United States District Court
For the Northern District of California

****E-filed 4/10/12****

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MARIA HERRERA, MARIA ALVAREZ, SALVADOR GALLARDO, MARIA VEGA, TARCISIO VEGA, JOSE TASAYCO, OLGA LOAIZA, ESPERANZA J. LOPEZ, MANUAL LOPEZ, JOSE A. LUNA, RUTILIO RIVAS, and CAROLINA RODRIGUEZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87, SERVICE EMPLOYEES INTERNATIONAL UNION, and DOES 1 through 10, inclusive

Defendant.

_____/

No. CV 10-01888 RS

ORDER DENYING MOTION TO CERTIFY CLASS AND DENYING MOTION TO DISMISS

I. INTRODUCTION

This case arises out of alleged discrimination against Hispanic union members by officials of Local 87, the local affiliate of the Service Employees International Union (SEIU). The operative second amended complaint (SAC) states representative and individual claims for relief under federal and state law. Plaintiffs have now moved to certify the proposed class. Briefing and argument on the motion was continued to permit discovery on the class allegations. Defendant opposes the

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motion and again moves to dismiss for failure to state a claim.[1] In consideration of the briefs, oral arguments, and for the reasons stated below, plaintiffs' motion to certify a class is denied without prejudice, and defendant's motion to dismiss is denied.

II. FACTS

Plaintiffs are Hispanic members of SEIU's Local 87. The local affiliate has over 3,000 members consisting mainly of janitorial employees working under contracts between the union and building maintenance companies. These companies in turn contract with various buildings in which the union members work. The union, a "labor organization" as defined under Title VII of the Civil Rights Act of 1964, is the duly certified collective bargaining representative for its members and operates a "hiring hall" that is the exclusive means of hiring for positions that the members fill. As alleged in the SAC, Local 87 and the maintenance companies have a Collective Bargaining Agreement (CBA) that establishes, among others, rules of seniority governing how union members must be hired, working terms and conditions, and procedures for grievances to be pursued by the union on behalf of its members for employer violations of the CBA.

The SAC alleges that, in or about 2005, plaintiffs perceived a pattern of discrimination against Hispanic members in the leadership of Local 87. In particular, the SAC avers, Local 87 discriminated by: (1) denying Hispanic members employment positions or referring them to inferior positions; (2) advancing members of certain other ethnicities and national origins in contravention of the seniority rules; (3) failing to pursue grievances against employers on behalf of Hispanic members; (4) failing to hire representatives who would defend the interests of Hispanic members; (5) denying Hispanic members certain rights of union membership, such as the right to attend meetings and to hold union positions; (6**)** harassing and disparaging Hispanic members in the union hall; (7) providing fewer opportunities for training and support to Hispanic members than those given to non-Hispanic members; (8) requiring Hispanic members to take positions in less preferred locations as a condition of promotion or hiring; (9) and retaliating against those Hispanic members who complained of rules violations. To be clear, there is no suggestion that Local 87 has a formal policy of discrimination. Rather, plaintiffs allege a pattern of discriminatory conduct by the union's

[1] Defendant's prior motion to dismiss was granted in part and denied in part.

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leadership. The SAC further avers that union leaders, including president Olga Miranda and vice-president Ahmed Abozayd, have made a number of discriminatory comments that betray the biased manner in which they made decisions. For instance, Miranda allegedly said, "The only [members] I care about are the Chinese and Arabic members," and refused to approve eight positions at a potential employer "because they are all Latino." *See* SAC ¶¶ 36, 61. Similarly, Abozayd allegedly asked a union foreman who had attempted to assist an Hispanic member, "Why are you helping these stupid Latinos[?]" SAC ¶ 58.

The SAC also alleges a number of specific, "illustrative" acts of discrimination against the named plaintiffs. For example, according to the SAC, Miranda and Abozayd actively sought to bar plaintiff Maria Herrera from attaining certain union offices or from attending meetings in retaliation for her complaints about the union's failure to represent Hispanic members in their complaints for discrimination and for her actions as a whistleblower concerning discriminatory enforcement of the CBA. Likewise, the SAC also alleges that when plaintiff Jose Tasayco was passed over for a position by a Middle Eastern man with less seniority, Abozayd told him, "I'm not going to take out an Arab for you," and when plaintiff Salvador Gallardo was fired on a pretextual basis to facilitate the hiring of a Middle Eastern janitor, the union refused to represent him. SAC ¶¶ 50-51.

According to the SAC, each of the named plaintiffs filed charges of national origin discrimination against Local 87 with the United States Equal Employment Opportunity Commission ("EEOC").[2] They all received a right-to-sue notice issued on February 2, 2010, as well as a letter in 2007 in which the EEOC determined that there was "reasonable cause to believe that [Local 87] discriminated against [plaintiffs] and a class of similarly situated individuals based on their race/national origin, Hispanic." SAC ¶¶ 65-79. The plaintiffs also each received a right-to-sue notice from the California Department of Fair Employment and Housing permitting private action under the Fair Employment and Housing Act (FEHA), California Government Code § 12940.

