Uniphase Corp.*, 439 F. Supp. 2d 401, 406 (E.D. Pa. 2006) (recognizing that the similarly situated standard is the same under the NJLAD and the ADEA).

law, insufficient to establish fourth element of the prima facie test."); *Gutknecht v. SmithKline Beecham Clinical Labs., Inc.,* 950 F. Supp. 667, 672 (E.D. Pa. 1996) ("Although no uniform rule exists, it is generally accepted that when the difference in age between the fired employee and his or her replacement is fewer than five or six years, the replacement is not considered sufficiently younger, and thus no prima facie case is made").

None of the Plaintiffs can show that PGW retained someone similarly situated who was sufficiently younger. In each instance, PGW either eliminated the job responsibilities of that particular Plaintiff and/or (re)-assigned the tasks to older employees who were retrained.

As for Karlo (age 51.36), a Senior Engineering Specialist who developed tooling, and McLure (age 54.83), a Senior Technical Assistant Soldering who conducted validation testing, their primary work duties were outsourced by PGW in connection with its reorganization. Their ongoing duties and tasks were otherwise assumed by Irv Wilson (age 59.41) and John Bender (age 54.15)—both of whom are older than (or nearly the same age as) Karlo and McLure and held job functions that were not comparable to Karlo and McLure (Wilson was an engineer; Bender was the loan resource that was intimate with the instrumentation for Hercon scanners and GTTC). Similarly, the job tasks of Meixelsberger (age 52.73), a Senior Technical Assistant who worked in Windshield Bending, were absorbed by Wilson and Bender—both of whom are also older than Meixelsberger.

Much like Karlo, McLure and Meixelsberger, PGW reassigned various engineers to take on the job responsibilities of Cunningham (age 52.58), a Senior Technical Assistant who worked in the Sidelight Process and Marietti (age 55.33), a Senior C/M Specialist who worked in Tooling & Instrumentation. Two of these engineers – Fecik (age 57.73) and Cleary (age 59.62) – are older than Cunningham and Marietti, and the other – Schwartz (age 51.24) – is only one

year younger than Cunningham (in addition to being his supervisor) and four years younger than Marietti, an age gap that is not sufficiently wide to give rise to an inference of discrimination.

At the same time, all five Plaintiffs point to a single, individual, Steve Horcicak (age 36.49), as the sufficiently younger similarly situated employee who was retained by PGW. But once again they miss the mark. Horcicak's job function and duties were unmatched by any Plaintiff, as he worked in the operationally-critical area of fracture mechanics, requiring a skill-set that none of the Plaintiffs possessed. And Plaintiffs do not cite any evidence that Horcicak (or any sufficiently younger employee) assumed any of Plaintiffs' job tasks. In other words, Horcicak is not a valid comparator for any of the Plaintiffs, and the circumstances otherwise do not support an inference of discrimination.

Because Plaintiffs have not shown that PGW retained a similarly situated employee who was sufficiently younger, they cannot meet the fourth element of their prima facie case, and therefore, the Court need not proceed to the second (or third) step of the *McDonnell Douglas* test. Accordingly, the Court will grant PGW's motion for summary judgment on Plaintiffs' individual disparate treatment claims.

B. Disparate Impact

"In a disparate impact claim under the ADEA, the plaintiff challenges a specific, facially neutral employment practice that operates to 'deprive [the] individual of employment opportunities or otherwise adversely affect his status as an employee.'" *Embrico v. U.S. Steel Corp.*, 404 F. Supp. 2d 802, 817 (E.D. Pa. 2005) (quoting *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005). "To establish a disparate impact claim, a plaintiff must identify the specific practice(s) alleged to have created a disparate impact, and show that this practice caused observable statistical differences affecting the protected class." *Petruska v. Reckitt Benckiser,*

LLC, No. CIV.A. 14-03663 CCC, 2015 WL 1421908, at *6 (D.N.J. Mar. 26, 2015) (citing *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005)).

