IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHANIE ODLE, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 3:11-cv-2954-O**
	§	
WAL-MART STORES INC.,	§	
	§	
Defendant.	§	
	§	

ORDER

Before the Court are Defendant Wal-Mart Stores, Inc.'s ("Wal-Mart") Motion to Dismiss in Part Plaintiffs' First Amended Complaint, or in the Alternative to Strike Class Claims and Brief in Support (ECF No. 16); Plaintiffs' Response and Brief in Opposition (ECF No. 25); and Defendant's Reply (ECF No. 27). Having considered the pleadings and the applicable law, the Court finds that the Defendant's Motion to Dismiss (ECF No. 16) should be and is hereby **GRANTED IN PART** and **DENIED IN PART**.

I. PROCEDURAL BACKGROUND

Plaintiff Stephanie Odle and six other named plaintiffs filed this suit on behalf of themselves and all others similarly situated on October 28, 2011, alleging that they were "subjected to gender discrimination as a result of specific policies and practices in Wal-Mart's regions located in whole or in part in Texas." Pls.' First Am. Compl. ¶ 3, ECF No. 10. Specifically, Plaintiffs allege gender discrimination by 1) denying equal opportunities for promotion to management track positions, and 2) denying equal pay for both hourly retail store positions and for salaried management positions.

Id.

Previously, the named plaintiffs were class members in a national class action. *Id.* ¶ 1; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The Northern District of California certified a national class of female employees challenging retail store pay and management promotion policies and practices under Federal Rule of Civil Procedure 23(b)(2). Pls.' First Am. Compl. ¶ 2, ECF No. 10; *see also Dukes*, 131 S. Ct. at 2549. The Ninth Circuit affirmed in part and remanded in part. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc). It found that the group of former employees—those who were not working at Wal-Mart when they filed the lawsuit, including Odle—lacked standing to pursue injunctive relief. *Id.* at 623. As to those former employees, the Ninth Circuit remanded for the district court to determine whether to certify a separate class of former employees for back pay and punitive damages. *Id.* As to the putative class members who were employees when the lawsuit was filed, the Ninth Circuit found that the district court did not abuse its discretion in finding that commonality existed or that the typicality requirement was satisfied, but that the district court abused its discretion in certifying plaintiffs' claims for punitive damages without analyzing whether such damages cause monetary relief to predominate. *Id.* at 622. The Supreme Court disagreed with this conclusion and reversed the class certification order, finding that plaintiffs did not satisfy Rule 23's commonality requirement. *Dukes*, 131 S. Ct. at 2555-56.

After the Supreme Court's decision, named Plaintiff Stephanie Odle filed this class action on behalf of herself and all others similarly situated on October 28, 2011. *See generally* Original Compl., ECF No. 1. Plaintiffs amended the complaint and Defendant filed its Motion to Dismiss in Part Plaintiffs' First Amended Complaint or in the Alternative to Strike Class Claims. *See*

generally Pls.' First Am. Compl., ECF No. 10; Def.'s Mot. Dismiss, ECF No. 16. Defendant's motion is ripe for consideration.

II. LEGAL STANDARD

To defeat a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 129 S. Ct. at 1949-50. When there are well-pleaded factual allegations, the Court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.* "Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court

may take judicial notice." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citations and internal quotation marks omitted). Likewise, a court may consider documents that a defendant attaches to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claims. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

III. ANALYSIS

In this Title VII class action, Plaintiffs allege that Defendant engaged in gender discrimination by (1) denying equal opportunities for promotion to management track positions up to and including Co-Manager, (2) denying equal pay for hourly retail store positions, and (3) denying equal pay for salaried management positions up to and including Co-Manager. *See* Pls.' First Am. Compl. ¶ 3, ECF No. 10. Defendant moves to dismiss in part Plaintiffs' First Amended Complaint based on the following: (1) Plaintiffs' class allegations are barred by limitations and (2) Plaintiffs' class allegations do not satisfy Rule 23(a). *See generally* Def.'s Mot. Dismiss, ECF No. 16. Defendant also moves to dismiss those claims of specific plaintiffs: (1) who have not satisfied Title VII's EEOC Charge Requirement, (2) who do not satisfy Title VII's particularized venue requirements, and (3) Odle's individual claims that Defendant alleges are barred by the statute of limitations. *See generally id.*