[2] Notably, the EEOC also recently entered into a consent decree with ABM Industries, one of the employers to which Local 87 provides union janitorial services, that provided many of the named plaintiffs in this action with injunctive relief from discrimination as well as a monetary recovery to the agency. *EEOC v. ABM Indus.*, No. 09-04593 (N.D. Cal. Sept. 14, 2011) (Dkt. No. 122).

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Plaintiffs then exercised their right to sue, and filed this action on April 30, 2010. The SAC's first and second claims for relief allege that Local 87 violated Title VII of the Civil Rights Act of 1964, by discriminating against the named plaintiffs individually and against the class they represent on the basis of national origin. *See* 42 U.S.C. § 2000e-2(c). The third claim for relief, similarly brought on an individual and representative basis, alleges Local 87 violated the California Fair Employment and Housing Act (FEHA), California Government Code § 12940, by discriminating against plaintiffs on the basis of national origin. The SAC requests actual and punitive damages, declaratory and injunctive relief against the union, as well as attorneys' fees and costs. Plaintiffs' motion to certify the class proposes the named plaintiffs (except Tarcisio Vega and Jose Luna) serve as class representatives, and plaintiffs' attorneys serve as class counsel.

III. DISCUSSION

A. Motion to dismiss

Curiously, defendant states as its reason for filing the motion that plaintiffs have failed to make available four named plaintiffs for deposition in preparation for the class certification motion. Since the motion was taken under submission, two of the four named plaintiffs whose testimony is at issue have been voluntarily dismissed. (*See* Dkt. No. 98). Plaintiffs admit that the remaining two individuals have not yet been deposed, but insist they made reasonable efforts to make them available. Whatever the case, defendant never moved to compel those plaintiffs to sit for depositions, or made any related discovery request whatsoever. Instead, it simply filed the instant motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Given that defendant answered the SAC over a year ago, its motion is untimely. In addition, Rule 12 is not the proper vehicle for defendant's discovery request, and the severe sanction of dismissal would be quite inappropriate under the circumstances. Accordingly, the motion is denied.

B. Class certification

Plaintiffs move to certify a class defined as: "all members of Local 87 in the period 2003 to the present who were of Hispanic national origin, also sometimes colloquially known as 'Latinos.'" SAC ¶ 25. It falls to plaintiffs to make a *prima facie* showing that class certification is appropriate. *In re Northern Dist. of Cal. Dalcon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982)

(citing *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977)); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). Certification is only appropriate if a rigorous analysis indicates the prerequisites of Rule 23(a) have been satisfied. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). Although one recent Ninth Circuit decision has held that "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements," that opinion does not entirely clarify the extent to which district courts must inquire. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) and *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (1992)). *But see Dukes*, 131 S. Ct. at 2551-52 (satisfaction of Rule 23 "frequently" entails "some overlap with the merits"), *and Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"). In any case, it remains relatively clear that an ultimate adjudication on the merits of plaintiffs' claims is inappropriate, and that any inquiry into the merits must be strictly limited to determining whether plaintiff's allegations satisfy Rule 23. *Ellis*, 657 F.3d at 983 n.8.

To merit certification, a class or subclass must satisfy the requirements of Federal Rule of Civil Procedure 23. Fed. R. Civ. P. 23; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982) (subclass). Rule 23(a) provides that a class action is available only where: (1) the class members are so numerous that joinder is impracticable; (2) common question of law or fact exist; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties will fairly and adequately protect the class interests. Additionally, plaintiffs must satisfy Rule 23(b)(1), (2), or (3). Fed. R. Civ. P. 23(b) (requiring that the proposed class qualify as one of three types). Here, plaintiffs contend that the proposed class satisfies both Rule 23(b)(2), since defendant has allegedly discriminated "on grounds that apply generally to the class" such that class-wide injunctive relief is appropriate, and Rule 23(b)(3), because, they maintain, common questions of law or fact predominate over individual issues and class adjudication would resolve their claims more fairly and efficiently than would separate actions.