Plaintiffs cannot, however, make this showing. On July 13, 2015, this Court granted PGW's motion to bar Plaintiffs' purported statistical expert, Dr. Michael Campion, from testifying at trial, finding that the requirements of Rule 702 were not met. *See Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-CV-1283, 2015 WL 4232600, at **10-13 (W.D. Pa. July 13, 2015). And "[w]ithout statistical proof, disparate impact is not established." *Cardelle v. Miami Beach Fraternal Order of Police*, 593 F. App'x 898, 902 (11th Cir. 2014) (citation omitted); *see Stockwell v. City & Cnty. of San Francisco*, 749 F.3d 1107, 1115 (9th Cir. 2014); *see also Crawford v. Verizon Pennsylvania, Inc.*, -- F. Supp. 3d --, No. CIV.A. 14-3091, 2015 WL 1636866, at *10 (E.D. Pa. Apr. 13, 2015) ("[D]ata concerning six individuals, in the absence of a statistical analysis or expert, are not of the kind or degree sufficient to support any allegation of significant disparate impact.").

But even assuming that Dr. Campion (and his statistical report) had survived the *Daubert* challenge, the Court still cannot agree with Plaintiffs that an over-fifty-years-old subgroup is cognizable under the ADEA. *See generally Karlo v. Pittsburgh Glass Works*, LLC, No. 2:10-CV-1283, 2014 WL 1317595, at **16-17 (W.D. Pa. Mar. 31, 2014) (discussing subgrouping under the ADEA). Every court of appeals to face the issue has declined to recognize this theory with regard to disparate impact claims.[19] *See E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Smith v. Tennessee Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989), *superseded on other grounds by*

19. As one district court recently recognized, "the Third Circuit does not appear to have considered the issue of subgroup disparate impact claims, the majority view amongst the circuits that have considered this issue is that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger, and therefore it is improper to distinguish between subgroups within the protected class." *Petruska v. Reckitt Benckiser, LLC,* No. CIV.A. 14–03663 CCC, 2015 WL 1421908, at *6 (D.N.J. Mar.26, 2015) (citations omitted).

statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999). Several district courts have followed this approach. *Rudwall v. Blackrock, Inc.*, C09-5176TEH, 2011 WL 767965, at **10-11 (N.D. Cal. Feb. 28, 2011); *Schechner v. KPIX-TV*, C 08-05049 MHP, 2011 WL 109144, at *4 (N.D. Cal. Jan. 13, 2011); *Kinnally v. Rogers Corp.*, CV-06-2704-PHX-JAT, 2009 WL 597211, at **9-10 (D. Ariz. Mar. 9, 2009); *see also Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1131 n.156 (D. Kan. 2013); *but see Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 636 (W.D. Pa. 2012); *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3 (D. Me. 1994); *Finch v. Hercules Inc.*, 865 F. Supp. 1104, 1129 (D. Del. 1994). This Court finds those appellate decisions persuasive and instructive. Accordingly, the Court will grant PGW's motion for summary judgment on Plaintiffs' disparate impact claims.[20]

C. Retaliation

The retaliation claims brought by Karlo and McLure against PGW primarily proceed under the theory that PGW, as their purported employer, summarily terminated their employment because they refused to withdraw their EEOC charges. Alternatively, they assert that, even if their status as contract employees bars their retaliatory discharge claim, they still may maintain a failure to hire claim.

As an initial matter, Karlo and McLure must each first establish that they were in fact an employee of PGW and not of Belcan/Carol Harris, the temporary staffing agencies, in order to maintain their retaliatory discharge claim. "In order to determine whether a person is an employee for purposes of the ADEA, the common law of agency and the traditional master-

20. To hold otherwise, as the Eight Circuit recognized, "would be to require an employer engaging in a RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force." *McDonnell Douglas Corp.*, 191 F.3d at 951. Moreover, "[a]doption of such a theory [ ] might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes." *Id.*

servant doctrine applies." *Cauler v. Lehigh Valley Hosp., Inc.*, No. 15-CV-01082, 2015 WL 2337311, at *3 (E.D. Pa. May 14, 2015) (citations omitted); *see also Pavlik v. Int'l Excess Agency, Inc.*, 417 F. App'x 163, 166 (3d Cir. 2011) ("Both Title VII and ADEA use the same test to determine whether an individual is an employee or an independent contractor."). Specifically, the Court should consider:

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Shah v. Bank of Am., 346 F. App'x 831, 834 (3d Cir. 2009) (quoting N*ationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1992)). "No one factor is dispositive, and the list is not exhaustive." *Mulzet v. R.L. Reppert, Inc.*, 54 F. App'x 359, 360 (3d Cir. 2002).