A. Statute of Limitations and Class Actions

First, Defendant argues that the *Dukes* case only tolled the statute of limitations on Plaintiffs' individual claims. It contends the equitable tolling doctrine does not allow those individuals to pursue their claims as a subsequent class action. *See id.* 5-8. Defendant agrees that under *American*

Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), former class members who either intervene or file individual claims in another forum benefit from tolling. *See* Def.'s Mot. Dismiss 5, ECF No. 16. However, Defendant argues that under *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), there is a "no piggyback rule" that prevents applying *American Pipe* tolling to Plaintiffs' class claims. Def.'s Mot. Dismiss 6-8, ECF No. 16. Thus, Defendant contends that while the class members in this case may use the *Dukes* action to toll the statute of limitations for their individual claims, *Salazar-Calderon* requires the Court to dismiss Plaintiffs' class action claims based on the statute of limitations.

Plaintiffs first respond that *Salazar-Calderon* is factually distinguishable from this case because that suit involved a subsequent class that was identical to the original class, while this case involves a narrower class than the original *Dukes* class. Def.'s Mot. Dismiss Hr'g Tr. Plaintiffs also argue that recent Supreme Court precedent supports tolling the statute of limitations for Plaintiffs' class claims and allows application of *American Pipe* tolling in a successor class action. Pls.' Resp. Def.'s Mot. Dismiss 15-21, ECF No. 25. Plaintiffs cite to *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010) for the proposition that "where individual claims may be pursued, only Rule 23—not any other law or policy—controls whether class claims may be pursued." Pls.' Resp. Def.'s Mot. Dismiss 15, ECF No. 25. Plaintiffs also allege that *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), "supercedes earlier decisions barring plaintiffs from pursuing second class cases after denial of certification in an earlier case." Pls.' Resp. Def.'s Mot. Dismiss 15, ECF No. 25. Because the central dispute involves equitable tolling, the Court finds it necessary to first

review the cases that establish tolling in the class action context.

1. The Class Action Equitable Tolling Doctrine

In *American Pipe* plaintiffs initiated a class action lawsuit asserting antitrust violations. *American Pipe*, 414 U.S. at 541-42. The district court refused to certify the class because the numerosity requirement of Rule 23(a)(1) was not satisfied. *Id.* at 543. After that determination, those who claimed to be members of the original class filed motions to intervene to assert their individual claims as plaintiffs. *Id.* at 544. The district court denied these motions because the statute of limitations period for their claims had expired. *Id.* The Supreme Court disagreed and found that the commencement of the original class suit tolled the running of limitations for "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," as long as they make a timely motion to intervene. *Id.* at 554.

After *American Pipe*, the Supreme Court extended the tolling doctrine in *Crown*. In *Crown*, a group of African-American males initiated a class action lawsuit asserting racial discrimination under Title VII. *Crown*, 462 U.S. at 346-47. The district court denied class certification based on the typicality and numerosity requirements. *Id.* at 347-48. One of the members of the previous class, Theodore Parker, filed a separate lawsuit rather than attempting to intervene. *Id.* at 348. In that lawsuit, the district court granted summary judgment for defendant Crown, deciding that the previous class action had not tolled Parker's claims, and thus his claims were time-barred. *Id.* On appeal, the Supreme Court explained that statutes of limitations are meant to put defendants on notice of adverse claims and defendants are on notice when a class action is commenced. *Id.* at 352. The Supreme Court explained that tolling the statute of limitations does not create a potential for

unfair surprise because defendant had notice of the claim, and therefore Parker should be allowed to enforce his rights by filing his own suit after a denial of class certification. *Id.* Thus *Crown* extended *American Pipe* tolling to "all asserted members of the class, not just as to interveners." *Id.* at 350 (citations omitted) (internal quotation marks omitted). *Crown* established that, once tolled, the statute of limitations remain tolled until class certification is denied, at which time class members may file their own suits. *Id.* at 354.