1. Numerosity

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Numerosity is met if the potential class members are so numerous that the alternative – joinder of individual plaintiffs – is "impracticable." Fed. R. Civ. P. 23(a)(1). While there is no fixed number that satisfies the numerosity requirement, as a general matter, a class greater than forty often satisfies the requirement, while one less than twenty-one does not. *See Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 346 (N.D. Cal. 2008). As noted above, the putative class plaintiffs seek to certify in this case encompasses all Hispanic members of Local 87, from 2003 to the present. Plaintiffs estimate that the union presently includes approximately 1600 Hispanic members, but have not attempted to approximate how many former union members may be included within the proposed class. While joinder of all these former and current members would certainly be impracticable, as detailed below, a class simply consisting of all Hispanic members suffers from over breadth, and fails Rule 23's other requirements.[3] With respect to numerosity, plaintiffs have made no effort whatsoever to assess the number of Hispanic members actually exposed to, or impacted by, the alleged discrimination, which according to plaintiffs, takes many different forms. Granted, plaintiffs are not required to muster exact numbers to warrant certification, *Target*, 582 F. Supp. 2d at 1199, but here they offer only anecdotal evidence from relatively few named plaintiffs who have allegedly suffered from discrimination under varying circumstances. This evidence does not satisfy the "rigorous analysis" necessary to establish numerosity. *Hanon*, 976 F.2d at 509.

Although plaintiffs may be able to show numerosity and Rule 23's other requirements with respect to some narrower subclass, they have not proposed any. District courts possess the authority and discretion to create subclasses with respect to "particular issues," Fed. R. Civ. P. 23(c)(4), but that approach is largely foreclosed here, as there is no indication in the record of how many individuals might fall within any such subclass.[4] Defendant, for its part, seeks to limit the class to

[3] For reasons explained below, plaintiffs cannot establish that certification is appropriate simply by asserting that all Hispanic members were necessarily harmed by the alleged discrimination by virtue of their national origin. Although plaintiffs appear to advance diverse theories of harm, including hostile workplace environment, failure to oppose discrimination by an employer, failure to pursue grievances, and breach of duty of fair representation, among others, considered independently, there is currently insufficient evidence in the record to support certification of the proposed class of all Hispanic members on any one of these theories.

[4] Plaintiffs have filed a four-page declaration by a retained statistician which avers that in sixty buildings serviced by Local 87, Arabic- and Chinese-speaking janitors are overrepresented, relative

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"Hispanic members of Local 87 who have suffered some adverse employment action due to discrimination by the union," and argue that numerosity may not be satisfied for that class, so defined. Defs.' Opp'n, 15:4-5. *But see Bates v. United States*, 204 F.R.D. 440, 443 (N.D. Cal. 2001) ("Courts have held that subclasses may not necessarily be required to fulfill the numerosity requirement"). That definition, however, to the extent it is limited to those members who have suffered formal, "adverse employment action," ignores the diverse natures and full extent of the injuries alleged by plaintiffs. In sum, while plaintiffs' proposed class of over 1600 Hispanic union members certainly meets the numerosity requirement, the necessary showing that the entire proposed class meets the other requirements of Rule 23 is absent, and plaintiffs further have not identified any potential subclass sufficiently numerous to preclude practicable joinder.

2. Commonality

Federal Rule of Civil Procedure 23(a)(2) requires plaintiff to show the existence of "questions of fact and law which are common to the class." The commonality requirement of Rule 23(a)(2) is construed less rigorously than the "predominance" requirement of Rule 23(b)(3). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In essence, the former merely requires some "questions of fact and law which are common to the class," whereas the latter requires that "questions of law or fact common to class members [must] predominate over any questions affecting only individual members." Thus, for purposes of Rule 23(a)(2), a perfect identity of facts and law is not required; relatively "minimal" commonality will do. *Id.* at 1019-20. The requirement is met by "[t]he existence of shared legal issues with divergent factual predicates" or "a common core of salient facts coupled with disparate legal remedies within the class." *Id.* at 1020. Further, members of the proposed class "may possess different avenues of redress," provided that "their claims stem from the same source." *Id.*

to their representation in the union's membership rolls overall. Because the analysis does not take into account seniority, it provides, at most, weak circumstantial evidence of discrimination in referrals. It also does not posit any estimation of the number of Hispanic union members involved. *See* Carlson Decl. in Supp. of Pls.' Reply.

By way of background, plaintiffs advance claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(c). That section states, in relevant part, "it shall be an unlawful employment for a labor organization":

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Title VII thus holds unions liable to the same extent as employers. *Woods v. Graphic Comms.*, 925 F.2d 1195, 1200 (9th Cir. 1991). The SAC alleges violations of all three subsections, and plaintiffs are proceeding on a disparate treatment theory. In other words, their allegation is that Local 87 "treats some people less favorably than others because of their ... national origin." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000).

As a number of courts have recognized, although "racial discrimination is by definition class discrimination," claims of class-based discrimination must still meet all of Rule 23's strictures, including commonality. *Gen. Telephone v. Falcon*, 457 U.S. 147, 157-158 (1982). The mere "allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Id.* at 157. That said, in cases brought under Title VII alleging a pattern or practice of discrimination, "the legality of defendant's practices or policies will usually be a question common to the class, and the existence of different factual questions with respect to various [plaintiffs] will not defeat satisfaction of the commonality requirement." *Jordan v. Los Angeles Cnty.*, 669 F.2d 1311, 1320 (9th Cir. 1982). *See also East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("…suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present").