At the same time, "[t]he essence of the *Darden* test is whether the hiring party has the 'right to control the manner and means by which the product is accomplished.'" *Plaso v. IJKG, LLC*, 553 F. App'x 199, 204 (3d Cir. 2014). In making this determination, a court "may focus on three indicia of control: (1) which entity paid plaintiff; (2) who hired and fired plaintiff; and (3) who 'had control over [plaintiff's] daily employment activities.'" *Id.* (quoting *Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 F.3d 114, 119 (3d Cir. 2013)).

Although the record is somewhat sparse regarding some of the *Darden* factors, the only consideration that supports PGW's position relates to the compensation of Karlo and McLure (which they apparently negotiated in advance with PGW), the benefits they received, and (perhaps) their tax treatment, as reflected in the employment paperwork. Both Karlo and

McLure sent their time sheets to Belcan (which PGW nevertheless had to approve), received their paychecks from Belcan, and had their income taxes withheld by Belcan. In addition, Karlo received over $10,000 in unemployment benefits through Belcan after his time at PGW had ended. Even so, "which entity paid plaintiffs" is the only differences between their previous employment with PGW and their later placement at its facilities.

All other applicable considerations weigh in their favor. PGW (through its employees) sought out both Karlo and McLure and arranged for their hiring through Belcan, which merely served as a conduit for their return to PGW. PGW also controlled their day-to-day employment activities: it assigned them to projects; supervised and reviewed their work, and set their schedule. In addition, Karlo and McLure also worked exclusively in PGW's facilities where they used its equipment, instruments, and tools, engaged in PGW's regular (and continued) course of business of manufacturing and testing automotive glass products on a (nearly) daily basis. Belcan had no involvement in these day-to-day activities. It was also PGW (and not Belcan) that decided to end the placement of both Karlo and McLure at its facilities. Karlo and McLure were thus both "employees" of PGW.

As to whether Plaintiffs can establish prima facie retaliation cases,[21] the Court is not convinced that there are no genuine issues as to any material fact when the evidence is viewed in the light most favorable to the non-moving parties. For example, the timing of the decision to terminate Plaintiffs (and/or to not rehire them into non-contract positions), and precisely who knew what when—which would seem to be a material fact in this case—remains entirely unclear (perhaps because both sides somewhat distort the record). Moreover, it is incorrect, not to

21. Under the ADEA, a prima facie case of retaliation requires a plaintiff must show that: "(1) s/he was engaged in a protected activity; (2) the defendant took an adverse employment action after or contemporaneous with the plaintiff's protected activity; and (3) a causal link exists between the plaintiff's protected activity and the adverse employment action." *McClement v. Port Auth. Trans-Hudson*, 505 F. App'x 158, 162-63 (3d Cir. 2012) (citing *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 508-09 (3d Cir. 2004)).

mention self-serving, for PGW to rely on the deposition testimony of the relevant decision-makers to the exclusion of contrary evidence in positing that they knew nothing of this litigation before the glassBYTEs.com article—even when McCullough himself had been involved in preparing the response to the EEOC charge. The trier of fact (*i.e.*, not PGW) must determine whether the testimony of Karlo and McLure is credible in light of the relevant decision-makers. In addition, it also remains unclear as to whether there was ever any discussion of the EEOC charge in either plant, what constituted the so-called "issue"/"the situation," and how the decisions to end the placements were made. Contrary to PGW's suggestion, these disputed facts cannot be dismissed as watercooler gossip; they are instead questions for a jury. Accordingly, the Court will deny PGW's motion for summary judgment on the retaliation claims of Karlo and McLure.

IV. Conclusion

For the reasons hereinabove stated, the Court will grant PGW's motions for summary judgment on the Plaintiffs' individual disparate treatment and disparate impact claims; deny PGW's motion for summary judgment on the retaliation claims of Karlo and McLure; and deny PGW's motion to strike unsupported facts and deem improperly contested facts admitted.

An appropriate order follows.