In *Salazar-Calderon*, the Fifth Circuit affirmed the district court's decision that *American Pipe* and *Crown* tolling did not apply to a previous class member's subsequent class action lawsuit. *Salazar-Calderon*, 765 F.2d at 1351. This suit involved four separate class actions filed in various divisions of the Western District of Texas by farm workers who alleged that the growers violated their employment agreement. *Id.* at 1338. First, a district court in El Paso denied class certification of the original class action, which had six named plaintiffs and was on behalf of 809 other farm workers (*Lara v. PVFA*). *Id.* at 1350. Then, 251 farm workers who were putative members of the *Lara* action filed two new class action lawsuits in the Pecos division (*Primero v. PVFA* and *Salazar v. PVFA*). *Id.* These two actions included the same class of plaintiffs, but one alleged breaches of the Farm Labor Contractor Registration Act and the other alleged contract causes of action. *Id.* Regarding both actions, the district court denied class certification because the classes did not satisfy Rule 23(b)(3)'s predominance requirement. *Id.* When the district court also denied members of the putative class's motions to intervene, these same plaintiffs then filed a separate complaint in the Pecos division alleging the same causes of action as the *Primero* and *Salazar* actions (*Zuniga v. PVFA*). *Id.* After these four cases were consolidated in the Pecos division, the district court did not

award damages to the *Zuniga* plaintiffs because they were barred by limitations. *Id.* at 1351.

On appeal, the Fifth Circuit affirmed the district court's ruling that the *Zuniga* class plaintiffs were barred by limitations. *Id.* The Fifth Circuit explained, "Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Id.* The Fifth Circuit also quoted *American Pipe*'s warning that "the tolling rule [in class actions] is a generous one, inviting abuse." *Id.* (alteration in original) (quoting *Crown*, 462 U.S. at 354 (Powell, J., concurring)) (internal quotation marks omitted). Since this decision, district courts and other circuit courts have relied on *Salazar-Calderon* to find subsequent classes time-barred. When a district court had previously denied class certification, any putative class members could not rely on *American Pipe* and *Crown* tolling if they filed a subsequent class action—they may only rely on tolling if they filed a motion to intervene or a subsequent individual action. *See, e.g.*, *Korwek v. Hunt*, 827 F.2d 874, 878 (2nd Cir. 1987) ("[*Salazar*] found that the *American Pipe* tolling rule does not apply to permit putative class members to file a subsequent class action."); *Dickson v. Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 629 (N.D. Tex. 2010) ("As the Fifth Circuit explained in *Salazar-Calderon*, putative class members are not permitted to piggyback one class action onto another and thus toll the statute of limitations indefinitely." (internal citation omitted)).

2. Plaintiffs' Argument that *Salazar-Calderon* Is Distinguishable

While not presented in their brief, Plaintiffs argued at the hearing on this motion that *Salazar-Calderon* is factually distinguishable from this case for two reasons. Def.'s Mot. Dismiss Hr'g Tr. First, Plaintiffs argue that *Salazar-Calderon* did not allow *American Pipe* tolling because the

subsequent class action dealt with an identical class to the previous one. *Id.* Plaintiffs argue that *Salazar-Calderon* stands for the proposition that a plaintiff cannot bring a class, subsequently bring the same class again, and expect to benefit from *American Pipe* tolling. *Id.* Plaintiffs distinguish *Salazar-Calderon* by asserting that Odle's class is not identical to the national class that was at issue in *Dukes*. *Id.* Plaintiffs explained that this is a narrower class than the *Dukes* class and that a number of things distinguish it from the national class, including alleging different employment practices. *Id.* Second, Plaintiffs implicitly argue that *Salazar-Calderon* would have been decided differently had the Fifth Circuit addressed the issue today. *Id.* Plaintiffs note that the Fifth Circuit's decision said that plaintiffs had no authority permitting members of the failed class to pursue a second class. *Id.* But Plaintiffs allege that there is now authority to pursue a subsequent class action, and that is *Smith v. Bayer* and *Shady Grove*. *Id.*