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Defendant urges that the Supreme Court's recent decisions require plaintiffs to adduce "significant proof that an employer operated under a general policy of discrimination" to meet the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (quoting *Falcon*, 457 U.S. at 157-158). However, the allegations in this case do not resemble those advanced in *Dukes* or *Falcon*. In *Dukes*, of course, there was no centralized supervision or policy governing employment of the vast, proposed class, and plaintiffs instead challenged the discretion committed to individual managers as enabling discrimination. *Id.* at 2548. Although the named plaintiffs were able to document instances of intentional discrimination, the class allegations relied on statistical evidence to show the broader disparate impact upon women. *Id.* In *Falcon*, plaintiff asserted he had been the victim of intentional discrimination, and mounted an "across-the-board" attack on his employer's hiring and promotional practices. He urged the existence of a class that had suffered similar injuries based on circumstantial statistical evidence of a disparate impact. *Falcon*, 457 U.S. at 157-58. He was allowed to proceed by the district court despite the fact that "[t]he complaint contained no factual allegations concerning petitioner's hiring practices." *Id.* at 150. The Supreme Court reversed the certification because there had been no "specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent." *Id.* at 158.

Here, by contrast, the proposed class is far less expansive than the *Dukes* class, and plaintiffs have alleged a host of discriminatory practices, with some support in the record. *See Jordan*, 669 F.2d at 1320. As a result, at least compared to *Dukes* and *Falcon*, the "gap" between the named plaintiffs' claims and the class allegations is narrower. Although defendant is correct that the many different theories advanced by plaintiffs raise a number of distinct factual and legal issues, the source of the alleged discrimination is always the same: Local 87's officers. Local 87 does not, of course, dispute that its leaders, including the president and vice president, possess the authority to exercise control over the practices at issue, and there is ample evidence to support that finding in the record, based on the named plaintiffs' individual experiences.

Instead, defendant, invoking *Dukes*, insists that plaintiffs have mustered no statistics, and insufficient anecdotal evidence, to warrant an inference of class-wide discrimination.[5] 131 S. Ct. at 2556. Although the presentation of statistical evidence to show commonality is certainly preferred, it is not necessarily required at the class certification stage. *Dukes*, moreover, recognizes that "[a] discrimination claimant is free to supply as few anecdotes as he wishes," provided that such evidence supports an inference of systemic discrimination. *Id.* at 2556 n.9. While allegations of class-wide discrimination cannot be accepted as a matter of course simply because sex, race, or some other class-based characteristic, is the alleged basis for the discrimination, plaintiffs may show commonality by alleging specific incidents of discrimination, with supporting affidavits, and other evidence. 8 Newberg on Class Actions § 24:21 (4th ed. 2011). There is no bright line requiring a particular number or ratio of anecdotes, relative to the size of the class, and ultimately, the inquiry is qualitative, rather than quantitative. *Dukes*, 131 S. Ct. at 2556.

In this case, the sworn statements by some of the named plaintiffs, relating their own experiences and those of fellow union members, are, to be sure, much less substantial than the proof offered in many other cases – particularly given that plaintiffs' proposed class covers, in all likelihood, several thousand people. Plaintiffs' counsel does not appear to have interviewed scores of potential class members to lay the ground work for certification of such a large group, and rather than tailoring the proposed class to a particular theory of discrimination and harm, as is the usual practice in class action litigation, plaintiffs simply request class adjudication covering all Hispanic members from 2003 to the present. As a result, plaintiff's burden is greatly increased, for as the Supreme Court has repeatedly instructed, "a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

[5] In support of this supposition, defendant relies upon a paralegal's "analysis" of job referrals in the hiring hall. That submission notes the union is comprised of 70% Hispanics, who have received 76% of referrals, yet it completely neglects to take into account seniority, or any other relevant factor, and thus falls far short of professional standards. In the end, it demonstrates little. Plaintiffs have replied with expert analysis by a statistician employing a similarly rudimentary method, yet contradicting defendant's findings.