McVerry, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO, MARK K. MCLURE, WILLIAM S. CUNNINGHAM, JEFFREY MARIETTI, and DAVID MEIXELSBERGER,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 3rd day of September, 2015, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows:

(1) the MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' INDIVIDUAL DISPARATE TREATMENT CLAIMS (ECF No. 372) is **GRANTED**;

(2) the MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFFS' INDIVIDUAL DISPARATE IMPACT CLAIMS (ECF No. 374) is **GRANTED**;

(3) the MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF KARLO'S AND PLAINTIFF MCLURE'S RETALIATION CLAIMS (ECF No. 377) is **DENIED**; and

(4) the COMBINED MOTION TO STRIKE UNSUPPORTED FACTS AND DEEM IMPROPERLY CONTESTED FACTS ADMITTED (ECF No. 417) is **DENIED**.

IT IS FURTHER ORDERED that the caption in this matter is hereby **AMENDED** as follows:

RUDOLPH A. KARLO and MARK K. MCLURE,	)	
	)	
Plaintiffs,	)	**2:10-cv-1283**
	)	
vs.	)	
	)	
PITTSBURGH GLASS WORKS, LLC,	)	
	)	
Defendant.	)	

BY THE COURT:

s/Terrence F. McVerry
Senior United States District Judge

cc: All counsel of record.
(via CM/ECF)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO and MARK K. MCLURE,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER OF COURT

Pending before the Court is a MOTION TO CERTIFY FINAL JUDGMENT UNDER RULE 54(b) AND STAY PROCEEDINGS filed by Plaintiffs Rudolph A. Karlo and Mark K. McLure (ECF No. 452) with a brief in support (ECF No. 453). Defendant Pittsburgh Glass Works, LLC ("PGW") filed a brief in opposition (ECF No. 454); Plaintiffs filed a replay brief (ECF No. 457). Accordingly, the motion is ripe for disposition.

I. Background

The Court has previously detailed the extensive procedural history of this action in its Memorandum Opinion and Order dated March 31, 2014, in which it granted in part and denied in part PGW's motion for decertification, which dismissed the claims of Opt-in Plaintiffs Michael Breen, Matthew Clawson, Stephen Shaw, and John Titus. (ECF No. 343). The Court hereby incorporates that discussion by reference.

Since that time, the Court has issued a Memorandum Opinion and Order of Court in which it (1) granted PGW's (renewed) motions to bar (a) the proposed expert opinion of Dr. Anthony G. Greenwald related to implicit social bias; (b) the opinion of Dr. Michael Campion regarding the statistical analysis; and (c) Dr. Campion's opinion on reasonable human resource

practices; and (2) granted in part and denied in part PGW's motion to bar the rebuttal expert report of David Duffus. (ECF No. 442). Following that ruling, Plaintiffs filed a (renewed) motion to certify for interlocutory appeal the Court's Memorandum Opinion and Order which decertified Plaintiffs' conditionally-certified collective action as well as its Memorandum Opinion and Order which granted (in part) PGW's motions to bar the testimony of Plaintiffs' experts.

While that motion was pending, the Court issued a Memorandum Opinion and Order on September 2, 2015, which granted PGW's motions for summary judgment on the individual disparate treatment and disparate impact claims of the then-named Plaintiffs Rudolph A. Karlo, Mark K. McLure, William S. Cunningham, Jeffrey Marietti, and David Meixelsberger; and denied PGW's motion for summary judgment of the individual retaliation claims of Karlo and McLure. (ECF No. 448). In accordance with that Memorandum Opinion and Order, the Court entered judgment the following day in favor PGW and against Karlo, McLure, Cunningham, Marietti, and Meixelsberger on Count One (Disparate Treatment Under the Age Discrimination in Employment Act) and Count Two (Disparate Impact Under the Age Discrimination in Employment Act) of Plaintiffs' Second Amended Complaint. Thus, the only claims that remain are the individual retaliation claims of Karlo and McLure.

The parties thereafter jointly motioned the Court to withdraw Plaintiffs' motion to certify for interlocutory appeal and to permit Plaintiffs to refile same to reflect the rulings on PGW's motions for summary judgment. The Court granted the parties' motion on September 3, 2015, stating that "Plaintiffs may renew and refile their Motion to Certify for Interlocutory Appeal and Stay Proceedings on or before September 11, 2015, with said motion relating back to August 26, 2015 for the purpose of any jurisdictional or procedural deadline(s)." (ECF No. 451).