First, the Court finds unpersuasive Plaintiffs' argument that *Salazar-Calderon* is factually distinguishable from this case. Plaintiffs argue that the Fifth Circuit refused to toll the plaintiffs' subsequent class claims because the classes were identical. Def.'s Mot. Dismiss Hr'g Tr. The class here is not identical to the *Dukes* case, but rather a narrower version of the class, and thus Plaintiffs allege that *Salazar-Calderon* does not apply. *Id.* Even assuming this factual distinction exists, the Court disagrees with Plaintiffs' assertion that the Fifth Circuit did not allow tolling of those claims because the classes were identical.

The Fifth Circuit and courts following its decision focus on the vehicle that plaintiffs use to bring a second action after a class action—individual lawsuit or class action—when determining whether tolling applies. The Fifth Circuit's "no piggyback rule" restricts the tolling to subsequent

individual lawsuits and not further class actions, whether the class is identical or not. *See, e.g.*, *Morrow v. Washington*, 277 F.R.D. 172, n. 7 (E.D. Tex. 2011) (explaining tolling is limited to "subsequent individual lawsuits and not further class actions," but not specifying it must be the same class); *Dickson v. Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 630 (N.D. Tex. 2010) ("[T]he tolling would salvage no more than the plaintiff's individual claim, and could not serve as a basis for untimely pursuit by the plaintiff of yet another class action . . . .") Thus, the Court finds Plaintiffs' argument factually distinguishing *Salazar-Calderon* unpersuasive.

Plaintiffs also contend that *Salazar-Calderon* is distinguishable because now Plaintiffs have a policy to cite that supports tolling of the class claims; something the Fifth Circuit found lacking in the *Salazar-Calderon* case. *See* Def.'s Mot. Dismiss Hr'g Tr.; *see also Salazar-Calderon*, 765 F.2d at 1351 ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another . . . ."). This argument is identical to Plaintiffs' argument that *Smith* and *Shady Grove* overrule *Salazar-Calderon*. These arguments will be addressed below.

3. Plaintiffs' Arguments that *Smith* and *Shady Grove* Overrule *Salazar-Calderon*

In response to Defendant's argument that the class claims should be dismissed based on the statute of limitations, Plaintiffs argue that recent Supreme Court precedent overrules the Fifth Circuit's decision in *Salazar-Calderon*. Pls.' Resp. Def.'s Mot. Dismiss 15-21, ECF No. 25. Before addressing the merits of this argument, the Court must first determine whether it has the authority to find that a recent Supreme Court decision has overruled Fifth Circuit precedent.

a. District Court's Authority to Find a Supreme Court Decision Has Overruled a Fifth Circuit Decision

Plaintiffs allege, based on two Fifth Circuit cases, that "[w]hen an intervening Supreme Court

decision implicitly overrules prior Fifth Circuit precedent, courts must follow the Supreme Court ruling rather than the superseded Fifth Circuit authority." Pls.' Resp. Def.'s Mot. Dismiss 15-16, n.14, ECF No. 25 (citing *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999); *United States v. Thevis*, 665 F.2d 616 (5th Cir. Unit B 1982), *superseded by rule*, Fed. R. Evid. 804(b)(6), *as recognized in United States v. Nelson*, 242 F. App'x 164 (5th Cir. 2007)). The Court finds that these cases do not support Plaintiffs' assertion. *Burge* merely specifies that "in the absence of an intervening contrary or superseding decision . . . a panel cannot overrule a prior panel's decision" while *Thevis* states that "ordinarily a panel must adhere to prior decisions of this court, our first duty is to follow the dictates of the United States Supreme Court." *Burge*, 187 F.3d at 466; *Thevis*, 665 F.2d at 626. First, these cases both address the Fifth Circuit's authority to overrule a prior decision. They do not specify what authority a district court has to disregard existing precedent. Second, these cases do not state that a district court can rely on Supreme Court cases that merely imply that a case is overruled, as Plaintiffs allege.