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In this limited respect, the resemblance between this case and the "across-the-board" challenge disapproved in *Falcon* is somewhat striking. *Falcon*, 457 U.S. at 157-58. As that case makes clear, plaintiffs cannot obtain class certification by merely asserting that the alleged interests and injuries are common to the class and the named plaintiffs simply because they are all Hispanic. That argument, though seductively simple, is foreclosed by *Falcon*. *Id.* at 157. Failing that, plaintiffs have not presented evidence to suggest that all Hispanic members of Local 87 from 2003 to the present have suffered discriminatory conduct in each of the forms alleged. Instead, for example, they present a handful of anecdotes suggesting that several named plaintiffs have suffered discrimination while trying to pursue grievances, while others allege to have witnessed discriminatory remarks made by union officials, and yet others claim that they have been denied employment at the hiring hall for discriminatory reasons. As noted above, there is no admissible statistical evidence to support their claims, and portions of the declarations they have submitted are plainly hearsay. Thus, the relatively limited evidence now in the record cannot support class wide adjudication for "all members of Local 87 in the period 2003 to the present who were of Hispanic national origin, also sometimes colloquially known as 'Latinos.'"

In fairness, a closer question is presented by plaintiffs' hostile workplace allegations, and their claims arising from the disbanding of the union's committees. With respect to the former, plaintiffs argue that their allegations of discriminatory remarks by union officials support a hostile workplace-like claim. Indeed, there is some evidence of slurs in the record. *See* Herrera Decl. in Supp. of Pls.' Mot. ¶ 8 (plaintiff witnessed Local 87's president say at a membership meeting, "I don't care about Latinos. We're going to help the Arabs and the Chinese"); Exh. L (Vega Depo.) to Stimling Decl. in Supp. of Pls,' Reply, pp. 35, 36 (union president Miranda made discriminatory comments repeatedly at executive board meetings); Exh. O (Rivas Depo.) to Strimling Decl. in Supp. of Pls.,' Reply, pp. 64, 65 (Miranda made discriminatory remarks after union elections, and union vice president Abozayd also made discriminatory statements to individual plaintiff). The SAC also generally alleges that many of the named plaintiffs, as well as other union members, have been driven away from the hiring hall and other union functions as a result of the alleged harassment. Putting aside plaintiffs' bare assertions that this is an issue for hundreds of Hispanic

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union members, there are only a handful of supporting declarations in the record. Again, considerable uncertainty concerning the scope of the supposed hostility remains: for instance, other than one remark by the union president in 2005, it is difficult to discern the true time frame of these events.[6] Collectively, then, these allegations do not support class certification of all Local 87 members, from 2003 to the present, of Hispanic national origin.

The SAC also avers the union leadership eliminated the Local 87's Grievances Committee and Hiring Hall Committee, institutional safeguards plaintiffs contend are required by the union's constitution, precisely for the purpose of protecting members against unlawful discrimination. According to the SAC, the leadership's dissolution of Local 87's standing committees facilitated union officials' discrimination against Hispanics. Here, again, however, it appears that the union's committees were eliminated in 2005, not 2003, and there is no indication in the record of how many Hispanic union members were denied an opportunity to avail themselves of the committees' assistance, or even aware of the alleged animus. As a result, it is exceedingly difficult to accept plaintiffs' blanket assertion that the proper class consists of *all* Hispanic union members since 2003. While some more limited class might conceivably be properly certified, the current record does not provide sufficient specificity to permit the Court to do so.

In short, although *Hanlon* requires only "minimal commonality" of factual and legal issues, *Hanlon*, 150 F.3d at 1019-20, at least at this stage, plaintiffs have not carried their burden to demonstrate satisfaction of that requirement. While the SAC and supporting declarations contain anecdotal allegations describing a pattern of systematic and overt discriminatory conduct by the union, the evidence in the record does not match the scope of the proposed class. Should plaintiffs attempt to renew their motion, they will have to muster additional evidence, or more narrowly focus the proposed class, to satisfy commonality. For this reason alone, the motion must be denied.

3. Typicality

The representative plaintiffs' claims must also be typical of those advanced by the class. Fed. R. Civ. P. 23(a)(3). Admittedly, the "[t]he commonality and typicality requirements of Rule

[6] The current union leadership that stands accused of discrimination took office in 2005. As a result, it remains unclear what the source of the alleged hostility was from 2003 to 2005.

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23(a) tend to merge." *Falcon*, 457 U.S. at 157-158 n.13. However, typicality, like adequacy, is directed to ensuring that plaintiffs are a proper party to proceed with the suit. The test is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal. 1985)). That said, "[t]ypicality refers to the nature of the claim or defense of the class representative," and less so, "the specific facts from which it arose or the relief sought." *Hanon*, 976 F.2d at 508 (quoting *Weinberger v. Thorton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986)). "Under the rule's permissive standards, representative claims are 'typical' if they are *reasonably co-extensive* with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020 (emphasis added).