Plaintiffs timely filed the pending motion, in which they now ask the Court to certify its judgment in favor of PGW and against Plaintiffs as a final judgment under Federal Rule of Civil Procedure 54(b) and to issue an express determination that "there is not just reason for delay" of appellate review. Plaintiffs also request that the Court stay the proceedings pending resolution of their appeal, which PGW opposes. PGW does not, however, oppose the entry of final judgment.

Even so, this Court must independently assess whether it should enter a final judgment. As our court of appeals has observed, "Rule 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel." *Panichella v. Pa. R.R. Co.*, 252 F.2d 452, 455 (3d Cir. 1958). In other words, "district judges may not enter orders under Rule 54(b) just because the parties ask." *Stamatakis Indus., Inc. v. J. Walter Thompson, U.S.A., Inc.*, 944 F.2d 382, 383 (7th Cir. 1991). Instead, district judges "must independently inquire whether such orders are appropriate, and they owe an obligation to [the court of appeals] to ensure that the claims being carved off for separate judgment are legally and factually distinct from those reserved." (citation omitted). Accordingly, the Court must turn to the controlling standard for deciding a motion brought under Rule 54(b).

II. Legal Standard

Federal courts of appeal only have jurisdiction over appeals from "final decisions" of federal district courts. 28 U.S.C. § 1291. "Ordinarily, an order which terminates fewer than all claims, or claims against fewer than all parties, does not constitute a 'final' order for purposes of appeal under 28 U.S.C. § 1291." *Carter v. City of Philadelphia*, 181 F.3d 339, 343 (3d Cir. 1999). However, Rule 54(b) allows a district court to convert "an order adjudicating less than an entire action to the end that it becomes a 'final' decision over which a court of appeals may

exercise jurisdiction under 28 U.S.C. § 1291." *Elliott v. Archdiocese of New York*, 682 F.3d 213, 219 (3d Cir. 2012). Rule 54(b) expressly provides:

> **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief – whether as a claim, counterclaim, crossclaim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

This rule "'attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties.'" *Elliot*, 682 F.3d at 220.

Be that as it may, "certification of a judgment as final under Rule 54(b) is the exception, not the rule, to the usual course of proceedings in a district court." *Id.* "'Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a dispatcher.'" *Id.* (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)). As such, "[t]he power which this Rule confers upon the trial judge should be used only in the infrequent harsh case as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute [28 U.S.C. § 1291] and rule." *Panichella*, 252 F.2d at 455

"Rule 54(b) thus requires that a district court first determine whether there has been an ultimate disposition on a cognizable claim for relief as to a claim or party such that there is a 'final judgment.'" *Elliot*, 682 F.3d at 220 (citing *Curtiss-Wright Corp.*, 446 U.S. at 8). "If it determines that there has been such a disposition, 'the district court must go on to determine

whether there is any just reason for delay,' taking into account 'judicial administrative interests as well as the equities involved.'" *Id.* (quoting *Curtiss-Wright*, 446 U.S. at 7-8). "This latter requirement, that a district court 'must go on to determine whether there is any just reason for delay,' is not merely formalistic." *Id.* If the district court fails to make such a determination on the record, the order is not considered to be final and the court of appeals, in turn, lacks jurisdiction. *Id.* Moreover, when certifying an order pursuant to Rule 54(b), a mechanical recitation of the "no just reason for delay" language in the rule will not suffice. *Id.* The district court must therefore instead "'clearly articulate the reasons and factors underlying its decision . . . .'" *Id.* (quoting *Allis–Chalmers Corp. v. Phila. Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975)). "Unlike the need for an express determination that there is 'no just reason for delay,'" however, the requirement that the district court provide a statement of reasons is not a jurisdictional prerequisite, so long as "'the propriety of the appeal may be discerned from the record.'" *Id.* (quoting *Carter*, 181 F.3d at 346).