Defendant alleges, based on *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) and *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777 (5th Cir. 2012), that when there is controlling Fifth Circuit authority, even though it may be questioned in light of an intervening Supreme Court decision, the lower court is bound to follow the Fifth Circuit decision. Def.'s Mot. Dismiss Hr'g Tr. These cases deal with the relationship between the Court of Appeals and the Supreme Court, rather than a district court and a circuit court. *See Rodriguez*, 490 U.S. at 484; *Ballew*, 668 F.3d at 782. According to *Rodriguez*, "[i]f a precedent of this [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions,

the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *See Rodriguez*, 490 U.S. at 494. Thus, by analogy to *Rodriguez* and *Ballew*, a district court should follow precedent of the Fifth Circuit that has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions" and the district court should leave to the Fifth Circuit "the prerogative of overruling its own decisions." Accordingly, the Court will follow controlling Fifth Circuit and is bound by the *Salazar-Calderon* case.

The "no piggyback rule" from *Salazar-Calderon* is established Fifth Circuit precedent. It requires that if one court finds a suit inappropriate for class action, then former class members may not file a subsequent class action suit, assuming the statute of limitations has already run for their class action claims. *See Salazar-Calderon*, 765 F.2d at 1351. Because the Court is bound by *Salazar-Calderon*, the Plaintiffs' class claims do not benefit from *American Pipe* tolling, are barred by the statute of limitations, and should be dismissed.

Alternatively, the Court finds that, even if it had the authority to find a Fifth Circuit decision overruled by an intervening Supreme Court case, at a minimum it is bound by the same standard that the Fifth Circuit would use to overrule its own previous decisions. On this point, the Fifth Circuit follows its precedent in the face of an intervening Supreme Court decision unless the decision is "more than merely illuminating with respect to the case before us . . . [and the Fifth Circuit] can only overrule a prior panel decision if 'such overruling is unequivocally directed by controlling Supreme Court precedent.'" *Martin v. Medtronic Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991)). Assuming a district court has this

authority, the Court addresses Plaintiffs' arguments that *Smith* and *Shady Grove* overrule the Fifth Circuit's *Salazar-Calderon* decision under this "more than merely illuminating" standard.

b. Plaintiffs' Argument that Shady Grove Overrules Salazar-Calderon

Plaintiffs argue that two recent Supreme Court decisions, *Shady Grove* and *Smith*, support application of *American Pipe* tolling to this subsequent class action. Pls.' Resp. Def.'s Mot. Dismiss 15-21, ECF No. 25.

In *Shady Grove*, the plaintiffs filed a diversity suit to recover interest on their insurance claim that defendant Allstate owed pursuant to New York law as a result of a delay in paying this claim. *Shady Grove*, 130 S. Ct. at 1436. The district court first explained that New York Civil Practice Law § 901(b), which prohibited class action lawsuits to recover penalties, applied in diversity suits in federal court despite Rule 23. *See id.* at 1437. Then, the district court dismissed the suit for lack of jurisdiction, reasoning that 1) the state law precluded a suit to recover a "penalty" from proceeding as a class action and 2) the statutory interest constituted a "penalty." *Id.* at 1436-37. The Second Circuit agreed and held that § 901(b) and Federal Rule of Civil Procedure Rule 23 do not conflict because they address different issues. *Id.* at 1437. The Supreme Court disagreed and found that Rule 23 and § 901(b) both address the same issue: whether a class action may be maintained. *Id.* at 1437-43. Because these two rules could not be reconciled, the Supreme Court held that Rule 23 preempted § 901(b), and therefore governed. *Id.* at 1438.

Plaintiffs contend that *Shady Grove* stands for the proposition that "where individual claims may be pursued, only Rule 23—not any other law or policy—controls whether class claims may be pursued." Pls.' Resp. Def.'s Mot. Dismiss 15, ECF No. 25. The Supreme Court stated, as Plaintiffs

note, that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437; Pls.' Resp. Def.'s Mot. Dismiss 16, ECF No. 25 Plaintiffs analogize the *Salazar-Calderon* restriction barring class claims to the New York law in *Shady Grove* also barring class claims. Def.'s Mot. Dismiss Hr'g Tr.