Here, the union disputes typicality on the grounds that "plaintiffs' claims are not typical of the class they purport to represent because none of the named plaintiffs has an individual claim for discrimination." Defs.' Opp'n 19:23-25. Defendant's attempt to litigate the ultimate merits of plaintiffs' individual claims is premature. The question here is not whether plaintiffs can prevail in the end. It is, rather, whether the class claims are sufficiently co-extensive with the named plaintiffs' own claims. Plaintiffs insist that "all members of the Class have an [sic] basically identical interest in nondiscriminatory treatment by the Union, which is the claim of plaintiffs." Pls.' Mot. 15:26-27. That position is telling insofar as it drastically oversimplifies the nature of plaintiffs' many claims, the interests of hundreds of putative class members, and the potential injuries at issue. Class certification does not proceed at such a high level of generality. For the reasons explained above, on the current record there is insufficient evidence to connect the nine different theories of discrimination advanced by plaintiffs to a proposed class consisting of all Hispanic members of Local 87 since 2003. Although it is conceivable that one or more certifiable class exists within the class proposed by plaintiffs, the evidence that the entire class has incurred "reasonably co-extensive" claims that correspond with those of the named plaintiffs is very thin. As currently constituted, plaintiffs' motion therefore fails under Rule 23(a)(3), as well.

4. Adequacy of representation

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The named plaintiffs must be deemed capable of adequately representing the interests of the entire class, including absent class members. *See* Fed. R. Civ. P. 23(a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). The adequacy inquiry turns on: (1) whether the named plaintiff and class counsel have any conflicts of interest with other class members; and (2) whether the representative plaintiff and class counsel can vigorously prosecute the action on behalf of the class. *Ellis*, 657 F.3d at 985. In practice, courts have interpreted this test to encompass a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (quoting *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d at 855). The record does not provide any basis to doubt the competency of counsel to represent the class, and defendant does not argue otherwise. Instead, the union merely disputes whether the named plaintiffs have established individual claims for discrimination, either in connection with job referrals or grievances. For the reasons discussed above, this line of argument, directed to challenging the merits, is unavailing.

Local 87 raises two additional contentions directed to adequacy. The first concerns whether former and current union members possess conflicting interests with respect to injunctive relief. Defendant evidently reads *Ellis* to mean that the named plaintiffs, all but one of whom are current union members, cannot represent a class that includes current and former union members because those former members are not served by, and may not even have standing to pursue, injunctive relief. 657 F.3d at 985. *Ellis*, however, merely notes that former employees may not have an adequate incentive (or standing) to pursue injunctive relief.[7] *Id*. at 985-86. The court went on to hold that a *current* employee, with an interest in both legal and equitable remedies, could serve as an adequate class representative. *Id.* Here, the union has not pointed to anything in the record that suggests the named plaintiffs cannot, by virtue of their current membership, adequately represent former members, and the named plaintiffs stand to benefit from both remedies.

[7] A possible objection, though not one raised by defendant, is that plaintiff Herrera is not a current member of the union. Her individual standing to pursue injunctive relief is therefore uncertain.

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Second, Local 87 suggests there may be antagonism between Hispanic union members who enjoy the support of the union leadership and those who do not. Operating on the assumption that this suit is politically motivated, they argue that the named plaintiffs will be inclined to seek a resolution that benefits their political fortunes, at the expense of the class. Of course, such a settlement would not merit Court approval. More generally, to defeat adequacy, the union must show that the intra-class political conflicts are "serious and irreconcilable." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997). Contrary to Local 87's suggestion, the mere fact that some class members might not approve of the suit or the particular litigation strategy pursued by the named plaintiffs is not sufficient to defeat class certification, particularly where, as here, the opposition may stem in part from solicitation or pressure on the part of defendant. *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 348 (N.D. Cal. 2008) (holding that "[a] difference of opinion about the propriety of the specific relief sought in a class action among potential class members is not sufficient to defeat certification"). *Larry James Oldsmobile-Pontiac-GMC Truck Co., Inc. v. General Motors Corp.*, 164 F.R.D. 428, 436-38 (N.D. Miss. 1996) (questioning affidavits submitted by defendant purporting to represent class members' true opinions, in light of evidence that some class members feared retribution if they did not sign).

Ultimately, then, defendant's objections as to adequacy do not bar class certification, but because plaintiffs have failed to provide evidence that the claims they advance are common and typical to the entire proposed class, it is virtually impossible to assess the adequacy of the named plaintiffs as representatives. It may be that the named plaintiffs would be adequate representatives of the proposed class, or more likely, a narrower one. At this stage, however, the record simply reveals so little about the proposed class – as noted above, it is not even clear how many former Local 87 members might be included within it – that plaintiffs cannot satisfactorily demonstrate the absence of conflicts. Accordingly, plaintiffs have also failed to carry their burden as to adequacy.

5. Rule 23(b)

a. (b)(2) Class

Finally, plaintiffs argue that a class may be certified pursuant to either Rule 23(b)(2) or (b)(3). To certify a (b)(2) class, the Court must find that "the party opposing the class has acted or

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refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Ellis*, 657 F.3d at 986 (quoting *Zinser v. Accuflix Res. Institute, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001)). Although *Dukes* does not allow members of a class certified under (b)(2) to recover individualized damages awards, 131 S. Ct. at 2557, the case simultaneously recognizes "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." *Id.* at 2558-59 (quoting *Amchem*, 521 U.S. at 614). Moreover, the district court has discretion to certify a (b)(2) subclass with respect to "particular issues" only. Fed. R. Civ. P. 23(c)(4).

Although plaintiffs' proposed class is fatally overbroad, should plaintiffs choose to renew their motion and cure the defects identified above, it is certainly possible that some of the kinds of claims they raise could support certification under (b)(2). The union argues that certification is inappropriate because plaintiffs have pled for damages. That position is a red herring. In addition to damages, plaintiffs have requested declaratory relief that the alleged discriminatory practices are unlawful, and injunctive relief prohibiting defendant from continuing them. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 620 (9th Cir. 2010) (suggesting the court certify a "Rule 23(b)(2) class for equitable relief and a separate Rule 23(b)(3) class for damages"), *overruled on other grounds* 131 S. Ct. 2541. Those requests can be satisfied with "indivisible" equitable relief that benefits a larger class, as the Rule suggests. It follows that, at least for purposes of class wide injunctive relief, there is no need "to undertake a case-specific inquiry into whether class issues must predominate or whether class action is the superior method of adjudicating the dispute." *Dukes*, 131 S. Ct. at 2558. Rather, "[p]redominance and superiority are self-evident." *Id.* The union is, of course, correct that plaintiffs' plea for relief also advances requests for damages, including individualized damages for the named plaintiffs' non-class claims, as well as injunctive relief "restoring class members to their rightful positions on the hiring lists and seniority" and other forms of equitable relief specific to individual class members. SAC, 34:13-18. These requests are not

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appropriate for certification under (b)(2), but do not necessarily foreclose certification of a parallel class under (b)(3), so long as all other relevant prerequisites are met.

b. (b)(3) Class

Finally, plaintiffs seek to proceed on their damages claims under Rule 23(b)(3). Because plaintiffs have not met the requirements of Rule 23(a), they cannot proceed. Nonetheless, since the parties disagree as to the viability of the kinds of claims raised by plaintiffs under Rule 23(b)(3), those further questions are addressed below. Certification of a (b)(3) class is appropriate if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

i. Predominance

The Supreme Court has interpreted the predominance requirement to mean that the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. In other words, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1011. On this issue, plaintiffs simply argue the law without any significant discussion of the facts. In so doing, they manifestly fail to carry their burden. Although that finding could well end discussion, because the union resists the motion on a number of additional grounds that will likely arise if plaintiffs renew their motion, those objections warrant further consideration.

Local 87 first objects that common issues do not predominate over the individualized damages assessments that would be required to adjudicate particular class members' claims. It insists that where an individualized damages calculation is required, certification under (b)(3) is only appropriate if such assessments can be accomplished by "some mechanical or statistical process." Defs.' Opp'n 24:22-24 (citing *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004)). Certain courts have indeed balked at conducting individualized damages determinations where the circumstances would render doing so particularly burdensome, and undermine the predominance of common issues in the case. However, neither Ninth Circuit nor Supreme Court precedent requires

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courts to refuse to conduct such individualized damage assessments after a finding of liability. Indeed, *Teamsters* and *Dukes* expressly contemplate additional proceedings to determine the extent of individual damages. *Teamsters*, 431 U.S. at 361-62 ("a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief"); *Dukes*, 131 S. Ct. at 2561 (quoting *Teamsters*, 431 U.S. at 361) ("[w]hen the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, 'a district court must usually conduct additional proceedings ... to determine the scope of individual relief'"). *See also Blackie, et al. v. Barrack, et al.*, 524 F.2d 891, 905 (9th Cir. 1975) ("[t]he amount of damages is invariably an individual question and does not defeat class action treatment"), *and West v. Circle K Stores, Inc.*, No. 04-0438, 2006 WL 1652598, at *7-8 (E.D. Cal. June 13, 2006) ("individual issues regarding damages will not, by themselves, defeat certification under Rule 23(b)(3)"). Thus, while the union has raised questions concerning the extent of damages calculations, the possibility that post-liability proceedings on damages may be required is hardly fatal to plaintiff's motion. Although plaintiffs generally argue that individualized damages assessments should not bar certification, because the proposed class is too diffuse to merit certification, and additionally because they have failed to apply that general principle to the facts, plaintiffs will have to address that question again, and with much greater specificity, should they choose to renew their motion.

As to liability, plaintiffs have also failed to demonstrate that common issues "predominate" over those issues that are unique to particular class members. Ultimately, this question requires an examination of the substantive issues raised by plaintiffs, as well as the proof that such matters entail. The parties appear to take for granted the proposition that in the first instance, the existence of a pattern or practice of discrimination under Title VII constitutes a common issue of fact. Supposing that is true, the union argues that even if plaintiffs could establish such discrimination, the Supreme Court's precedent in *Teamsters* would require each and every class member to make a *prima facie* case that he or she is a member of the class and has suffered a cognizable injury. *Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 359 (1977). This, according to the union, will require complicated, individual factual determinations that may entail days of trial time.

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Elaborating, defendant relies on *Brown v. Federal Express*, 249 F.R.D. 580, 585 (C.D. Cal. 2008), for the proposition that "highly individualized factual determinations" defeat certification under Rule 23(b)(3). Although it would be premature to test that premise as applied to this case given that plaintiffs have not yet established a viable class under Rule 23(a), the factual scenario at issue in *Brown* does not appear to resemble the circumstances of this case. There, plaintiffs asserted meal and rest break claims against FedEx. Determination of their claims was greatly complicated by the fact that the proposed class encompassed multiple different types of courier employees, each working complex schedules that varied significantly across 114 locations. *Id.*

Here, by contrast, there appears to be far less factual variation underlying plaintiff's claims. Assuming, for argument's sake, that to establish a *prima facie* case of discrimination under *Teamsters*, each class member must show that (1) he or she sought a dispatch from the hiring hall, and (2) a non-Hispanic member received the dispatch instead, in contravention of seniority rules. Again, assuming that to be true, it nonetheless appears that those questions can be resolved relatively easily by reference to the union's membership rolls and hiring hall records. The union insists that "the fact that someone with less seniority was dispatched can be extremely complicated determination," because, for example, "seniority rules apply by company, so one person can have several different seniority dates." Defs.' Opp'n 26:15-16. Without deciding the issue prematurely, these do not appear to be such extensive factual issues as to overwhelm common questions concerning the alleged pattern or practice of discrimination by the union's leadership. Union officials make seniority determinations on a regular basis, and defendant's own description of that process suggests the referrals are actually quite rule-bound and relatively routine. As *Teamsters* suggests, negotiation of seniority systems in labor and employment class actions is not at all uncommon, and the presence of such issues does not necessarily defeat certification.

Similarly, defendant suggests that for each class member who claims a grievance was handled in a discriminatory manner, the union may defend itself, on the ground that the grievance was (1) not timely and properly filed, (2) meritless, (3) unwinnable, (4) if settled, reasonably settled,

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or (5) if dropped, reasonably so.[8] To some extent, the union may be correct that proof of grievance-related issues will turn on circumstances that are particular to each class member. Plaintiffs have neither addressed this particular contention, nor developed the issue more generally in connection with their many other theories of unlawful discrimination. As it is their burden to show compliance with Rule 23, the current motion for class certification must be denied on this ground as well.

ii. Superiority

To determine whether class litigation is the superior method for adjudicating asserted claims, under the Rule, courts are to consider: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)-(D).

As for the first factor, the union, noting that Title VII provides punitive damages and attorneys' fees, suggests that "some absent class members may have damages claims that are worth considerably more than other claims." Defs.' Opp'n 28:26-28. In support of this contention, they speculate that some class members and named plaintiffs "have no economic damages." *See, e.g.*, Defs.' Opp'n 28:26-28. Other than its self-serving assertions, the union has not pointed to anything in the record to support an inference one way or another on this issue, and in any case, absent class members may always avail themselves of the opportunity to opt-out.

With respect to the second and third factors, it is undisputed that there is no pre-existing litigation on this issue that warrants consideration, and that this District is the most convenient to all parties involved. It follows that only the fourth factor, concerning "the likely difficulties in managing a class action," merits further discussion. On this question, the union generally reiterates its arguments concerning the necessity of individualized litigation. For the reasons stated above,

[8] Along these lines, the union argues that bifurcating the trial into liability and remedial phases, as in *Teamsters*, might precipitate violations of its Seventh Amendment rights if the first jury were permitted to find, on the basis of the named plaintiffs' testimony, a pattern or practice of discrimination, and the second jury concluded that the same evidence did not support ultimate liability. *See Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999). The union's concerns are overstated. Should the proceedings be bifurcated, the two juries would be instructed not to draw contrary conclusions based on duplicative testimony.

these contentions are largely unpersuasive. As plaintiffs have failed to propose a certifiable class, however, these concerns need not be addressed further at this time. Suffice it to say, serious questions remain as to the suitability of plaintiffs' claims for class adjudication.

V. CONCLUSION

For the reasons stated above, the motion for class certification is denied without prejudice, and the motion to dismiss is denied.

IT IS SO ORDERED.

Dated: 4/10/12

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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