III. Discussion

Plaintiffs' motion has requested that the Court certify its judgment in favor of PGW and against Plaintiffs Karlo, McLure, Cunningham, Marietti, and Meixelsberger as a final judgment pursuant to Rule 54(b) and to stay further proceedings in the district court pending the resolution of their appeal. The Court will address these two aspects of Plaintiffs' motion seriatim.

A. Rule 54(b)

The Court finds that the requirements of Federal Rule of Civil Procedure 54(b) have been met. As an initial matter, there is no question that the Court's Memorandum Opinion and Order of September 2, 2015 (ECF No. 448), constituted the "ultimate disposition" of the disparate

treatment and disparate impact claims of Plaintiffs Karlo, McLure, Cunningham, Marietti and Meixelsberger, which had been brought against PGW.

The question then becomes whether there is any "just reason" for delaying the entry of final judgment. In making this determination, the Court must consider several factors: "the relationship between the adjudicated and unadjudicated claims," "the possibility that the need for review might or might not be mooted by future developments in the district court," "the possibility that the reviewing court might be obliged to consider the same issue a second time," "the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final," and "miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 203 (3d Cir. 2006) (quoting *Allis-Chalmers,* 521 F.2d at 364).

These factors weigh in favor of granting this aspect of Plaintiffs' pending motion. Notably, the issues presented through the disparate treatment and disparate impact claims of Plaintiffs are separable and distinct – factually and legally – from the individual retaliation claims of Karlo and McLure against PGW.[1] As a result, there is no risk of duplicative appeals or reason to delay appellate review of the other aspects of this five-year-old action. In addition, future developments in the district court are unlikely to moot the need for appellate review. Plaintiffs are either going to appeal now, if given the opportunity, or later, after a trial on the merits of the individual retaliation claims of Karlo and McLure. The counterclaims asserted by

1. For instance, the discrimination claims of Karlo and McLure (as well as Cunningham, Marietti and Meixelsberger) involved the events related to the March 31, 2009 reduction in force, during which time they were terminated from the Manufacturing Glass Technology Department in Harmarville, Pennsylvania by Gary Cannon and received severance paperwork from Diana Jarden of human resources. The retaliation claims of Karlo and McLure stem from positions that they, respectively, held at PGW's Creighton facility and its Glass Research Center in Harmarville. The manager of Karlo's assignment was Mark Soderberg, and the human resources personnel involved in the decision to end his position was John Felker. As to McLure, he was supervised by Peter Dishart, and the decision to end his position was made by Robert McCullough.

PGW against Plaintiffs also would not result in a set-off against the judgment sought to be made final – which is in favor of the defendant.

For the foregoing reasons, the Court finds that there is "no just reason for delay," and therefore, it will certify its judgment in favor of PGW and against Plaintiffs Karlo, McLure, Cunningham, Marietti, and Meixelsberger as a final judgment pursuant to Rule 54(b).[2]

B. Stay

On September 30, 2015, the United States Court of Appeals for the Third Circuit issued a precedential opinion that "focus[es] on how to balance the four factors that determine whether to grant a stay pending appeal." *In re Revel AC, Inc.*, -- F.3d --, No. 15-1253, 2015 WL 5711358, at *1 (3d Cir. Sept. 30, 2015). Those factors are: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at *7. "In order not to ignore the many gray shadings stay requests present, courts 'balance[e] them all' and 'consider the relative strength of the four factors.'" *Id.* (quoting *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011)).

2. The Court notes that the parties say very little regarding the immediate appeal(ability) of the Court's Memorandum Opinion and Order dated March 31, 2014 (ECF No. 343) which decertified the conditionally-certified collective action – which turned on whether those who have opted in were in fact "similarly situated" to the representative plaintiffs. For example, in their brief, Plaintiffs make reference to their now-withdrawn motion in which they renewed their motion to certify for interlocutory appeal the Court's Memorandum Opinion and Order that decertified their collective action. (ECF No. 453 at 2 n.1). They also mention that "six of the eight original [P]laintiffs who would have a stake in an appeal[footnote] (whether taken at this time or later in the future) have no retaliation claims and would thus be forced to idly wait for the retaliation claims to be tried before pursuing their appeals." *Id.* at 4. Moreover, Plaintiffs' footnote states: "[t]hese include the four opt-in Plaintiffs who were dismissed from the case when the collective action was decertified." *Id.* at n.2. To be sure, the Court finds that there is no just reason for delay with regard to that ruling as well – it disposes of the collective action component of this case and remains separate and distinct from the remaining individual retaliation claims of Karlo and McLure. Moreover, the same reasons that warrant the certification of a final judgment on the disparate impact and disparate treatment claims also fully justify an immediate appeal of the decertification ruling.

Even so, "'the most critical' factors, according to the Supreme Court are the first two.'" *Id.* at *7 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Although both are necessary, our court of appeals has suggested that "the former is arguably the more important piece of the stay analysis." *Id.* At the first step, "a sufficient degree of success for a strong showing exists if there is 'a reasonable chance, or probability, of winning.'" *Id.* at *8 (quoting *Singer Mgmt. Consultants, Inc. v. Milgram,* 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). In other words, "while it 'is not enough that the chance of success on the merits be "better than negligible,"' *Nken*, 556 U.S. at 434, the likelihood of winning on appeal need not be 'more likely than not, *Singer Mgmt. Consultants*, 650 F.3d at 229.'" *Id.* "On the second factor, the applicant must 'demonstrate that irreparable injury is *likely* [not merely possible] in the absence of [a] [stay].'" *Id.* (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)) (emphasis and alterations in original). "While a reference to 'likelihood' of success on the merits has been interpreted by courts to cover the generic range of outcomes, for irreparable harm [our court of appeals] understand[s] the Supreme Court's use of 'likely' to mean more apt to occur than not." *Id.*

If "'an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Id.* (quoiting *Nken*, 556 U.S. at 435). At this point, a district court engages in the so-called "balancing of harms or balancing of equities" in which it must "weigh the likely harm to the movant (absent a stay) (factor two) against the likely irreparable harm to the stay opponent(s) if the stay is granted (factor three)." *Id.* In addition, the court must also "take into account where the public interest lies (factor four)—in effect, how a stay decision has 'consequences beyond the immediate parties.'" *Id.* (quoting *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 388 (7th Cir. 1984).

"In deciding how strong a case a stay movant must show," the court is to apply the "sliding-scale approach." *Id.* at *9 (citations omitted). "Under it, '[t]he necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other [stay] factors .'" *Id.* (quoting *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002)). Put differently, "'[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [its] favor; the less likely [it] is to win, the more need it weigh in [its] favor.'" *Id.* (quoting *Roland Mach.*, 749 F.2d at 387).

Applying this framework, the Court must first ask "[d]id the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) *and* (b) will suffer irreparable harm absent a stay?" *Id.* (emphasis in original). And here, the answer to both questions is no.

Plaintiffs make no attempt to evaluate their likelihood of success on the merits and even criticize PGW for doing so. *See* Pls.' Reply at 1 ("PGW opposes a stay pending appeal based upon the wrong legal standard . . . . [it] incorrectly attempts to have this Court evaluate Plaintiffs' likelihood of success on the merits of their appeal in determining whether a stay should issue."). Be that as it may, the Court doubts (with all due deference) that Plaintiffs could make this showing. Take, for example, Plaintiffs' purported experts. In deciding the motions to bar their testimony, the Court found that the opinions of Dr. Greenwald and Dr. Campion were not based on sufficient facts or data, were not the product of reliable methods *and* would not assist the factfinder in resolving an issue in this case – rulings which are all reviewed for an abuse of discretion.[3] Absent Dr. Campion, Plaintiffs concede that their discrimination claims are

3. Plaintiffs suggest that the Court's ruling will be subject to de novo review because "[t]he core issue relating to the exclusion of [Dr. Campion's] report is the pure legal question of whether a group of age discrimination plaintiffs can assert an over-fifty disparate impact claim." (ECF No. 457 at 2). They base this suggestion on a footnote in the Court's opinion, in which it states as follows: "Of course, the subgrouping analysis would only be helpful to the

not viable. (ECF No. 446 at 1). Yet even assuming that Dr. Campion (and his statistical report) had survived the *Daubert* challenge, the Court has also ruled that an over-fifty-years-old subgroup is not cognizable under the ADEA. So, too, has the Court ruled that not a single Plaintiff could establish a prima facie case for disparate treatment. Thus, Plaintiffs would also have to show that they are likely to succeed on the merits with regard to these rulings as well. Once again, they have not attempted to do so. For these reasons, the Court cannot conclude that Plaintiffs have shown (or could show) that they are likely to succeed on the merits.