The Court finds these arguments unpersuasive. First, the Court finds that this case is not speaking more broadly beyond conflicts between state and federal procedure. Second, the Court also finds Plaintiffs' analogy unpersuasive. *Salazar-Calderon* does not substantively restrict class actions or the relief available as § 901(b) does; it simply restricts the timing of when plaintiffs may pursue those claims. Most importantly, this case does not reach the "more than merely illuminating" threshold that the Fifth Circuit requires to overrule a previous panel decision. *See Martin*, 254 F.3d at 577.

c. Plaintiffs' Argument that Smith Overrules Salazar-Calderon

In *Smith*, the defendant in federal district court moved for an injunction ordering a state court not to consider a motion for class certification. *Smith*, 131 S. Ct. at 2373. Previously, the same federal district court denied a similar class-certification motion brought against defendant by a different plaintiff, but alleging similar claims. *Id.* The federal court enjoined the state court proceedings, reasoning that its previous denial of certification precluded subsequent litigation of the certification in Smith's case. *Id.* The Eighth Circuit affirmed, noting that the Anti-Injunction Act's relitigation exception authorized this injunction because issue preclusion barred Smith from seeking certification of this proposed class. *Id.* at 2374. The Supreme Court, however, disagreed and found that the federal district court exceeded its authority under the relitigation exception. *Id.* at 2373.

First, the Supreme Court found that the two courts were not deciding the "same issue." *Id.* at 2376. The federal court decided the first class action under the standards set by Federal Rule of Civil Procedure 23, while the state court considered Smith's proposed class under those set by West Virginia's Rule 23. *Id.* at 2376-78. Because these rules apply different legal standards, the two courts decided distinct questions, and thus the resolution of class certification in federal court did not preclude a state court's determination. *Id.* Second, the Supreme Court found the injunction improper because Smith was not a party to the federal suit and neither a proposed, nor a rejected, class action may bind nonparties. *Id.* at 2379. The Supreme Court rejected defendant's policy arguments that plaintiffs may abuse the class action device by repeatedly trying to certify the same class by simply changing the named plaintiff. *Id.* at 2381. Reasoning that "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs," the Supreme Court found that binding nonparties to a judgment was an incorrect approach. *Id.*

Plaintiffs contend that *Smith* "supersedes earlier decisions barring plaintiffs from pursuing second class cases after a denial of certification in an earlier case." Pls.' Resp. Def.'s Mot. Dismiss 15, ECF No. 25. They argue that "courts cannot deny tolling and refuse to hear successive class actions either because class members were a part of a prior class action in which certification was denied, or because pursuit of successor class actions could invite abuse." *Id.* at 20.

The Court finds Plaintiffs' arguments unpersuasive. The Court finds that *Smith* does not speak beyond the Anti-Injunction Act's relitigation exception. Odle's class action suit does not involve the Anti-Injunction Act or issue preclusion. Even though *Smith* mentions *American Pipe*

in a footnote, it is only to reject defendant's citation of the case to support its argument that unnamed class members may be treated as parties even when a class is not certified. *Smith*, 131 S. Ct. at 2379, n.10. The Supreme Court clarified that *American Pipe* does not stand for defendant's proposition, but instead allows unnamed class members to receive certain benefits, like tolling, from a previous litigation. *Id.* The Court finds that this mention of *American Pipe* does not change the meaning of *American Pipe* or overrule *Salazar-Calderon*. Thus, the Court finds *Smith* does not speak to the tolling rule and this case does not reach the "more than merely illuminating" threshold that the Fifth Circuit requires to overrule a previous panel decision. *See Martin*, 254 F.3d at 577.

Because the Court is bound by *Salazar-Calderon* and, alternatively, because the cases that Plaintiffs' cite are not "more than merely illuminating," the Plaintiffs' class claims do not benefit from *American Pipe* tolling, are barred by the statute of limitations, and should be dismissed. Accordingly, Defendant's motion to dismiss as to Plaintiffs' class action claims is **GRANTED** and the Court **ORDERS** Plaintiffs' claims for classwide relief be dismissed with prejudice.