Nor have Plaintiffs shown that they will suffer irreparable harm absent a stay. Plaintiffs instead suggest that their proposed stay "attempts to preserve fundamental fairness," "serve[s] the interest of judicial efficiency," prevents "the duplicative presentation of witnesses at trial," which, from their perspective, "will waste several days of the Court['s] and the parties' resources." (ECF No. 457 at 1-3). At most, these considerations relate to the time and expense that a second and successive trial would entail if the Court was reversed, which does not constitute irreparable harm. *See id.* at *11 ("To establish irreparable harm, a stay movant 'must demonstrate an injury that is neither remote nor speculative, but actual and imminent.'") (citing *Tucker Anthony Realty Corp. v. Schlesinge*r, 888 F.2d 969, 975 (2d Cir. 1989)); *see also S. Freedman & Co. Inc. v. Raab*, No. CIV. 06-3723 RBK, 2008 WL 4534069, at *3 (D.N.J. Oct. 6, 2008) (noting that there is "no hardship where the moving party's basis for seeking the stay was to avoid being forced to defend itself twice") (citing *CTF Hotel Holdings, Inc. v. Marriot Int'l, Inc.*, 381 F.3d 131, 139 (3d Cir. 2004)).

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factfinder if this Court held that Plaintiffs could maintain an over-fifty disparate impact claim. It has not done so." (ECF No. 442 at 25). While the Court did make that observation (and suggested that it would be an alternative basis to bar Dr. Campion's testimony), the crux of its opinion was that "his report is not based on sufficient data," that his "methodology is not reliable," and that five of his six analyses related to the RIF were "rooted in rank speculation," and therefore, his statistical report did not meet the requirements of Federal Rule of Evidence 702. *Id.* at 24-25.

"Keeping in mind that the first two factors are the most critical, if 'the chance of success on the merits [is only] better than negligible' and the 'possibility of irreparable injury' is low, a stay movant's request fails." *In re Revel AC, Inc.*, 2015 WL 5711358, at *10 (quoting *Nken*, 556 U.S. at 434) (alteration in original). And where, as here, "'the movant does not make the requisite showings on either of these [first] two factors, the [ ] inquiry into the balance of harms [and the public interest] is unnecessary, and the stay should be denied without further analysis.'" *Id.* at *10 (quoting *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300-01 (7th Cir. 1997)) (alterations in original). Accordingly, the stay will be denied.

IV. Conclusion

For the reasons hereinabove stated, the Court will grant in part and deny in part Plaintiffs' motion to certify final judgment under Rule 54(b) and stay proceedings. The Court will certify its judgment in favor of PGW and against Plaintiffs on their discrimination claims, but it will not stay the proceedings pending the resolution of their appeal. An appropriate Order follows.

McVerry, S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUDOLPH A. KARLO and MARK K. MCLURE,	)	
Plaintiffs,	)	**2:10-cv-1283**
vs.	)	
PITTSBURGH GLASS WORKS, LLC,	)	
Defendant.	)	

ORDER OF COURT

AND NOW, this 2nd day of October, 2015, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that Plaintiffs' MOTION TO CERTIFY FINAL JUDGMENT UNDER RULE 54(b) AND STAY PROCEEDINGS (ECF No. 452) is **GRANTED** insofar as the Court will enter final judgment pursuant to Federal Rule of Civil Procedure 54(b) on Plaintiffs' discrimination claims and **DENIED** insofar as the Court will not stay the proceedings pending the resolution of the appeal.

IT IS FURTHER ORDERED that a telephonic status conference with counsel will be conducted by the Court regarding the future direction of this litigation on Tuesday, October 6, 2015 at 3:00 p.m. Counsel are responsible for coordinating the call to Chambers on one telephone line at that time.

BY THE COURT:

s/Terrence F. McVerry
Senior United States District Judge

cc: All Counsel of Record
(via CM/ECF)