B. Tolling of Named Plaintiff Stephanie Odle's Claims

Defendant argues that the Ninth Circuit's decision ejected Odle from the proposed *Dukes* class and that, because only members of a class may benefit from tolling, her claims are now time-barred. *See* Def.'s Mot. Dismiss 21-23, ECF No. 16. Plaintiffs respond that the Ninth Circuit did not "eject" Odle from the class, her tolling continued, and thus her individual claims are not time-barred. Pls.' Resp. Def.'s Mot. Dismiss 24, ECF No. 25. Thus, this issue rests on how to classify the Ninth Circuit's decision.

In determining when tolling ends, *Crown* explained "[o]nce the statute of limitations has been

tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 364. The Fifth Circuit explained that "[*Crown*] requires that the tolling of the statute of limitations continue until a final adverse determination of class claims." *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008) (quoting *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 766 (3rd Cir. 1983)) (internal quotation marks omitted). Further, *Taylor* explained:

> the general rule [is] that tolling continues until the judgment in the case becomes final or until "a final adverse determination" is made. . . . When a class is certified . . . unless the district court later decertifies the class for failure to satisfy the Rule 23 factors, members of the certified class may continue to rely on the class representative to protect their interests throughout the entire prosecution of the suit, including appeal.

Id. at 520-21.

In its en banc opinion, the Ninth Circuit found that putative class members who did not work for Wal-Mart when Plaintiffs filed the complaint, including Odle, lacked standing to pursue injunctive or declaratory relief. *Dukes*, 603 F.3d at 623. Once the Ninth Circuit rejected that class and issued its Mandate,[1] it was clear that Odle and other former employees were no longer a part of that class action lawsuit. At that time, the putative class members had "no reason to assume that their rights were being protected" because there was no longer any class of former employees on which they could rely. *See Taylor*, 554 F.3d at 520. The Supreme Court's opinion clarified that the class before it did not include Odle or any other former employees. *See Dukes*, 131 S. Ct. at 2547 n.1, 2550 n.4. The class of former employees neither moved to stay the mandate, nor appealed this

[1] Under Federal Rule of Evidence 201(c)(1), the Court takes judicial notice that the Ninth Circuit's mandate issued on October 20, 2010 and its April 26, 2010 judgment took effect on that date. *See* Mandate, *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720 (9th Cir. October 20, 2010); Def.'s App. Supp. Mot. Dismiss Ex. A. (Mandate), App. 1-3, ECF No. 17.

issue to the Supreme Court. Thus, once the Mandate issued, it constituted a "final adverse determination" as to Odle's claims and tolling ceased. *See Taylor*, 554 F.3d at 520. At that point, Odle was required to file a new lawsuit in order to protect her claims, and her failure to do so within the statute of limitations now bars her claims. Accordingly, Defendant's motion to dismiss as to Odle's individual claims is **GRANTED.**

C. Rule 23 Commonality Requirement, EEOC Charge Requirement, and Particularized Venue Requirement

Because the Court grants Defendant's Motion to Dismiss Plaintiffs' class allegations, only the named plaintiffs remain in this suit, and it is unnecessary for the Court to decide Defendant's three arguments regarding the now-non-existent putative class members.

IV. CONCLUSION

For the reasons stated above, the Court is of the opinion that Defendant's motion to dismiss should be **GRANTED IN PART** and **DENIED IN PART**.

Accordingly, it is **ORDERED** that Defendant's motion to dismiss Plaintiffs' class allegations based on statute of limitations and Defendant's motion to dismiss as to named Plaintiff Odle's individual claims is **GRANTED** and these claims are **DISMISSED with prejudice**. It is **FURTHER ORDERED** that the Motion to Dismiss is **DENIED** as to 1) Defendant's motion to dismiss or strike the Plaintiffs' class allegations based on Plaintiffs' failure to allege Rule 23's commonality requirement, 2) Defendant's motion to dismiss plaintiffs who have not satisfied the EEOC Charge Requirement, and 3) Defendant's motion to dismiss the claims of those who violate Title VII's particularized venue requirement.

SO ORDERED on this **15th day** of **October, 2012.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE