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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

José Parra, Gonzalo Estrada,)
and Aurelia Martinez,)
)
Plaintiffs,)
)
vs.)
)
Bashas', Inc.)
)
Defendant.)
_____)

No. CIV-02-0591-PHX-RCB

O R D E R

Introduction

More than a decade ago, current and former Hispanic¹ employees of defendant Bashas', Inc. filed this action alleging race and national origin discrimination in violation of Title VII of the 1964 Civil Rights Act as amended ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, for both disparate impact and disparate treatment, and intentional race discrimination in violation of 42 U.S.C. § 1981. Plaintiffs allege that

¹ Plaintiffs interchangeably refer to themselves as "Latino" or "Hispanic." For the sake of uniformity, and because plaintiffs primarily refer to themselves as Hispanics so too will this court.

1 Bashas' has discriminated against them with respect to pay
2 and working conditions. In 2005, this court denied
3 certification of a pay class, but granted certification as to
4 the working conditions claim. Parra v. Bashas', Inc., 2005
5 WL 6182338 (D. Ariz. 2005) ("Parra I"). In the ensuing
6 years, for a host of reasons recounted below, this action has
7 not moved beyond the class certification stage. Pending
8 before the court is the most recent permutation of the class
9 certification issue.

10 Background

11 Bashas' Inc. operates three grocery store chains with
12 three different formats and monikers: A.J.'s Fine Foods
13 ("A.J.'s"); (2) Bashas'; and (3) Food City. In this putative
14 class action, named plaintiffs Gonzalo Estrada,² a Hispanic
15 former Food City hourly employee, and Aurelia Martinez, a
16 Hispanic current Food City hourly employee,³ allege that
17 Bashas' pays its "predominantly" Hispanic Food City
18 employees, less than it pays "the Caucasian employees at
19 A.J.'s Fine Foods and Bashas' for performing the same work."
20 First Amended Complaint ("FAC") (Doc. 116) at 1:26-2:2, ¶ 1
21 ("the pay claim"). Plaintiffs further allege that the Food
22 City Hispanic employees "are required to work under

23
24 ² As part of their motion for class certification, plaintiffs have
25 submitted numerous declarations from current and former Hispanic hourly
26 Food City employees. José Agapito Perez Estrada provided one such
27 declaration. To clarify, all references herein to Estrada are to the named
28 plaintiff, Gonzalo Estrada.

27 ³ Originally, José Parra also was a named plaintiff, but he has
28 since withdrawn, although he remains a member of the putative class. See
Parra I, 2005 WL 6182338, at *17 n. 31.

1 conditions that are typically less safe and less hygienic
2 than the conditions found at A.J.'s . . . and Bashas'." Id.
3 at 2:2-4, ¶ 1 ("the working conditions claim").

4 In Parra I, this court granted plaintiffs' motion for
5 class certification pursuant to Fed.R.Civ.P. 23(b)(2) as to
6 the working conditions claim, but denied certification of the
7 pay claim, because there was not "sufficient commonality
8 among the class members" as to the latter claim. Parra I,
9 2005 WL 6182338, at *16. Commonality, as Rule 23(a)(2)
10 requires for all class actions, was lacking because, as the
11 parties conceded, "the contested pay scales ha[d] merged and,
12 for the most part, are now identical." Id. at *15 (citations
13 omitted).

14 On appeal, the Ninth Circuit faulted this court for
15 "only look[ing] at the current pay scales." Parra v.
16 Bashas', Inc., 536 F.3d 975, 979 (9th Cir. 2008) ("Parra II"),
17 *cert. denied*, Bashas', Inc. v. Parra, 555 U.S. 1154, 129
18 S.Ct. 1050, 173 L.Ed.2d 470 (2009). This court also should
19 have "consider[ed] the evidence of past pay disparities and
20 discrimination common to the Hispanic workers at Food City."
21 Id. Taking that evidence into account, the Court found that
22 the "pay scales were common for all Bashas', Inc. employees
23 and provided for different pay for similar jobs based only on
24 where the employee worked." Id. Additionally, the Ninth
25 Circuit pointed out that "[t]he class definition seeks to
26 reach those Hispanic employees who suffered *past*
27 discrimination under th[o]se pay scales." Id. (emphasis
28 added). Given plaintiffs' "extensive evidence showing

1 Bashas', Inc.'s discriminatory pay practices commonly
2 affected all members of the proposed class[,]” the Ninth
3 Circuit reversed this court’s commonality finding and
4 remanded, instructing it to “consider[] . . . the remaining
5 class certification factors[.]” Id. at 979-980.

6 Thereafter, the issue of class certification as to the
7 pay claim was in a state of legal limbo for quite a while.
8 Bashas’ filing of a voluntary Chapter 11 bankruptcy petition
9 resulting in an automatic statutory stay, heavily contributed
10 to that state, as did this court’s decision to “defer
11 resolution of the class certification issue pending a
12 decision” in Wal-Mart Stores, Inc. v. Dukes, 603 F.3d 571
13 (9th Cir. 2010) (“Dukes II”) (*en banc*), *cert. granted*, ---
14 U.S. ---, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010). Ord. (Doc.
15 295) at 2:14-15 (citation omitted). This court opted for
16 deferral “rather than deciding the case in haste without the
17 benefit of the Supreme Court’s decision in Dukes[.]” Id. at
18 2:13-14.

19 Nearly three years after Parra II, the Supreme Court
20 rendered its decision in Wal-Mart Stores, Inc. v. Dukes, 564
21 U.S. ___, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (“Dukes”).
22 Vacating certification of a class estimated to include 1.5
23 million female current or former Wal-Mart employees, the
24 Supreme Court held, *inter alia*, that plaintiffs did “not
25 establish[] the existence of any common question[,]” as Rule
26 23(a)(2) requires. Id. at 2557 (footnote omitted). In
27 accordance with this court’s order, the parties then
28 simultaneously filed supplemental briefs and replies with

1 respect to the potential impact of Dukes upon the present
2 case. After considering all of the submissions filed with
3 respect to plaintiffs' 2004 motion for class certification,⁴
4 their positions during oral argument thereon, and the
5 parties' supplemental Dukes briefs, replies and other
6 filings, the court finds as follows.

7 **Discussion**

8 Originally, plaintiffs sought class certification
9 pursuant to Fed.R.Civ.P. 23(b)(2) as to both the pay and the
10 working conditions claims; and in Parra I, this court
11 confined its analysis accordingly. Now, however, in light of
12 Dukes, the plaintiffs are seeking certification of the pay
13 claim pursuant to Fed.R.Civ.P. 23(b)(3). Furthermore, also
14 in light of Dukes, Bashas' is requesting that this court
15 reconsider its decision certifying the working conditions
16 claim, and decertify that claim. The court will address the
17 myriad of issues surrounding class certification as to each
18 of these two claims separately, beginning with the pay claim.
19 But first, the court will outline the legal framework for its
20 analysis.

21 **I. Class Certification Legal Framework**

22 Rule 23 "give[s] the district court broad discretion
23 over certification of class actions[.]" Stearns v.
24 Ticketmaster Corp., 655 F.3d 1013, 1019 (9th Cir. 2011).

25 ⁴ In 2004, the class certification motion, the response, the reply
26 and some supporting documentation were all filed under seal. Given "the
27 extreme passage of time[,]" as Bashas' notes, "much of the information no
28 longer is sensitive." Defs.' Supp. Br. (Doc. 301) at 2:25, n. 1. Thus, to
the extent the parties have relied upon any sealed documents, so, too has
the court.

1 However, class certification remains “an exception to the
2 usual rule that litigation is conducted by and on behalf of
3 the individual named parties only.” Comcast Corp. v.
4 Behrend, --- U.S. ----, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515
5 (2013) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-701,
6 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). “[T]o justify a
7 departure from that rule, a class representative must be part
8 of the class and possess the same interest and suffer the
9 same injury as the class members.” Dukes, 131 S.Ct. at 2550
10 (internal quotation marks and citations omitted).

11 The Dukes Court made clear that “Rule 23 does not set
12 forth a mere pleading standard.” Dukes, 131 S.Ct. at 2551.
13 Therefore, “a party seeking to maintain a class action ‘must
14 affirmatively demonstrate . . . compliance’ with Rule 23.”
15 Comcast, 133 S.Ct. at 1432 (quoting Dukes, 131 S.Ct. at 2551-
16 2552). That means, “a party must . . . ‘be prepared to prove
17 that there are *in fact* sufficiently numerous parties, common
18 questions of law or fact,’ typicality of claims or defenses,
19 and adequacy of representation, as required by Rule 23(a).”⁵

20
21 ⁵ “The Supreme Court . . . has yet to decisively attach a standard
22 of proof to Rule 23 requirements[,]” Keegan v. American Honda Motor Co.,
23 284 F.R.D. 504, 521 n. 83 (C.D.Cal. 2012) (internal quotation marks and
24 citation omitted), even after its two most recent class action decisions,
25 Amgen Inc. v. Conn. Ret. Plans and Trust Funds, --- U.S. ----, 133 S.Ct.
26 1184, 185 L.Ed.2d 308 (2013), and Comcast. Similarly, the Ninth Circuit
27 has not yet been squarely confronted with this burden of proof issue.
28 Among the Circuit Courts to have addressed the issue, a consensus is
emerging around the “preponderance of the evidence” standard. See, e.g.,
Levitt v. J.P. Morgan Securities, Inc., 710 F.3d 454, 465 (2nd Cir. 2013)
(internal quotation marks and citation omitted) (emphasis added) (“The Rule
23 requirements must be established by at least a preponderance of the
evidence.”); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811
(7th Cir. 2012) (citations omitted) (“Plaintiffs bear the burden of showing
that a proposed class satisfies the Rule 23 requirements, . . . , but they
need not make that showing to a degree of absolute certainty. It is

1 Id. (quoting Dukes, 131 S.Ct. at 2551) (emphasis in
2 original). Satisfying those prerequisites, "effectively
3 limit[s] . . . class claims to those fairly encompassed by
4 the named plaintiff's claims." Dukes, 131 S.Ct. at 2550
5 (internal quotation marks and citations omitted).

6 When analyzing the propriety of class certification, the
7 Supreme Court has "[r]epeatedly . . . emphasized that it
8 'may be necessary for the court to probe behind the
9 pleadings before coming to rest on the certification
10 question,' and certification is proper only if 'the trial
11 court is satisfied, after a rigorous analysis, that the
12 prerequisites of Rule 23(a) have been satisfied.'" Comcast,
13 133 S.Ct. at 1432 (quoting Dukes, 131 S.Ct. at 2551) (quoting
14 in turn General Telephone Co. of Southwest v. Falcon, 457
15 U.S. 147, 160-161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).
16 The exact contours of a "rigorous analysis," as well as the
17 extent to which courts may "probe behind the pleadings[.]" is
18 still evolving. What is certain though is that a rigorous
19 analysis "will frequently entail 'overlap with the merits of
20 the plaintiff's underlying claim.'" Id. (quoting Dukes, 564

21 _____
22 sufficient if each disputed requirement has been proven by a preponderance
23 of evidence."); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320
24 (3d Cir. 2008) ("a district court exercising proper discretion in deciding
25 of the evidence and make findings that each Rule 23 requirement is met or
26 is not met[.]"). However, that view is not universally held. See Gooch v.
Life Investors, Co. of Am., 672 F.3d 402, 418 n. 8 (declining
"preponderance of the evidence" standard for the "rigorous analysis"
mandated by Dukes and Falcon).

27 Absent specific guidance from the Supreme Court or the Ninth Circuit,
28 the court, "see[s] no reason to superimpose a more specific standard than
the Supreme Court[.]" See Gooch, 672 F.3d at 418 n. 8. This is especially
so because "factual issues are not in play[]" in that Bashas' concessions
provide the primary factual basis, at least with respect to plaintiffs' pay
claim. See id.

1 U.S. at ----, 133 S.Ct. at 2551). "That is so because the
2 'class determination generally involves considerations that
3 are enmeshed in the factual and legal issues comprising the
4 plaintiff's cause of action.'" Id. (quoting Dukes, 564 U.S.,
5 at ----, 131 S.Ct. at 2551) (other quotation marks and
6 citation omitted).

7 Post-Dukes, the Ninth Circuit has stressed that "a
8 district court *must* consider the merits if they overlap with
9 the Rule 23(a) requirements." Ellis v. Costco Wholesale
10 Corp., 657 F.3d 970, 981 (9th Cir. 2011) ("Ellis I") (emphasis
11 in original) (citations omitted). Indeed, the Supreme Court
12 has recently cautioned that "Rule 23 grants no license to
13 engage in free-ranging merits inquiries at the certification
14 stage. Merits questions may be considered to the extent - but
15 only to the extent - that they are relevant to determining
16 whether the Rule 23 prerequisites for class certification are
17 satisfied." Amgen, 133 S.Ct. at 1194-95; see also Comcast,
18 133 S.Ct. 1426. "To hold otherwise would turn class
19 certification into a mini-trial." Ellis I, 657 F.3d at 983
20 n. 8. This court thus will "not turn the[s]e class
21 certification proceedings into a dress rehearsal for the
22 trial on the merits." See Messner v. Northshore University
23 HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012) (citations
24 omitted).

25 That said, neither "the possibility that a plaintiff
26 will be unable to prove his allegations, nor the possibility
27 that the later course of the suit might unforeseeably prove
28 the original decision to certify the class wrong, is a basis

1 for declining to certify a class which apparently satisfies
2 [Rule 23]." United Steel, Paper & Forestry, Rubber,
3 Manufacturing Energy, Allied Industrial & Service Workers
4 International Union v. ConocoPhillips Co., 593 F.3d 802, 809
5 (9th Cir. 2010). "[A]ctual, not presumed, conformance with
6 Rule 23(a) remains . . . indispensable." Falcon, 457 U.S. at
7 161. Consequently, "a court is not required to
8 "unquestioningly accept a plaintiff's arguments as to the
9 necessary Rule 23 determinations." Gonzales v. Comcast
10 Corp., 2012 WL 10621, at *9 (E.D.Cal. Jan. 3, 2012) (internal
11 quotation marks and citation omitted), adopted in full, 2012
12 WL 217708 (E.D.Cal. Jan. 23, 2012).

13 Once all four prerequisites of Rule 23(a) are shown,
14 "the party must also satisfy through evidentiary proof at
15 least one of the provisions of Rule 23(b)." Comcast, 133
16 S.Ct. at 1432. In the present case, the provision at issue
17 is subsection three, which requires a court to find that "the
18 questions of law or fact common to class members predominate
19 over any questions affecting only individual members."
20 Fed.R.Civ.P. 23(b)(3). Leaving no doubt, the Comcast Court
21 expressly held that "[t]he same analytical principles[,] "
22 outlined above, requiring a rigorous analysis and "frequently
23 entail[ing] some overlap with the merits[,] . . . govern Rule
24 23(b)." Comcast, 133 S.Ct. at 1432 (citation omitted).
25 These principles form the backdrop for the pending issue of
26 whether to certify a class as to plaintiffs' pay claim, and
27 also whether to decertify the class as to their working
28 conditions claim.

1 **II. Pay Claim**

2 **A. Fed.R.Civ.P. 23(a)**

3 **1. Numerosity**

4 Numerosity, the first prerequisite for class
5 certification under Rule 23(a), is shown when "the class is
6 so numerous that joinder of all members is impracticable."
7 Fed.R.Civ.P. 23(a)(1). In Parra I, Bashas' did not contest
8 certification based upon a lack of numerosity, and the
9 putative class has "thousands of members[.]" See Parra I,
10 2005 WL 6182338, at *14 (citations omitted). The plaintiffs
11 thus have readily shown numerosity. Further, because Bashas'
12 did not contest numerosity on appeal, nor does Bashas' raise
13 that issue now, the court adheres to that earlier finding.
14 Consequently, the court is free to turn to the vigorously
15 disputed issue of whether, in the wake of Dukes, plaintiffs
16 have met their burden of showing commonality as to their pay
17 claim.

18 **2. Commonality**

19 The second requirement under Rule 23(a) is the existence
20 of "questions of law or fact common to the class[.]"
21 Fed.R.Civ.P. 23(a)(2). Commonality under that Rule was
22 "[t]he crux" of Dukes, 131 S.Ct. at 2550. In the present
23 case, the parties strenuously disagree as to the
24 applicability of Dukes, especially given the procedural
25 posture of this case -- on remand after a finding of
26 commonality. From Bashas' perspective, Dukes "substantially
27 restated the standard for establishing commonality[.]" Def.'s
28 Resp. (Doc. 304) at 5:20, n. 1 (citations omitted). Strongly

1 implying that because Dukes constitutes an intervening change
2 in law, Bashas' further argues that "[n]either the law of the
3 case doctrine nor the mandate rule" require this court to
4 abide by the Ninth Circuit's finding of commonality in Parra
5 II. Id. at 5:19, n. 1. Hence, Bashas' believes that after
6 Dukes "it is not only proper but necessary [for this court]
7 to revisit Plaintiffs' ability to show commonality." Id. at
8 5:23, n. 1.

9 To the contrary, plaintiffs argue that the Ninth
10 Circuit's finding of commonality in Parra II "is unaffected"
11 by Dukes. Pls.' Supp. Br. (Doc. 302) at 16:11. Therefore,
12 plaintiffs assert that Bashas' is "effect[ively] . . .
13 urg[ing] this Court to ignore the mandate of the Ninth
14 Circuit." Pls.' Reply (Doc. 303) at 6:5-6 (citation
15 omitted). Skirting the critical issue of whether Dukes
16 amounts to a change in controlling law, plaintiffs first
17 observe that the Parra II Court "did not rely on any of the
18 Ninth Circuit's rulings in *Wal-Mart*, now reversed by the
19 Supreme Court["] in Dukes. Id. at 16:12-13. While obviously
20 true,⁶ it does not necessarily follow that because of that
21 Dukes is not an intervening change in law, as plaintiffs
22 suggest.

23 Plaintiffs add that Dukes and the present case "raise
24 different commonality issues." Id. at 16:14. Assuming that
25 is so, it also does not necessarily follow therefrom that
26 Dukes does not constitute an intervening change in law. Put

27
28 ⁶ Given that Parra II was decided in 2008, it would have been impossible for that Court to have relied upon the Ninth Circuit's 2010 Dukes decision.

1 differently, it is possible that Dukes is an intervening
2 change in law, regardless of the nature of the commonality
3 issues. Plaintiffs' final response is that "the policy issue
4 in this case is precisely the kind of 'specific employment
5 practice' found lacking by the Supreme Court in [Dukes]."
6 Id. at 16:19-21. Still, this is not directly responsive to
7 the change in law issue.

8 **a. Law of the Case/Rule of Mandate**

9 It is well settled in this Circuit that "[w]hen a case
10 has been decided by an appellate court and remanded, the
11 court to which it is remanded must proceed in accordance with
12 the mandate and such law of the case as was established by
13 the appellate court.'" United States v. Luong, 627 F.3d 1305,
14 1309 (9th Cir. 2010) (quoting Firth v. United States, 554 F.2d
15 990, 993 (9th Cir. 1977)). Pursuant to the law of the case, "a
16 court will generally refuse to reconsider an issue that has
17 already been decided by the same court or a higher court in
18 the same case." Gonzalez v. Arizona, 677 F.3d 383, 389 n. 4
19 (9th Cir. 2012) (citation omitted) (en banc), cert. granted, -
20 -- U.S. ----, 133 S.Ct. 476, 184 L.Ed.2d 296 (2012). The
21 law of the case doctrine applies when, *inter alia*, "the issue
22 in question [was] decided explicitly . . . in the previous
23 disposition." United States v. Thrasher, 483 F.3d 977, 981
24 (9th Cir. 2007). Plainly, "the issue in question" here -
25 whether plaintiffs met Rule 23(a)(2)'s commonality standard -
26 was explicitly decided in Parra II. Thus, prior to Dukes,
27 the Ninth Circuit's finding of commonality in Parra II would
28 have been binding upon this court, and the law of the case

1 doctrine would have barred reconsideration of that issue on
2 remand.

3 The same result holds true with respect to the rule of
4 mandate, which "is similar to, but broader than, the law of
5 the case doctrine." See id. at 982 (internal quotation marks
6 and citation omitted). "The Supreme Court long ago
7 emphasized that when acting under an appellate court's
8 mandate, an inferior court 'cannot vary it, or examine it for
9 any other purpose than execution; or give any other or
10 further relief; or review it, even for apparent error, upon
11 any matter decided upon appeal; or intermeddle with it,
12 further than to settle so much as has been remanded.'" Matter of Beverly Hills Bancorp, 752 F.2d 1334, 1337 (9th Cir.
13 1984) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247,
14 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895)). Prior to
15 Dukes, the rule of mandate would have deprived this court of
16 jurisdiction to revisit on remand the Parra II commonality
17 finding. See Luong, 627 F.3d at 1309 (internal quotation
18 marks and citation omitted) ("[I]f a district court errs by
19 violating the rule of mandate, the error is a jurisdictional
20 one[.]") That is so because in reversing this court's
21 "finding that Plaintiffs' originally proposed class lacked
22 commonality under Rule 23(a)(2)," the Ninth Circuit
23 explicitly remanded "for consideration of the *remaining* class
24 certification factors in accordance with [its] opinion."
25 Parra II, 536 F.3d at 980 (emphasis added).
26

27 Importantly, there is some flexibility with respect to
28 the rule of mandate and law of the case doctrines. Indeed,

1 Ninth Circuit "cases make clear that the rule of mandate is
2 designed to permit flexibility where necessary, *not* to
3 prohibit it." U.S. v. Kellington, 217 F.3d 1084, 1095 n. 12
4 (9th Cir. 2000) (emphasis added). The Ninth Circuit likewise
5 has recognized that the "[l]aw of the case should not be
6 applied woodenly in a way inconsistent with substantial
7 justice." United States v. Miller, 822 F.2d 828, 832-33 (9th
8 Cir. 1987); see also Yankee Atomic Electric Co. v. United
9 States, 679 F.3d 1354, 1360 (Fed. Cir. 2012) internal
10 quotation marks and citations omitted) ("An appellate mandate
11 does not turn a district judge into a robot, mechanically
12 carrying out orders that become inappropriate in light of
13 subsequent factual discoveries or changes in the law.")

14 Given that inherent flexibility, there are exceptions
15 warranting a departure from the law of the case and rule of
16 mandate doctrines. Among other reasons, a court has
17 discretion to depart from the law of the case doctrine based
18 upon "intervening controlling authority [which] makes
19 reconsideration appropriate[.]" United States v. Jingles,
20 682 F.3d 811, 820 (9th Cir. 2012) (internal quotation marks
21 and citations omitted). Further, because "[t]he mandate rule
22 is a subpart of the law of the case doctrine[,]" . . . the
23 mandate rule is subject to the same exceptions[]" as the law
24 of the case doctrine. American Express Travel Related Serv.
25 Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 457 (9th
26 Cir. BAP 1999), aff'd, 242 F.3d 381 (9th Cir. 2000) (citing
27 Miller, 822 F.2d at 832). Hence, because the "Ninth Circuit
28 has identified . . . an intervening change in the law" as one

1 of several "circumstances in which the law of the case
2 doctrine," need not be applied, "by analogy the rule of
3 mandate doctrine[] [also] need not be applied[]" when there
4 has been such a change in the law. See Allen v. Astrue,
5 2010 WL 4825925, at *5 (C.D.Cal. 2010) (emphasis added)
6 (citing cases).

7 In the present case, the issue thus becomes whether, as
8 Bashas' contends, Dukes constitutes an intervening change in
9 the controlling law so as to permit departure from the rule
10 of mandate and law of the case doctrines. See Fraschilla,
11 235 B.R. at 455 (citing cases) ("[T]rial courts are permitted
12 on remand to consider whether any exceptions to the law of
13 the case doctrine excuse compliance with a determination made
14 by an appellate court.") In its first application of Dukes,
15 the Ninth Circuit sweepingly declared it to be "new precedent
16 altering existing case law[,] " requiring remand to the
17 district court. Ellis I, 657 F.3d at 974. The Ninth Circuit
18 in Ellis vacated and remanded a grant of class certification
19 in a Title VII action alleging gender discrimination by the
20 defendant employer in its promotion and management practices.
21 Admittedly, the Ellis I Court was not faced with the precise
22 issue before this court: whether Dukes is a change in
23 controlling law so as to permit deviating from the law of the
24 case and rule of mandate doctrines. Nonetheless, the Ninth
25 Circuit's broad declaration in Ellis I is a strong signal
26 that it views Dukes as changing the legal landscape with
27 respect to class certification.

28 Reinforcing this view is the Ninth Circuit's more recent

1 decision in Wang v. Chinese Daily News, Inc., 709 F.3d 829
2 (9th Cir. 2013). There, the plaintiffs argued that the
3 defendant had "waived its right to challenge the district
4 court's commonality finding because its opening brief, filed
5 before . . . *Wal-Mart*, discussed the existence of common
6 questions only in arguing against Rule 23(b)(3)
7 certification." Id. at 833. The defendant "did not argue
8 the issue of commonality in its discussion of Rule 23(a)."
9 Id. "Generally, an issue is waived when the appellant does
10 not specifically and distinctly argue the issue in his or her
11 opening brief." Id. (internal quotation marks and citation
12 omitted). However, invoking the settled rule that an
13 appellate court "may consider new arguments . . . if the
14 issue arises because of an intervening change in law[,] " the
15 Ninth Circuit "conclude[d] that the [Supreme] Court's
16 decision in *Wal-Mart* present[ed] a sufficiently significant
17 legal development to excuse any failure of [the defendant] to
18 discuss the commonality requirement of Rule 23(a)(2) in its
19 opening brief." Id.

20 The Ninth Circuit is not alone in its view that Wal-Mart
21 is "new precedent altering existing case law[,] " Ellis I, 657
22 F.3d at 974, or a "significant legal development[.]" See
23 Wang, 709 F.3d at 833. Other courts, including district
24 courts within this Circuit, have variously recognized that
25 Dukes: (1) sets forth a "heightened standard of
26 commonality[;]"⁷ (2) "represents a significant restatement of

27 _____
28 ⁷ See Morrison v. Anadarko Petroleum Corp., 280 F.R.D. 621
(W.D.Okla. 2012) (refusing to give preclusive effect to a state court class
certification order because that court "did not apply the heightened

1 the commonality requirement[;]"⁸ (3) clarifies the Rule
2 23(a) commonality element;⁹ and (4) "undoubtedly increas[es]
3 the burden on class representatives by requiring that they
4 identify *how* common points of facts and law will drive or
5 resolve the litigation[.]"¹⁰ Partially based upon this
6 weight of authority, the court is convinced that Dukes
7 represents an intervening change in law.

8 Additionally, an independent examination of Dukes
9 further convinces this court that the Supreme Court altered
10 the legal standards for assessing commonality by, among other
11 things, adding an additional level of scrutiny under Rule
12 23(a)(2). More specifically, Dukes adopted the view that
13 "[w]hat matters to class certification . . . is not the

14 _____
15 standard of commonality as set forth in *Dukes*["]").

16 ⁸ Walter v. Hughes Communications, Inc., 2011 WL 2650711, at *7
17 (N.D.Cal. 2011).

18 ⁹ See, e.g., Ellis I, 657 F.3d at 974 ("Several of the[] issues
19 ["relating to class certification[]"] have recently been clarified by
Dukes); Ross v. RBS Citizens, N.A., 667 F.3d 900, 902 (7th Cir. 2012)
20 ("[T]he Supreme Court clarified the Rule 23(a) commonality element in"
Dukes); Sanchez v. Sephora USA, Inc., 2012 WL 2945753, at *3 (N.D.Cal.
2012) (same); In re Wells Fargo Residential Mortg. Lending Discrimination
21 Litigation, 2011 WL 3903117, at *2 (N.D.Cal. 2011) (same).

22 This court is keenly aware that in attempting to define what
23 constitutes an intervening change in controlling law, it has previously
found that "cases which merely confirm, clarify or explain existing case
24 law" do not amount to such a change. Teamsters Local 617 Pension and
Welfare Funds v. Apollo Group, Inc., 282 F.R.S. 216, 224 (D.Ariz. 2012).
25 Significantly, however, in Apollo Group this court was examining what
26 constitutes an intervening controlling law for purposes of determining
whether to alter or amend a judgment under Rule 59(e), and it limited its
27 finding accordingly. The interests of finality and conservation, which are
of paramount importance in that context, Carroll v. Nakatani, 342 F.3d 934,
945 (9th Cir. 2003), are not implicated here. Moreover, as can be seen,
28 clarification is just one of many ways in which courts have described
Dukes' influence on Rule 23(a)(2)'s commonality standard.

¹⁰ Gonzales, 2012 WL 10621, at *10 (citation omitted) (emphasis in
original).

1 raising of common 'questions' – even in droves – but, rather
2 the capacity of a classwide proceeding to generate common
3 answers apt to drive the resolution of the litigation.”
4 Dukes, 131 S.Ct. at 2551 (internal quotation marks and
5 citation omitted) (emphasis in original). Consequently, in
6 its discretion, and given “the contours of the situation and
7 common sense[,]” this court finds it appropriate to revisit
8 the commonality issue, notwithstanding the Ninth Circuit’s
9 resolution of that issue in Parra II.¹¹

10 Hegler v. Borg, 50 F.3d 1472 (9th Cir. 1995) (“Hegler
11 II”), is closely analogous, and provides additional support
12 for reexamining the commonality issue in light of Dukes.
13 Reversing and remanding, in Hegler v. Borg, 990 F.2d 1258 (9th
14 Cir. 1993), the Ninth Circuit instructed the district court
15 to determine whether a particular error was harmless beyond a
16 reasonable doubt. On remand, the district court “disobeyed
17 the instruction in the mandate because an intervening Supreme

18 ¹¹ To a certain extent, the court finds itself in the position, so
19 aptly described by the Fraschilla court:

20 In effect, when there has been an intervening
21 authoritative decision of a higher appellate court
22 [i.e., Dukes] to which both the lower appellate court
23 that issued the mandate [i.e., Parra III] and th[is]
24 trial court owe obedience, then the trial court is
25 presented with the dilemma of a clash between the
26 dictates of the doctrine of *stare decisis* and the
27 imperative of the mandate rule. The correct choice
28 depends upon the contours of the situation and common
sense. It is no more comfortable for the trial court than
it is for the private soldier who receives contradictory
orders from the sergeant and the captain or the employee
caught between a middle manager and a top executive.

27 Fraschilla, 235 B.R. at 458.

1 Court decision prescribed a different standard." Fraschilla,
2 235 B.R. at 458. In Hegler II, another Ninth Circuit panel
3 agreed that it "must apply intervening Supreme Court
4 authority to a subsequent appeal[]" as an exception to the
5 law of the case doctrine. Hegler II, 50 F.3d at 1478.
6 Therefore, the Hegler II Court "had no difficulty affirming
7 the [district] court[]" despite that court's disregard of the
8 mandate and the law of the case. See Fraschilla, 235 B.R. at
9 458 (citation and footnote omitted).

10 Southern Oregon Barter Fair v. Jackson County, 372 F.3d
11 1128 (9th Cir. 2004), and Fraschilla, 235 B.R. 449, are also
12 instructive as to when a district court may depart from the
13 mandate and law of the case. In Barter Fair, the Court held
14 that it was not an abuse of discretion to re-examine the
15 merits after the issuance of a preliminary injunction,
16 notwithstanding the law of the case, because an intervening
17 Supreme Court decision "provided important guidance" therein.
18 Barter Fair, 372 F.3d at 1136.

19 Similarly, in Fraschilla, 235 B.R. 449, the Bankruptcy
20 Appellate Panel ("BAP") held that although its mandate had
21 directed entry of judgment in plaintiff's favor, the trial
22 court did not err by subsequently conducting a trial where,
23 following remand, there had been two intervening Ninth
24 Circuit decisions. One such decision "amplified the
25 importance of the other elements of [nondischargeability for]
26 common law fraud." Id. at 456. The second intervening
27 decision, while "somewhat opaque," "adjusted the focus" for a
28 finding of nondischargeability, "emphasiz[ing] the need to

1 make an actual finding regarding intent[.]” Id. Those two
2 decisions change[d] the landscape regarding credit card
3 nondischargeability actions . . . alter[ing] the analysis
4 that was applicable when the BAP decided the initial
5 appeal[.]” therein. Id. at 455. As Barter Fair and
6 Fraschilla demonstrate, even if an intervening decision does
7 not go so far as to “prescribe a different standard,”
8 nonetheless, such a decision can warrant a departure from the
9 rule of mandate and law of the case doctrines. See
10 Fraschilla, 235 B.R. at 458.

11 Ultimately, as plaintiffs assert, the Parra II Court’s
12 finding of commonality (as distinguished from its rationale)
13 might be “unaffected.” Pls.’ Supp. Br. (Doc. 302) at 6:13
14 (citation omitted). It also may be, as plaintiffs assert,
15 that Dukes “does not require a re-examination of [prior]
16 *factual* findings[.] in this case. See Pls.’ Reply (Doc. 303)
17 at 6:8-9 (emphasis added). Nevertheless, this court cannot
18 disregard Dukes, which altered the legal standards for
19 assessing Rule 23(a)(2) commonality.

20 **b. Dukes**

21 The Dukes plaintiffs alleged “that the discretion
22 exercised by their local supervisors over pay and promotions
23 matters violate[d] Title VII by discriminating against
24 women.” Dukes, 131 S.Ct. at 2547. The Dukes plaintiffs
25 attempted to demonstrate the common issue of company-wide
26 gender discrimination chiefly through three different “forms
27 of proof[.]” Dukes, 131 S.Ct. at 2549. First, the plaintiffs
28 relied upon “statistical evidence about pay and promotion

1 disparities between men and women at the company[.]” Id.
2 Second, they relied upon “anecdotal reports of discrimination
3 from about 120 of Wal-Mart’s female employees[.]” Id.
4 Third, the plaintiffs relied upon “the testimony of a
5 sociologist, . . . , who conducted a ‘social framework
6 analysis’ of Wal-Mart’s ‘culture’ and personnel practices,
7 and concluded that the company was ‘vulnerable’ to gender
8 discrimination.” Id. (citation omitted). In dismantling the
9 nation-wide class, a five justice majority in Dukes held that
10 plaintiffs did not show commonality because they did not
11 “provide . . . convincing proof of a companywide
12 discriminatory pay and promotion policy[,]” and hence they
13 did “not establish[] the existence of any common question[,]”
14 as Rule 23(a)(2) mandates. Id. at 2556-57.

15 Summarizing the commonality requirement, Justice Scalia
16 wrote, that it “requires the plaintiff to demonstrate that
17 the class members ‘have suffered the same injury[,]’” not
18 “merely that they have all suffered a violation of the same
19 provision of law.” Id. at 2551 (quoting Falcon, 457 U.S. at
20 157, 102 S.Ct. 2364). To show that they have suffered the
21 same injury, plaintiffs’ “claims must depend upon a common
22 contention,” according to the Dukes Court. Id. That common
23 contention, in turn, “must be of such a nature that it is
24 capable of classwide resolution - which means that
25 determination of its truth or falsity will resolve an issue
26 that is central to the validity of each [claim] in one
27 stroke.” Id. Such a common contention was missing in Dukes
28 because there was not “some glue holding the alleged reasons

1 for all [of] those [individual employment] decisions
2 together[.]” Id. at 2552 (emphasis in original). Therefore,
3 it would “be impossible to say that examination of all the
4 class members’ claims for relief will produce a common answer
5 to the crucial question *why was I disfavored.*” Id. (emphasis
6 in original).

7 Rejecting plaintiffs’ statistical evidence, the Dukes
8 Court found that “[e]ven if . . . taken at face value,” such
9 evidence was “insufficient to establish that [plaintiffs’]
10 theory c[ould] be proved on a classwide basis.” Id. at 2555.
11 “Merely showing that Wal-Mart’s policy of discretion had
12 produced an overall sex-based disparity does not suffice.”
13 Id. at 2556. The “more fundamental” failure in plaintiffs’
14 proof though was their failure to “identif[y]” [a] ‘specific
15 employment practice’ - - much less one that ties all their
16 1.5 million claims together.” Id. at 1255-56. Plaintiffs’
17 anecdotal evidence in Dukes was similarly defective and “too
18 weak to raise an inference that all the individual,
19 discretionary personnel decisions are discriminatory[.]”
20 because it did not focus on particular Wal-Mart stores. Id.
21 Thus, because the plaintiffs did not provide “convincing
22 proof of a companywide discriminatory pay and promotion
23 policy,” the Dukes Court held that they did “not establish[]
24 the existence of any common question.” Id. (footnote
25 omitted).

26 c. Analysis

27 Before considering whether plaintiffs have shown
28 commonality post-Dukes, it is necessary to clarify the scope

1 of their pay claim. Since seeking class certification in
2 2004, plaintiffs have severely restricted the scope of that
3 claim. Originally, plaintiffs' pay claim had encompassed a
4 pay policy purporting to have "elements of local manager
5 subjectivity[,]" Pls.' Supp. Br. (Doc. 302) at 18:27, n. 9,
6 the so-called, "Subjective Placement claim[.]" Pls.' Reply
7 (Doc. 303) at 5:16-17. Plaintiffs unequivocally declare that
8 they "did not pursue that policy on . . . appeal . . . and no
9 longer seek certification of that claim[,]" however. Pls.'
10 Supp. Br. (Doc. 302) at 18:27-28, n. 9.

11 Another component of plaintiffs' pay claim had been
12 Bashas' alleged failure to pay Sunday premiums to Food City
13 employees. Plaintiffs make only "passing reference" to the
14 Sunday premiums; and, more importantly, they have not come
15 forth with any factual support for this claim, as Bashas'
16 accurately notes. See Def.'s Supp. Br. (Doc. 301) at 2:26,
17 n. 2 (citation omitted). Furthermore, as Bashas' also
18 correctly notes, "[p]laintiffs never raised this [issue]
19 again and neither this Court nor the [Ninth] Circuit . . .
20 addressed it." Id. at 2:27-28, n. 2. Plaintiffs have,
21 therefore, implicitly abandoned the Sunday premiums aspect of
22 their pay claim. Through their actions or, as the case may
23 be, inaction, plaintiffs' pay claim now consists solely of
24 what they describe as Bashas' "written Two-Tiered Wage Scale
25 [("the wage scale")][.]"¹² Pls.' Reply (Doc. 303) at 5:17-18.

26
27 ¹² Bashas' twice acknowledges that plaintiffs are challenging its
28 pay scales. See Def.'s Supp. Br. (Doc. 301) at 9:19-20 (citations omitted)
(emphasis added) (identifying "Bashas' pay scales[]" as "the *actual*
employment practice challenged in this case[]"); and id. at 10:19-20
(emphasis added) (defining the "issue at hand[]" as whether the *challenged*

1 The court will limit its analysis accordingly.

2 Plaintiffs are pursuing two closely related, although
3 not identical, theories of discrimination with respect to
4 Bashas' wage scales - disparate treatment and disparate
5 impact.¹³ See Pls.' Supp. Br. (Doc. 302) at 17:28-18:2.
6 Borrowing from Dukes, plaintiffs assert that they do have a
7 common answer to the "crucial question" posed therein, "[w]hy
8 was I disfavored?" See Dukes, 131 S.Ct. at 2552 (emphasis in
9 original). The common answer, plaintiffs posit, is because
10 Bashas' "adopted a lower wage scale for predominantly
11 Hispanic Food City employees doing the same work as their
12 white counterparts at Bashas' and A.J.'s Fine Foods." Pls.'
13 Supp. Br. (Doc. 302) at 17:26-28. Thus, regardless of which

14

15 pay scales constitute a discriminatory practice[)"). Yet, in its reply
16 Bashas' seems to disavow that view, declaring that "[w]hile Plaintiffs
17 claim to challenge [its] pay scales, in reality, they [are] rely[ing] on
18 statistically derived average pay differences between Hispanic Food City
19 employees and their counterparts working in other Bashas' formats." Def.'s
20 Resp. (Doc. 304) at 3:3-5 (emphasis in original). Even assuming *arguendo*
21 that is so, it does not change the fact that plaintiffs' equal pay claim
22 centers on Bashas' wages scales themselves.

20

¹³ For the most part, the parties have overlooked the distinction
21 between these two theories. For example, in its reply Bashas' outlines the
22 legal framework for a *prima facie* case of disparate impact, Def.'s Resp.
(Doc. 304) at 4:1-22, but it seems to couch its Dukes-based arguments in
23 terms of disparate treatment, not disparate impact.

24 Bashas' is not alone in this tendency. Even though they are pursuing
25 both, plaintiffs did not separately analyze disparate impact and disparate
26 treatment in terms of commonality or otherwise. Cf. Ellis v. Costco
27 Wholesale Corp., 285 F.R.D. 492, 510 (N.D.Cal. 2012) ("Ellis II")
28 ("[B]ecause there are differences with respect to the way *Dukes* might be
applied to disparate treatment, as opposed to disparate impact claims, the
Court . . . address[ed] these claims separately[.]") Following the
parties' lead, and without the advantage of their fully briefed views on
this issue, this court, too, will not distinguish between disparate
treatment and disparate impact at this stage. That does not foreclose the
possibility that that distinction will become relevant later in this
litigation.

1 theory their pay claim is grounded upon, plaintiffs contend
2 that they have met Dukes' commonality standard because
3 "[r]esolution of whether Bashas' [pay] policy violates Title
4 VII and Section 1981 . . . will resolve the question for all
5 class members." Id. at 17:23-25.

6 Bashas' responds that commonality is lacking because, as
7 in Dukes, the plaintiffs "cannot provide proof of a
8 companywide discriminatory pay practice." Def.'s Supp. Br.
9 (Doc. 301) at 12:24 (emphasis omitted). Bashas' further
10 responds that, also like Dukes, neither plaintiffs'
11 statistical nor their anecdotal evidence suffice to establish
12 commonality. Patterning its argument after the evidentiary
13 shortcomings in Dukes only serves to lay bare the flaws in
14 Bashas' commonality analysis, however. Although Bashas'
15 assails the evidence of plaintiffs' statistician, Dr. Richard
16 Drogin, it cannot now distance itself from "three significant
17 . . . conce[ssions]" it made earlier in this litigation. See
18 Parra II, 536 F.3d at 979. Bashas' retained Dr. Michael P.
19 Ward, an economist and statistician, to refute Dr. Drogin's
20 statistical analyses. Dr. Ward conceded these conclusions
21 reached by Dr. Drogin:

- 22 (1) Food City Stores have a higher
23 percentage of Hispanic employees
24 compared to Bashas' or A.J.'s stores,
- 25 (2) the pay scales at Bashas' and A.J.'s
26 stores were higher than those at Food City
27 during the period 1998-2000, and (3)
- 28 Hispanic employee hourly rates were
lower in similar jobs.

Id.; see also Parra I, 2005 WL 6182338, at *16 (same).

Bashas' wage scales, in combination with these concessions,
provide the "convincing proof of a companywide discriminatory

1 pay . . . policy" missing from Dukes. See Dukes, 131 S.Ct.
2 at 2556.

3 Indeed, even prior to Dukes, the Ninth Circuit was
4 similarly convinced, explaining that:

5 These pay scales were common for all Bashas',
6 Inc. employees and provided for different
7 pay for similar jobs based only on the store
8 where the employee worked. The proposed class
9 here shares the alleged discriminatory pay
scales of Bashas', Inc. The class definition
seeks to reach those Hispanic employees who
suffered past discrimination under these pay
scales.

10 Parra II, 536 F.3d at 979. The foregoing seriously erodes
11 Bashas' assertion that plaintiffs have not shown commonality
12 because Dr. Drogin "fail[ed] to "identify . . . a 'specific
13 employment practice' or one that impacts all of the
14 individuals in the proposed class." Def.'s Supp. Br. (Doc.
15 301) at 10:24-26 (citing Dukes, 131 S.Ct. at 2555).

16 Relatedly, the foregoing also deeply undercuts Bashas'
17 bald assertion that commonality is lacking because the
18 plaintiffs cannot show that they "'have suffered the *same*
19 injury[.]'" Def.'s Supp. Br. (Doc. 301) at 9:14-15 (quoting
20 Dukes, 131 S.Ct. at 2551) (emphasis added by Bashas'). The
21 putative class members have suffered the same injury: they
22 received lower wages than their Caucasian counterparts at
23 A.J.'s and Bashas' stores at least "during the period 1998-
24 2000[]" when, it is undisputed, that "the pay scales at
25 Bashas' and A.J.'s stores were higher than those at Food
26 City[.]" See Parra II, 536 F.3d at 977 ("according to
27 [Bashas'] pay scales, the hourly pay disparities for
28 comparable jobs at the three brand named stores ranged from

1 \$0.15 per hour to \$2.94 per hour[,]" which "translate to
2 annual salary differences of around \$300 per year to almost
3 \$6,000 per year[.]"). Thus, unlike Dukes, this is not a "mere
4 claim by [current and former Food City] employees that they
5 have suffered a Title VII injury, or even a disparate-impact
6 Title VII injury[.]" See Dukes, 131 S.Ct. at 2551. Rather,
7 as is evident, plaintiffs' pay claims can "productively be
8 litigated at once." See id.

9 In addition, Bashas' attacks on plaintiffs' statistical
10 evidence are largely immaterial because they are directed
11 primarily at Dr. Drogin's regression analyses, which
12 plaintiffs offered to support their "Subjective Placement
13 claim[]" - a claim they are no longer pursuing.¹⁴ Pls.' Reply
14 Br. (Doc. 303) at 7:1-2 (footnote omitted). Bashas' fares no
15 better with its attacks on plaintiffs' anecdotal evidence -
16 declarations from 13 former and current Bashas' employees. As
17 with their statistical evidence, Bashas' contends that
18 plaintiffs cannot establish commonality because, their
19 anecdotal evidence, *inter alia*, does not "provide
20 'significant proof' that [Bashas'] operated under a general
21 policy of discrimination[.]'" Def.'s Supp. Br. (Doc. 301) at
22 11:9-10 (quoting Dukes, 131 S.Ct. at 2553). Plaintiffs
23 counter, and the court agrees, that their anecdotal evidence
24 is "unnecessary to establish commonality[,]" Pls.' Reply
25 (Doc. 303) at 7:15 (emphasis omitted), given the "three

26
27 ¹⁴ Given the simultaneous filing of the opening post-Dukes briefs,
28 Bashas' cannot be faulted in its opening brief for concentrating on its
perceived deficiencies in Dr. Drogin's analyses. Bashas' had no way of
knowing when it filed that brief, that plaintiffs would be abandoning their
Subjective Placement claim.

1 significant conclusions conceded by Bashas' " and identified
2 above. See Parra II, 536 F.3d at 979.

3 Of equal import is that Bashas' written, non-
4 discretionary, centralized wage scale under which, as
5 plaintiffs allege and the evidence indicates, Hispanic Food
6 City hourly employees were paid less than their Caucasian
7 counterparts at Bashas' and A.J.'s stores, is precisely what
8 was missing in Dukes. See Dukes, 131 S.Ct. at 2548
9 (emphasis added) ("These plaintiffs . . . do not allege that
10 Wal-Mart has any express corporate policy against the
11 advancement of women.") Bashas' wage scales "provide the
12 'glue' the Supreme Court sought – but did not find – in
13 Dukes, sufficient to 'say that examination of all the class
14 members' claims for relief will produce a common answer to
15 the crucial question *why was I disfavored*." Ellis II, 285
16 F.R.D. at 530 (emphasis in original) (quoting Dukes, 131
17 S.Ct. at 2552).

18 So, for example, if a trier of fact finds that Bashas'
19 wage scales "lead to disparate outcomes[,]" that "is a common
20 question subject to classwide proof and rebuttal." See id. at
21 531. In the parlance of Dukes, determining the "truth or
22 falsity" of whether Bashas' wage scales violate Title VII or
23 section 1981 in the manner alleged "will resolve in one
24 stroke[]" an issue that is "central to the validity" of each
25 class member's pay claim. See Dukes, 131 S.Ct. at 2551; see
26 also Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015,
27 1029 (9th Cir. 2012) (quoting Dukes, 131 S.Ct. at 2551) (claim
28 that defendant violated the Fair Debt Collection Practices

1 Act by sending "collection notices addressed to the debtor,
2 but in 'care of' the debtor's employer, without first
3 obtaining consent[,] . . . is a common contention among the
4 class and 'determination of its truth or falsity' is pivotal
5 to this lawsuit and is capable of determination 'in one
6 stroke[]'"). "This case," at least insofar as the equal pay
7 claim is concerned, "presents the classic case for treatment
8 as a class action: that is, the commonality linking the class
9 members is the dispositive question in the lawsuit." See
10 Evon, 688 F.3d at 1030 (internal quotation marks and citation
11 omitted).

12 Notably, "commonality only requires a *single* significant
13 question of law or fact.'" Mazza, 666 F.3d at 589 (quoting
14 Dukes, 131 S.Ct. at 2556) (emphasis added). Further easing a
15 plaintiff's burden at this stage is that Rule 23(a)(2)'s
16 commonality requirement is to be "construed permissively, and
17 "[a]ll questions of fact and law need not be common to
18 satisfy the rule." Ellis I, 657 F.3d at 981 (internal
19 quotation marks and citation omitted); see also Evon, 688
20 F.3d at 1030 (internal quotation marks and citation omitted)
21 ("It is not necessary that members of the proposed class
22 share every fact in common.") Plaintiffs thus have a "limited
23 burden under Rule 23(a)(2)[.]" Mazza, 666 F.3d at 589.
24 Consequently, even in the wake of Dukes, for the reasons
25 outlined above, this court has little difficulty finding that
26 a class proceeding herein has "the capacity to generate
27 common *answers* apt to drive the litigation" insofar as the
28 equal pay claim is concerned. See Dukes, 131 S.Ct. at 2551

1 (internal quotation marks and citation omitted) (emphasis in
2 original); see also Gales v. Winco Foods, 2011 WL 3794887, at
3 *2 (N.D.Cal. Aug. 26, 2011)(finding commonality where
4 plaintiff identified an employer's policy of exempting from
5 overtime all assistant managers). No individualized inquiry
6 is necessary to determine whether Bashas' wage scales violate
7 federal law.

8 While not alone dispositive, the difference in scale
9 between Dukes further underscores why Dukes does not preclude
10 a finding of commonality here. Dukes was "one of the most
11 expansive class actions ever[,] comprised of approximately
12 1.5 million members. Dukes, 131 S.Ct. at 2547. Moreover,
13 the Dukes plaintiffs "held a multitude of different jobs, at
14 different levels of Wal-Mart's hierarchy, for variable
15 lengths of time, in 3,400 stores, sprinkled across 50 states,
16 with a kaleidoscope of supervisors (male and female), subject
17 to a variety of regional policies that all differed." Id.
18 (internal quotation marks and citation omitted).

19 Additionally, the plaintiffs in Dukes were challenging
20 "literally millions of employment decisions." Id. at 2552,
21 2556 n. 9. Given this factual scenario, the court agrees
22 with Judge Sand's astute observation in Chen-Oster v.
23 Goldman, Sachs & Co., 2012 WL 2912741 (S.D.Cal. July 17,
24 2012):

25 The Supreme Court suggested (when
26 not explicitly stating) that the sheer
27 size of the class and the vast number
28 and diffusion of challenged employment
decisions was key to the commonality
decision. This makes a great deal of sense
when the purpose of the commonality enquiry
is to identify 'some glue holding the

1 alleged reasons for all of [the
2 challenged] employment decisions together.'

3 Id. at *3 (quoting Dukes, 131 S.Ct. at 2552 (emphasis
4 omitted)).

5 The present case is vastly different. There are not
6 millions of potential plaintiffs here. Nor are the
7 plaintiffs scattered across the nation; they all work or
8 worked at Arizona Food City stores. And, they are not
9 challenging "millions of employment decisions;" rather, at
10 this point, they are only challenging Bashas' decision to pay
11 its employees pursuant to its two-tiered wage scales. These
12 factual distinctions reinforce this court's conclusion that
13 plaintiffs have met their burden of showing commonality as to
14 the equal pay claim.

15 **3. Typicality**¹⁵

16 Next, plaintiffs must show that "the claims or defenses
17 of the representative parties [are] typical of the claims or
18 defenses of the class." Fed. R. Civ. P. 23(a)(3). Bashas'
19 argues that the claims of named plaintiffs Estrada and
20 Martinez are not typical of those of the putative class
21 because there is no evidence of a shared "common
22 experience[.]" Bashas' Response to Motion for Class

23
24 ¹⁵ In Parra I, this court addressed typicality, but only with
25 respect to the working conditions claim. Indeed, after finding a lack of
26 commonality as to the equal pay claim, the court explicitly noted that it
27 had "not reached the other requirements for class certification on this
28 [equal pay] issue, and express[ed] *no opinion* on whether Plaintiffs could
 satisfy" the requirements of typicality and adequacy as to that claim.
 Parra I, 2005 WL 6182338, at *16, n. 30 (emphasis added). Moreover, given
 the Ninth Circuit's remand, as earlier noted, "for consideration of the
 remaining class certification factors[.]" undeniably the issue of whether,
 inter alia, plaintiffs have shown typicality as to their pay claim is
 properly before the court now.

1 Certification ("Def.'s Resp. MCC") (Doc. 190) at 45:9. As
2 to plaintiff Martinez alone, Bashas' argues that because she
3 works as a Food City Tortilla Ria Clerk, and that position
4 has "no comparable position in Bashas' or A.J.'s stores[,]"¹⁶
5 her pay claim is "unique to her," and thus not typical for
6 Rule 23(a)(3) purposes. Id. at 59:21 (footnote omitted); and
7 61:12. Bashas' also argues that because plaintiff Martinez
8 did not exhaust her administrative remedies, that is a
9 defense unique to her, thus precluding a finding that she is
10 a typical class representative.¹⁷ The court will address the
11 arguments pertaining solely to plaintiff Martinez first.

12 **a. Aurelia Martinez**

13
14 ¹⁶ Some preliminary clarification is necessary. Bashas', like the
15 plaintiffs, declares that plaintiff Martinez has worked in "one position,
16 tortilleria [sic] clerk, since 1991." Def.'s Resp. MCC (Doc. 190) at
17 59:18-21 (emphasis in original) (citation omitted); Plaintiffs' Motion for
18 Class Certification ("Pls.' MCC") (Doc. 159) at 14:23, ¶ 12 (citation
19 omitted) ("Aurelia Martinez has been employed as a tortilleria [sic] clerk
20 at a Food City store in Phoenix since July 1991.") The record belies this
21 statement, revealing that Ms. Martinez worked both as a Tortilla Ria Clerk
22 and as Tortilla Machine Operator. This is noteworthy because a basic
23 tenet of Bashas' argument that plaintiff Martinez's pay claim is atypical
24 is that she works, and has always worked, as a Tortilla Ria Clerk.

25 From Bashas' Payroll Status Authorization form, it appears, however,
26 that in roughly mid-September 2001 Ms. Martinez was promoted to a Tortilla
27 Machine Operator. Martinez Decl'n (Doc. 163), exh. A thereto. Regardless
28 of the exact date of Ms. Martinez's promotion, a Bashas' Performance
Evaluation form shows that she held that position at least from January,
2001 to January, 2002. Id., exh. B thereto. So although there is
uncertainty on this record as to exactly when Ms. Martinez first became
employed as a Tortilla Ria Clerk, and when she became a Tortilla Machine
Operator, clearly she held both positions at different times during the
class period. However, because the parties' are focusing exclusively upon
Ms. Martinez's status as a Tortilla Ria Clerk, so, too, will the court.

¹⁷ Like commonality, typicality "tend[s] to merge with the adequacy-
of-representation requirement[.]" Dukes, 131 S.Ct. at 2551 n. 5. So
although Bashas' presents these arguments when discussing adequacy, the
court will address them now - in the context of typicality. Cf. Ellis I,
657 F.3d at 974 (citation omitted) (vacating "ruling as to 'typicality'
. . . because the district court failed to consider the effect that
defenses unique to the named Plaintiffs' claims have on that questions[>").

1 An integral part of Bashas' exhaustion argument is that
2 because Ms. Martinez's pay claim is unique, plaintiff
3 Estrada's Equal Employment Opportunity Commission ("EEOC")
4 charge, among others, did not provide Bashas' with adequate
5 notice of her pay claim. So before considering Bashas'
6 exhaustion argument *per se*, the court first must decide
7 whether plaintiff Martinez's pay claim is unique.

8 **i. "Tortilla Ria Clerk"**¹⁸

9 Bashas' argues that plaintiff Martinez's pay claim is
10 "unique to her[]" because she works as a Food City Tortilla
11 Ria Clerk, and that position has "no comparable position in
12 Bashas' or A.J.'s stores."¹⁹ Def.'s Resp. MCC (Doc. 190) at
13 61:12; and 59:21 (footnote omitted). Disagreeing,
14 plaintiffs assert that a Tortilla Ria Clerk is the
15
16

17 ¹⁸ This designation is taken directly from Bashas' wage scales.
18 See, e.g., Def.'s exh. 1 (Proulx Aff.), exh. G thereto at BA 04350.

19 ¹⁹ Some preliminary clarification is necessary. Bashas', like the
20 plaintiffs, declares that plaintiff Martinez has worked in "one position,
21 tortilleria [sic] clerk, since 1991." Def.'s Resp. MCC (Doc. 190) at
22 59:18-21 (emphasis in original) (citation omitted); Pls.' MCC (Doc. 159) at
23 14:23, ¶ 12 (citation omitted) ("Aurelia Martinez has been employed as a
24 tortilleria [sic] clerk at a Food City store in Phoenix since July 1991.")
The record belies this statement, revealing that Ms. Martinez worked both
25 as a Tortilla Ria Clerk and as Tortilla Machine Operator. This is
26 noteworthy because a basic tenet of Bashas' argument that plaintiff
27 Martinez's pay claim is atypical is that she works, and has always worked,
28 as a Tortilla Ria Clerk.

From Bashas' Payroll Status Authorization form, it appears, however,
that in roughly mid-September 2001 Ms. Martinez was promoted to a Tortilla
Machine Operator. Martinez Decl'n (Doc. 163), exh. A thereto. Regardless
of the exact date of Ms. Martinez's promotion, a Bashas' Performance
Evaluation form shows that she held that position at least from January,
2001 to January, 2002. Id., exh. B thereto. So although there is
uncertainty on this record as to exactly when Ms. Martinez first became
employed as a Tortilla Ria Clerk, and when she became a Tortilla Machine
Operator, clearly she held both positions at different times during the
class period. However, because the parties' are focusing exclusively upon
Ms. Martinez's status as a Tortilla Ria Clerk, so, too, will the court.

1 "equivalent" of a Donut Fryer,²⁰ and thus, plaintiff
2 Martinez's pay claim is typical of the putative class
3 members. Pls.' Reply (Doc. 207) at 27:9 (citation omitted).

4 In resolving this dispute, the court is fully aware of
5 its earlier comment that "[w]ithout further information[]" it
6 could not "determine whether Martinez's position [as a
7 Tortilla Ria Clerk] has a comparable counterpart in
8 Defendant's other stores." Parra I, 2005 WL 6182338, at *18.
9 The court immediately noted, however, that "[r]egardless,
10 Martinez claims she has suffered from the same alleged
11 *disparate working conditions* as the proposed class members."
12 Id. (emphasis added). So "[w]hile close," this court found
13 that Ms. Martinez sufficiently satisfie[d] the typicality
14 requirement of Rule 23(a)(3) *on that issue[,] i.e.* the
15 working conditions claim. Id. (emphasis added).

16 In Parra I, this court was able to decide the typicality
17 issue as to Ms. Martinez's working conditions claim without
18 resolving whether a Food City Tortilla Ria Clerk has a
19 "comparable counterpart" in A.J.'s or Bashas' stores.
20 Therefore, the court's earlier quoted comment is, at most,
21 non-authoritative dictum, allowing it to visit that issue
22 against the backdrop of plaintiff Martinez's pay claim.

23 Probing more deeply into the record, as part of its
24

25
26 ²⁰ More recently, plaintiffs took the position that Martinez's
27 "position as a tortilla clerk is equivalent to a *higher paid* position,
28 donut fryer, in the Bashas' stores." Pls.' Supp. Br. (Doc. 302) at 20:3-4
(emphasis added) (citations and footnote omitted). Plaintiffs' cites do
not support that proposition, however. Moreover, as Bashas' pay scales,
among other things, reveal, and as plaintiffs argue above, Bashas' places
Tortillaria Clerks and Donut Fryers in the same wage bracket, undermining
this assertion that Donut Fryers are in a "higher paid position."

1 obligation to rigorously analyze whether the prerequisites of
2 Rule 23(a) have been met, convinces this court that plaintiff
3 Martinez's pay claim is typical of those of the putative
4 class. Most significantly, Bashas' own pay scales do not
5 differentiate between "Tortilla Ria Clerk[s] & Donut
6 Fryer[s]" [.] See, e.g., Larkin Decl'n (Doc. 161), exh. 13
7 thereto at BA 00196; exh. 14 thereto at BA 00206. Even if
8 the duties differ, Bashas' repeatedly classifies a Tortilla
9 Ria Clerk and a Donut Fryer together in one, single category
10 for wage purposes. See Bashas' exh. 1 (Proulx Aff.), exh. G
11 thereto at BA 04350; exh. H thereto at BA 04340; exh. I
12 thereto at BA 04321; exh. J thereto at BA 04283; exh. K
13 thereto at 2; exh. L thereto at BA 04256 - 04258; exh. M
14 thereto at BA 08281 - 0828_;²¹ BA 08293; BA 08295. This joint
15 designation is not a one-time aberration. The joint
16 designation for "Tortillaria Clerk, [and] Donut Fryer" is
17 found elsewhere, on "Bashas' Wage and Employee Benefit
18 Program[.]" Larkin Supp. Decl'n (Doc. 196), exh. 10 thereto
19 at BA 04231.

20 Tortillaria Clerk and Donut Fryer are not the only joint
21 designations for wage purposes. Bashas' also jointly places
22 a "Lead Deli Clerk[]" and a "Cappuccino Manager" - two
23 positions which on the face of it seem to have little in
24 common - into one wage category. See id., exh. 10 thereto at
25 BA 04231. Thus, there are certain job positions which, for
26 whatever reasons, Bashas' deems so closely analogous to
27 warrant placing them in the same wage category.

28 Had Bashas' wanted to distinguish between Tortillaria

²¹ The Bates stamp number is obstructed on the copy provided to the court.

1 Clerks and Donut Fryers, it could have, as it did for
2 Tortilla Production Supervisors and Tortilla Machine
3 Operators. Those are separate job listings, with separate
4 wages; and, for the most part, employees in those positions
5 are paid more than employees in the Tortilla Ria Clerk and
6 Donut Fryer category. See e.g., exh. 10 thereto at BA 04234.
7 The fact remains, however, that Bashas' did not make any
8 distinction in terms of wages with respect to those two
9 positions.

10 For these reasons, based upon the record as presently
11 constituted, to the extent Ms. Martinez is premising her
12 equal pay claim upon her tenure as a Food City Tortilla Ria
13 Clerk, her pay claim is typical of the pay claims of the
14 putative class. In reaching this conclusion the court has,
15 as it must, focused on the *nature of the claim* or defense of
16 the class representative, *and not to the specific facts* from
17 which it arose or the relief sought." See Ellis I, 657 F.3d
18 at 984 (internal citation and quotation marks omitted)
19 (emphasis added). That is because "[d]iffering factual
20 scenarios resulting in a claim of the same nature as other
21 class members does not defeat typicality." Id. at 985, n. 9
22 (citation omitted). Having found that plaintiff Martinez's
23 pay claim is typical of those of the class, the next issue is
24 whether, as Bashas' argues, her failure to exhaust her

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1 administrative remedies is a unique defense which would
2 defeat typicality.

3 **ii. Exhaustion of Administrative Remedies**

4 A plaintiff must file a timely charge of discrimination
5 with the EEOC as a prerequisite to bringing a Title VII
6 action. 42 U.S.C. § 2000e-5(e). There is no dispute that
7 Plaintiff Estrada filed such a charge and exhausted his
8 administrative remedies, see Bashas' exh. 40, and that
9 plaintiff Martinez did not. Bashas' argues that plaintiff
10 Martinez's failure to exhaust her administrative remedies is
11 a "defense unique" to her, which bars her from serving as a
12 class representative as to any Title VII claims. Def.'s Resp.
13 MCC (Doc. 190) at 58:21, n. 39.²²

14 Accurately reciting that notice is the underlying purpose
15 of Title VII's exhaustion requirement, see B.K.B. v. Maui
16 Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002), plaintiffs
17 invoke the "single filing" or "piggyback" rule. Under that
18 exception to exhaustion, "an individual who has not filed an
19 administrative charge can 'piggyback' on an EEOC complaint
20 filed by another person who is similarly situated."²³

21 _____
22 ²² Section 1981 does not contain a similar exhaustion requirement.
23 Therefore, Bashas' failure to exhaust argument is limited to plaintiffs'
24 Title VII claims.

25 ²³ In Parra I, when discussing typicality as to the working
26 conditions claim, this court mentioned in passing that although Ms.
27 Martinez had not exhausted her administrative remedies, she "may
28 'piggyback' onto Estrada's efforts and go forth with her Title VII claim."
29 Parra I, 2005 WL 6182338, at *17 (citing Albemarle Paper Co. v. Moody, 422
30 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975)). On its face,
31 that quote might appear to be dispositive of the exhaustion argument
32 herein. However, it is not.

33 There are two reasons for addressing the exhaustion argument anew at
34 this juncture. First, in Parra I, this court expressly declined to reach the
35 issue of typicality as to the equal pay claim. See n. 15 supra. Second,
36 although this court is not alone in citing footnote 8 in Albemarle for the

1 E.E.O.C. v. Giumarra Vineyards Corp., 2010 WL 3220387, at *4
2 (E.D.Cal. Aug. 13, 2010) (footnote and citation omitted).
3 Plaintiffs contend that Ms. Martinez is similarly situated to
4 “[s]everal [unspecified] members of the proposed class [who]
5 filed EEOC charges against [Bashas’] all alleging class
6 discrimination.” Pls.’ Reply (Doc. 207) at 25:7-9.
7 Plaintiffs thus reason that as a result of those EEOC
8 charges, Bashas’ had “notice of the ‘substantive claims being
9 brought against [it] [and] of the number and generic
10 identities of the potential plaintiffs who may participate in
11 the judgment.’” Id. at 25:9-12 (quoting American Pipe &
12 Construction Co. v. Utah, 414 U.S. 538, 555, 94 S.Ct. 756, 38
13 L.Ed.2d 713 (1974)). Given that purported notice, plaintiffs
14 argue that Ms. Martinez’s failure to exhaust her
15 administrative remedies is not a defense unique to her.
16 Named plaintiff Martinez thus meets Rule 23(a)(3)’s
17 typicality requirement irrespective of her failure to exhaust
18 her administrative remedies, plaintiffs reason.

19 Bashas’ retorts that the other EEOC charges did not
20 provide the requisite notice because those charges “were not
21 detailed, did not give [it] notice of the claims of the other
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23
24 proposition that unnamed class members need not file charges for Title VII
25 suits to proceed, see, e.g., Dukes v. Wal-Mart Stores, Inc., 2002 WL
26 32769185, at *7 n. 4 (N.D.Cal. Sept. 9, 2002) (“Wal-Mart Stores”), a close
27 reading of Albemarle reveals that it does not speak directly to the issue
28 squarely before the court now: whether a named plaintiff who has not
exhausted her administrative remedies can, nonetheless, be an adequate
representative under Rule 23(a)(4). Rather, footnote 8 answers in the
affirmative the issue of whether “backpay may be awarded on a class basis
even without exhaustion of administrative procedures by the unnamed class
members.” See Albemarle, 422 U.S. at 414 n. 8, 95 S.Ct. 2362 (emphasis
added).

1 class members, and in particular, could not have possibly
2 given [it] notice of Martinez' claims, because of their
3 uniqueness." Def.'s Resp. MCC (Doc. 190) at 58, n. 39:26-27
4 (citation omitted). Bashas' argument lacks both legal and
5 factual support.

6 In arguing that exhaustion of administrative remedies is
7 an essential predicate to serving as a class representative,
8 Bashas' relies upon this single sentence from Inda v. United
9 Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977):

10 "[I]f one brings suits on his own behalf,
11 or as a named plaintiff on behalf of a
12 class, he must have secured a right to sue
by timely following the procedures set
forth in Title VII."

13 Id. at 559. Plaintiffs counter that Gibson v. Local 40,
14 Supercargoes & Checkers, 543 F.2d 1259 (9th Cir. 1976),
15 "foreclose[s]" Bashas' Inda based argument. Pls.' Reply MCC
16 (Doc. 207) at 24:9. In Gibson, noting that only one
17 plaintiff had filed an EEOC charge, the Ninth Circuit
18 observed, "[t]his does not preclude representation of the
19 class by the other named plaintiffs or relief for the class."
20 Gibson, 543 F.2d at 1266 n. 13 (emphasis added) (citing
21 Franks v. Bowman Transp. Co., 424 U.S. 747, 771, 96 S.Ct.
22 1251, 1267, 47 L.Ed.2d 444 (1976); Albemarle, 422 U.S. at 414
23 n.8, 95 S.Ct. 2362)).

24 As plaintiffs strongly imply, Inda does not govern here,
25 but, then again, neither does Gibson. Plaintiffs fault
26 Bashas' for relying upon Inda, which it characterizes as
27 "dictum[,"] and because since 1977, when Inda was decided,
28 "[n]o Ninth Circuit case . . . has read Inda to impose . . .

1 a requirement[]" that each named plaintiff must exhaust their
2 administrative remedies to serve as a class representative.
3 See Pls.' Reply (Doc. 207) at 24:24-25. Somewhat ironically,
4 plaintiffs' reliance upon Gibson is misplaced for nearly
5 identical reasons. The portion of Gibson upon which
6 plaintiffs are relying also is dictum. And, in the 37
7 years since Gibson, it has never been read to support the
8 view that a named plaintiff need not exhaust their
9 administrative remedies.²⁴ Thus, there is no credence to
10 plaintiffs' argument that Gibson "forecloses" Bashas'.

11 Bashas' reliance upon Inda is equally unavailing. In the
12 past 36 years, the Ninth Circuit has never invoked Inda to
13 require each named plaintiff to individually exhaust their
14 administrative remedies. More importantly, "to the extent
15 [the] language [quoted above] in Inda is not dicta, it has
16 been restricted to its facts where a plaintiff sought to rely
17 on an administrative charge of an individual employee in a
18 separate action, and where the EEOC charge did not give
19 sufficient notice that other similarly-situated persons would
20 also be affected." E.E.O.C. v. Cal. Psychiatric Transitions,
21 Inc., 644 F.Supp.2d 1249, 1265 n. 11 (E.D.Cal. 2009)

22
23 ²⁴ This is not surprising given the Gibson Court's reference to
24 Franks and Albemarle. Those two Supreme Court cases considered whether
25 unnamed plaintiffs can recover under Title VII; both found that they could.
26 Albemarle, 422 U.S. at 414 n. 8, 95 S.Ct. 2362 ("reject[ing] th[is]
27 contention[] . . . that no backpay can be awarded to those unnamed parties
28 in the plaintiff class who have not themselves filed charges with the
EEOC[]"); Franks, 424 U.S. 771, 96 S.Ct. 1251 (unnamed class members who
had been discriminated against by their employer, but who had not filed
administrative charges with the EEOC, were not precluded from relief in the
form of retroactive seniority). Neither of those decisions supports the
view expressed in Gibson, however, and upon which plaintiffs so heavily
rely, that an unnamed plaintiff, who has not filed an EEOC charge, may
serve as class representative.

1 (citations omitted). More recently, citing to those two
2 district court decisions, the Ninth Circuit left no doubt
3 that "*Inda* should be limited to its specific facts - where a
4 plaintiff sought to rely on an administrative charge . . . of
5 an individual employee in a separate action." Harris v.
6 County of Orange, 682 F.3d 1126, 1136-1137 (9th Cir. 2012)
7 (citations omitted). That express limitation on Inda
8 eviscerates Bashas' argument, premised solely on Inda, that
9 Ms. Martinez is not an adequate class representative because
10 she did not exhaust her administrative remedies under Title
11 VII.

12 The Ninth Circuit's Harris decision has relevancy here
13 beyond rejecting Inda's restrictive interpretation of the
14 single filing rule. The Harris plaintiffs filed a class
15 action on behalf of thousands of Retirees alleging that the
16 "County's restructuring of its retiree medical program[,]"
17 violated, *inter alia*, their constitutional rights and the
18 Fair Employment and Housing Act ("FEHA"). Harris, 682 F.3d
19 at 1130. One of the class representatives had timely filed
20 an administrative charge, but it "did not state that it was
21 'on behalf of' other class members." Id. at 1131.
22 Therefore, the district court found that the Retirees did not
23 exhaust their administrative remedies under the FEHA.²⁵ On
24 appeal, "[t]he Retirees argue[d] that the single filing rule
25 permit[ted] them to 'piggyback' on the timely filed
26 administrative complaint . . . of one of the named

27
28 ²⁵ Given the absence of relevant authority regarding the applicability of the single filing rule in FEHA actions, the court looked to Title VII cases, among others. Harris, 682 F.3d at 1136.

1 plaintiffs." Id. at 1135.

2 Agreeing, the Ninth Circuit reiterated that the "single
3 filing rule is based on the observation that it would be
4 duplicative and wasteful for complainants with similar
5 grievances to have to file identical notices of intent to sue
6 with a governmental agency." Id. at 1136 (citing Bean v.
7 Crocker Nat'l Bank, 600 F.2d 754, 760 n. 15 (9th Cir. 1979));
8 see also Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095,
9 1110 (10th Cir. 2001) ("The policy behind the single filing
10 rule is that it would be wasteful, if not vain, for numerous
11 employees, all with the same grievance, to have to process
12 many identical complaints with the EEOC.") Consequently, even
13 though the Harris administrative complaint did not indicate
14 that it was a "class action" or "'on behalf of others
15 similarly situated[,]'" nonetheless, the Court found it was
16 "sufficient to establish exhaustion of administrative
17 remedies for all class members." Id. at 1136 and 1137
18 (footnote omitted). That is because the other named
19 plaintiffs, who had not filed administrative complaints were
20 "part of the same action asserted by" the plaintiff who had
21 timely filed such a complaint. Id. at 1137.

22 Here, as fully discussed herein, Ms. Martinez is "part of
23 the same action asserted" by Mr. Estrada who did timely file
24 an EEOC charge. Furthermore, in sharp contrast to the
25 defendant employer in Harris, Bashas' had explicit,
26 unequivocal notice of the existence of other similarly
27 situated class members, such as Ms. Martinez. Bashas' had
28 such notice because Mr. Estrada unambiguously declared that

1 he was "bring[ing] this charge on behalf of [him]self and
2 similarly situated Hispanic employees who [sic] [he]
3 believe[s] receive less pay and poorer assignments than
4 American-born, white employees." Def.'s Resp. MCC (Doc.
5 190), exh. 40 thereto. Not only that, arguably Bashas' had
6 additional notice because "[a]t least eight class charges of
7 race and national discrimination have been filed against [it]
8 by current proposed plaintiffs and class member witnesses in
9 this action." Pls.' Reply to Def.s' Resp. to Mot. for Leave
10 to File First Amended Complaint (Doc. 103) at 5:10-12. Thus,
11 if, as in Harris, the single filing rule can be applied
12 although the administrative complaint was silent as to
13 whether it was a class action or was being brought on behalf
14 of others similarly situated, surely Ms. Martinez can rely
15 upon that rule given that Mr. Estrada's EEOC charge was
16 unequivocal and explicit on that point.

17 Wal-Mart Stores, further bolsters a finding that Ms.
18 Martinez may "piggy-back" onto the EEOC charge of Mr.
19 Estrada and others to establish exhaustion of her
20 administrative remedies. There, the plaintiffs sought leave
21 to amend to add two plaintiffs who had never filed EEOC
22 charges. The moving plaintiffs were relying upon the EEOC
23 charge of a named representative who had "filed charges on
24 her own behalf as well as for others similarly situated."
25 Wal-Mart Stores, 2002 WL 32769185, at *5. Previously,
26 however, that named plaintiff was dismissed for failure to
27 meet Title VII's venue requirements and she became a putative
28 class member. Among other reasons, including the Supreme

1 Court's recognition that "EEOC charge-filing requirements are
2 . . . equitable in nature," and because "notice was afforded
3 to Wal-Mart in accordance with the policy goals of Title
4 VII," the Wal-Mart Stores court found "that all named
5 plaintiffs in a Title VII class action need *not* individually
6 exhaust EEOC charge-filing requirements prior to joining a
7 class action." Id. at *7 (emphasis added). The court
8 further reasoned that "the policy underpinnings of Title VII
9 and the single filing rule set forth in *Albermarle* - notice
10 to the defendant - is fully satisfied where at least one
11 plaintiff has filed a charge of discrimination alleging broad
12 class claims; and (2) requiring additional identical filing
13 serves no purpose other than to ensure duplicative
14 administrative proceedings." Id. (citation and footnote
15 omitted). The court thus held that "a proposed named
16 plaintiff may rely on the administrative compliance of
17 otherwise compliant fellow named representatives." Id.

18 As can be seen, "the analytical touchstone of the single
19 filing rule is whether the company had adequate notice of the
20 grievance to provide a basis for conciliation." Giumarra
21 Vineyards, 2010 WL 3220387, at *8. "A charge will be
22 adequate to support piggybacking under the single filing rule
23 if it contains sufficient information to notify prospective
24 defendants of their potential liability and permit the EEOC
25 to attempt informal conciliation of the claims before a
26 lawsuit is filed." Cal. Psychiatric Transitions, 644
27 F.Supp.2d at 1265 (citation omitted). However, "[t]he
28 parties' claims need not be factually identical to those

1 timely filed, but instead need to be [of] sufficient
2 similarity as to prevent frustration of Title VII policies."
3 Id. at 1266 (citation omitted). The single filing rule thus
4 intends to "give effect to the remedial purposes of [Title
5 VII] and to not exclude other suitable plaintiffs from [a
6 Title VII] class action simply because they have not
7 performed the useless act of filing a charge." Giumarra
8 Vineyards, 2010 WL 3220387, at *4 (internal quotation marks
9 and citation omitted).

10 "[L]ook[ing] to the predicate or 'actually filed' EEOC
11 charge[]" of Mr. Estrada, id. (footnote and citations
12 omitted), it is apparent that that charge gave Bashas' the
13 requisite notice. After identifying himself as "Hispanic[,]"
14 Mr. Estrada's charge informed Bashas', *inter alia*, of the
15 nature of his pay claim:

16 While employed by Bashas', Inc. I
17 believe that I have been discriminated
18 against based upon my national origin and
19 race with respect to pay[.]

19 Although the job I perform at Food
20 City is substantially the same job
21 as the work performed by my counterparts
22 at Bashas', I am paid less on an hourly
23 basis than the similarly situated employees
24 at Bashas'. It is my belief and understanding
25 that most of the employees at Bashas' are
26 American born and Caucasian. I believe I
27 am paid less because of my national origin,
28 Mexican, and my race, Hispanic.

24 Def.'s Resp. MCC (Doc. 190), exh. 40. Further, Mr.
25 Estrada explicitly states that he was bringing his EEOC
26 charge "on behalf of [him]self and similarly situated
27 Hispanic employees who[m] [he] believe[s] receive less pay
28 and poorer assignments than American-born, white employees."

1 Id.

2 Similarly, the FAC alleges that Ms. Martinez, like Mr.
3 Estrada, is a Hispanic hourly Food City employee, who was
4 paid less than her Caucasian counterparts at Bashas' and
5 A.J.'s. FAC (Doc. 116) at 3, ¶ 8. In light of the
6 foregoing, Bashas' argument that it lacked notice of Ms.
7 Martinez's pay claim is wholly unavailing. Further, for
8 substantially the same reasons outlined in section A(3)(a)(i)
9 above, Ms. Martinez's pay claim is not so unique from those
10 of Mr. Estrada so that it can be said that Bashas' lacked
11 notice of her pay claim on that basis. Hence, the asserted
12 "uniqueness" of Ms. Martinez's pay claim does not vitiate
13 that notice.

14 Taking another but equally unpersuasive tack, Bashas'
15 contends that "[i]f Estrada (the only other named Plaintiff
16 now suing on behalf of the class) is dismissed from the case
17 or deemed inappropriate as class representative, Martinez
18 could not take his place." Def.'s Resp. MCC (Doc. 190) at
19 57:19-21 (citation omitted). Plaintiffs respond that even if
20 Mr. Estrada cannot serve as a class representative, that
21 would not "negate notice." Pls.' Reply (Doc. 207) at 25:21-
22 22 (citation omitted). Hence, there is no basis for barring
23 Ms. Martinez from serving as class representative even if,
24 ultimately, Mr. Estrada cannot.

25 Plaintiffs have the sounder argument. In the first
26 place, Bashas' primary authority, Robinson v. Sheriff of Cook
27 County, 167 F.3d 1155 (7th Cir. 1999), as well as the two
28

1 cases to which it cites,²⁶ are out of Circuit non-binding
2 precedent. Second, all three cases are factually
3 distinguishable, further diminishing their precedential
4 value.²⁷ In Robinson, also a Title VII action, the defendant
5 challenged Mr. Robinson's suitability as a class
6 representative relying upon evidence of "his very poor
7 employment record[.]" Robinson, 167 F.3d at 1156. On that
8 basis, the district court rejected Robinson as the class
9 representative, but allowed another individual "to join the
10 suit as a plaintiff and take Robinson's place as class
11 representative." Robinson, 167 F.3d at 1158; and 1156. When
12 it was later discovered that that second individual had not
13 filed an EEOC charge, the district court dismissed her claim
14 and "disqualified her from serving as Robinson's successor as
15 class representative. " Id. at 1156. The district court
16 proceeded with the original named plaintiff's individual

17
18 ²⁶ Wakeen v. Hoffman House, Inc., 724 F.2d 1238 (7th Cir. 1983); and
Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987).

19 ²⁷ Wakeen involved a very different situation than the present case.
20 In Wakeen, the Seventh Circuit held "that a class member who does not meet
21 the procedural prerequisites for waging a Title VII suit may not use the
22 guise of a motion to intervene to take over as the sole class
23 representative for someone who initiates but is not legitimately able to
24 continue a class action." Wakeen, 724 F.2d at 1246. In fact, in Byas v.
Union Pacific R.R. Co., 2007 WL 1021976 (S.D.Ill. 2007), in a case not
unlike the present one, the court held that "[t]he narrow holding of Wakeen
does not apply in the instant case, where there are three named plaintiffs,
one of whom has satisfied EEOC filing requirements." Id. at *3 (emphasis
added).

25 Griffin is likewise readily distinguishable from the present case.
26 There, the Eleventh Circuit held that an intervening plaintiff could not
invoke the single filing rule because he was "not sufficiently similarly
27 situated[]" to the plaintiff who had timely filed an adequate EEOC
complaint. Griffin, 823 F.2d at 1493. As discussed above, plaintiff
28 Martinez's pay claim is sufficiently similar to plaintiff Estrada's.
Moreover, unlike in Griffin, plaintiff Martinez is not seeking
intervention.

1 claim, dismissing it after a bench trial.

2 On appeal, the plaintiffs argued, *inter alia*, that the
3 class should have been certified with both of them as "class
4 representatives irrespective of the deficiencies in their
5 claims[.]" Id. at 1157. Affirming denial of the class
6 certification, the Robinson Court found dispositive the fact
7 that because Robinson had been rejected as the class
8 representative, "there was no class action when [the second
9 individual] was added to the suit." Id. at 1158. Expanding
10 upon that reason, then Chief Judge Posner wrote:

11 There was no class representative who
12 had dropped the baton for her to pick up;
13 Robinson had never been approved as
14 the class representative. [The second
15 individual's] suitability as class
16 representative had thus to be
17 determined independently of him.

18 Id. Bashas' asserts that Ms. "Martinez would fail [such] an
19 independent evaluation of her suitability to be class
20 representative and should not be approved as one." Def.'s
21 Resp. MCC (Doc. 190) at 58:11-12 (footnote omitted).

22 To support this assertion, Bashas' seizes upon the
23 following language from Robinson:

24 In effect the appeal asks us to graft
25 [the original class representative's]
26 timely filing with the EEOC onto
27 [the successor's] untimely but not-yet-
28 shown-to-be-unmeritorious discrimination
29 case to create a composite plaintiff to
30 represent the class of blacks denied
31 employment by the defendant. We cannot
32 find any basis in law or good sense for
33 such ghastly surgery. Neither plaintiff
34 is a suitable class representative, and
35 zero plus zero is zero.

36 Id. at 58:2-5 (quoting Robinson, 167 F.3d at 1157) (other

1 citations omitted). Because Robinson is readily
2 distinguishable, it does nothing to advance Bashas' argument,
3 however.

4 The above quote was made in the context of "a named
5 plaintiff whose claims were *particularly* deficient-in fact,
6 they had been dismissed-and who was attempting to represent a
7 class of people with potentially plausible claims." Norris-
8 Wilson v. Delta-T Group, Inc., 270 F.R.D. 596, 605 (S.D.Cal.
9 2010) (emphasis in original). That is not the situation
10 here. There has been no showing at this juncture that Ms.
11 Martinez's pay claim is "particularly deficient[.]" See id.
12 What is more, Robinson supports the view that "[a] plaintiff
13 should not be disqualified as a class representative simply
14 because the "defendant *may* have good defenses" against that
15 plaintiff." Perez v. State Farm Mut. Auto. Ins. Co., 2011 WL
16 8601203, at *2 (N.D.Cal. Dec. 7, 2011) (quoting
17 Norris-Wilson, 270 F.R.D. at 605 (quoting in turn Robinson,
18 167 F.3d at 1158) (emphasis in original). Nor should a named
19 plaintiff be "disqualified as class representative if [s]he
20 may fail to prove h[er] case[.]" Robinson, 167 F.3d at 1158
21 (citation omitted) (emphasis in original). As the Robinson
22 Court made clear, "[o]nly if a plaintiff's 'claim is a *clear*
23 loser at the time [she] asks to be made class representative'
24 should she be disqualified, because in that case, approving
25 her 'as class representative can only hurt the class.'" Perez,
26 2011 WL 8601203, at *2 (quoting Robinson, 167 F.3d at
27 1158) (emphasis in original)). There has been no such
28 showing here.

1 Thus, the primary purpose of filing an EEOC charge --
2 notice -- was afforded to Bashas', even though named
3 plaintiff Martinez did not herself file such a charge. Mr.
4 Estrada's EEOC charge, and others, "contain[ed] sufficient
5 information to notify [Bashas'] of [its] potential liability
6 and permit the EEOC to attempt informal conciliation of the
7 claims before a lawsuit is filed." See Cal. Psychiatric
8 Transitions, 644 F.Supp.2d at 1265 (citation omitted).
9 Therefore, because "the purposes behind the filing
10 requirement [we]re satisfied" in this case, "no injustice or
11 contravention of congressional intent occurs by allowing [Ms.
12 Martinez] [to] piggyback[]" on Mr. Estrada's charge. See
13 Giumarra Vineyards, 2010 WL 3220387, at *5 (quoting Thiessen,
14 267 F.3d at 1110). In fact, because Mr. Estrada's EEOC
15 charge and others, see Def.'s Resp. MCC (Doc. 190), exh. 40
16 thereto, gave Bashas' notice of the pay claim against it, Ms.
17 Martinez was not required to perform the "useless act" of
18 filing her own separate charge. Giumarra Vineyards, 2010 WL
19 3220387, at *4 ("An act of filing an EEOC charge is deemed
20 'useless' in situations in which the employer is already on
21 notice that Plaintiffs may file discrimination claims, thus
22 negating the need for additional filings.") (internal
23 quotation marks and citation omitted). As discussed above,
24 plaintiff Martinez can avail herself of the single filing
25 rule and piggyback on the EEOC charges of other plaintiffs,
26 such as Mr. Estrada.²⁸

27
28 ²⁸ This does not foreclose the possibility that if, at a later
juncture, plaintiff Martinez's ability to represent the class is "found
wanting, the court may seek a substitute representative or decertify the
class." See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 416, 100 S.Ct.

1 Accordingly, because plaintiff Martinez's pay claim is
2 not subject to the defense of failure to exhaust her
3 administrative remedies, that defense "cannot be a reason for
4 finding that the typicality requirement is not satisfied."
5 See Evon, 688 F.3d at 1030 (because defendant did "not
6 qualify for the bona fide error defense as a matter of law,
7 . . . whether [plaintiff's] claim is subject to this
8 affirmative defense cannot be a reason for finding that the
9 typicality requirement is not satisfied[]"). For that same
10 reason, there is no "danger that absent class members will
11 suffer" because plaintiff Martinez "is preoccupied with [a]
12 defense[] unique to [her].'" See Ellis I, 657 F.3d at 984
13 (quoting Hanon, 976 F.2d at 508 (other quotation marks and
14 citation omitted). Finally, based upon the rulings herein,
15 there also is no danger that plaintiff Martinez's failure to
16 exhaust her administrative remedies will "create a
17 distraction that will become a 'major focus of the
18 litigation.'" See Ellis II, 285 F.R.D. at 534. In short,
19 neither plaintiff Martinez's pay claim nor her failure to
20 exhaust her administrative remedies are barriers to a finding
21 of typicality. The issue still remains, though, as to
22 whether plaintiffs Estrada and Martinez can meet Rule
23 23(a)(3)'s typicality standard given what Bashas' describes
24 as the lack of evidence of a shared "common experience[.]"
25 See Def.'s Resp. MCC (Doc. 190) at 45:9.

26 . . .

27

28 1202, 63 L.Ed.2d 479 (1980) (citations omitted) ("If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interest of the class members.")

1 Both allege that they were paid less than their Caucasian
2 counterparts at A.J.'s and Bashas' for performing the same
3 work. See FAC (Doc. 116) at ¶ 8; and Def.'s Resp. MCC (Doc.
4 190), exh. 40 (Estrada EEOC charge) thereto. The putative
5 class, comprised of "all past, present and future Latino
6 employees of" defendant alleges that same, identical injury.
7 See FAC (Doc. 116) at 3:19-20, ¶ 10. Further, as discussed
8 with respect to commonality, this lawsuit is "based on
9 conduct which is *not* unique to the named plaintiffs" -
10 Bashas' wage scales. See Ellis I, 657 F.3d at 984 (internal
11 quotation marks and citation omitted). Lastly, "other class
12 members have been injured by" those wage scales because, as
13 Bashas' conceded, under its wage scales "Hispanic employee
14 hourly rates were lower in similar jobs[,]"³⁰ at least "during
15 the period 1998-2000[.]" See Parra II, 536 F.3d at 979.
16 Thus, as just shown, Bashas' contention that the alleged
17 discrimination has not "*manifested itself . . . in the same*
18 *general fashion*[]" borders on the frivolous insofar as the
19 equal pay claim is concerned. See Def.'s Resp. MCC (Doc.
20 190) at 45:9; and 45:26-27 (quoting Falcon, 457 U.S. at 159
21 n. 15, 102 S.Ct. 2364) (emphasis added by Bashas').

22 An additional basis for finding typicality in this action
23 is that the named plaintiffs' pay claims "rest on legal
24 theories that apply to all putative class members." See Wood

25
26
27 ³⁰ As previously discussed, this is one of three concessions which
28 the Ninth Circuit found highly pertinent with respect to commonality.
However, because Rule 23(a)'s commonality and typicality requirements
"tend to merge[,]'" Dukes, 131 S.Ct. at 2551 (quoting Falcon, 457 U.S. at
157 n. 13, 102 S.Ct. 2364)), this concession also heavily bears on the
typicality inquiry.

1 V. Betlach, 286 F.R.D. 444, 448 (D.Ariz. 2012) (citing Cohen
2 v. Chicago Title Ins. Co., 242 F.R.D. 295, 299 (E.D.Pa. 2007)
3 (“[E]ven relatively pronounced factual differences will
4 generally not preclude a finding of typicality where there is
5 a strong similarity of legal theories.”) (citation omitted);
6 Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D.
7 551, 558 (D.Md. 2006) (“[W]hile claims of particular
8 individuals may vary in detail from one to another, the
9 collective claims focus on particular policies applicable to
10 each class member thereby satisfying the typicality
11 requirement of Rule 23(a).”) (other citation and footnote
12 omitted). Because the named plaintiffs’ pay claims rest on
13 the same legal theories, and because those claims are
14 reasonably co-extensive with the absent class members, they
15 have cleared the typicality hurdle. See Gong-Chun v. Aetna
16 Inc., 2012 WL 2872788, at *8 (E.D.Cal. July 12, 2012)
17 (typicality shown where “Plaintiffs’ claims are ‘co-
18 extensive’ with the other Class Members, as Plaintiffs and
19 the absent Class Members were all Defendants’ employees who
20 were paid under the same pay practices and worked under the
21 same company-wide employment policies[.]”); see also Marin v.
22 Evans, 2008 WL 2937424, at *4 (E.D. Wash. July 23, 2008)
23 (finding typicality where the “named Plaintiffs were
24 employees of [defendant company], and their claim is that
25 they were allegedly injured by the Illegal Hiring Scheme by
26 reduction in pay, which is typical of the claims that would
27 be asserted by all members of the purported class[.]”).

28 . . .

1 **4. Adequacy**

2 The last Rule 23(a) hurdle plaintiffs must clear is
3 subsection four, which provides that "the representative
4 parties will fairly and adequately protect the interests of
5 the class."³¹ Fed.R.Civ.P. 23(a)(4). This requirement
6 "satisf[ies] due process concerns[]" in that "absent class
7 members must be afforded adequate representation before entry
8 of a judgment which binds them." Hanlon, 150 F.3d at 1020
9 (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 61 S.Ct. 115,
10 85 L.Ed. 22 (1940)). The adequacy-of-representation
11 requirement "also raises concerns about the competency of
12 class counsel and conflicts of interest." See Dukes, 131
13 S.Ct. at 2551 n. 5 (citation and internal quotation marks
14 omitted). Therefore, "[a]dequate representation depends on,
15 among other factors, an absence of antagonism between
16 representatives and absentees, and a sharing of interest
17 between representatives and absentees." Ellis I, 657 F.3d at
18 985 (citation omitted). Consequently, "[t]o determine
19 whether named plaintiffs will adequately represent a class,
20 courts must resolve two questions: '(1) do the named
21 plaintiffs and their counsel have any conflicts of interest
22 with other class members and (2) will the named plaintiffs
23 and their counsel prosecute the action vigorously on behalf

24 _____
25 ³¹ "Since the revision of Rule 23 in December 2003, the adequacy of
26 class counsel is now evaluated pursuant to Rule 23(g). 'Rule 23(a)(4) will
27 continue to call for scrutiny of the proposed class representative, while
28 this subdivision will guide the court in assessing proposed class counsel
as part of the class certification process.'" Parra I, 2005 WL 6182338, at
*18 n. 33 (quoting Fed.R.Civ.P. 23 Advisory Committee note).

1 of the class?" Id. (quoting Hanlon, 150 F.3d at 1020).
2 Here, as explained below, the court answers the first
3 question in the negative, and the second, in the affirmative.
4 As a result, it finds that named plaintiffs Estrada and
5 Martinez are adequate class representatives with respect to
6 the pay claim.

7 Plaintiffs Estrada and Martinez maintain that they are
8 adequate class representatives because they are "able and
9 willing to represent the class[,] and they have the "same"
10 interests as those of the potential class members in that
11 they are seeking to prove, *inter alia*, that Bashas' "pay
12 policies . . . discriminate against Hispanic[] workers."
13 Pls.' MCC (Doc. 159) at 22:10-13 (citations and footnote
14 omitted). Essentially, Bashas' counters that the named
15 plaintiffs do not have the same interests as the putative
16 class because they are "puppets" of the United Food and
17 Commercial Workers Union ("the Union"), having "private
18 ulterior motives[.]" Def.'s Resp. MCC (Doc. 190) at 48:1-21;
19 47:7 (emphasis omitted).

20 This ulterior motives argument can be resolved with
21 dispatch because this court already addressed it in Parra I,
22 albeit in the context of the working conditions claim. The
23 differing nature of the claim does not change the result
24 though. The record is the same; the arguments are the same;
25 and the court's view is the same. It is "not convinced that
26 the named plaintiffs are inadequate due to [Bashas']
27 allegations of ulterior motives." Parra I, 2005 6182338, at
28 *18. It is necessary, though, to address Bashas' remaining

1 challenges, not specifically addressed in Parra I, as to the
2 adequacy of named plaintiffs Estrada and Martinez to serve as
3 class representatives.

4 **a. Gonzalo Estrada**

5 **i. "Individual Claim"**

6 Bashas' claims that plaintiff Estrada is not an adequate
7 class representative because he has "no individual claim fit
8 to pursue[.] Def.'s Resp. MCC (Doc. 190) at 56:6. This
9 court's finding in Parra I that plaintiff Estrada
10 "articulated [a] claim for pay disparity" undercuts that
11 assertion. See Parra I, 2005 WL 6182338, at *17.

12 There is likewise no merit to Bashas' claim that Mr.
13 Estrada is not an adequate class representative because "he
14 is involved in this suit, not for what happened to him, but
15 for what happened to others." Def.'s Resp. MCC (Doc. 190) at
16 54:10-11. The basis for this assertion is the following
17 snippet from Mr. Estrada's deposition:

18 Q. And in this lawsuit you're not
19 involved in it because of what
happened to you?

20 A. No.

21 Q. You're standing up for other employees?

22 A. Yes.

23 Id. at 54:12-16 (citing exh. 11 thereto 54:4-8) (footnote
24 omitted). If anything, it strikes the court that a
25 willingness to "stand[] up for other employees" is further
26 indicia that plaintiff Estrada is a proper class
27 representative. See id. This is especially so given that Mr.
28 Estrada, like Ms. Martinez, has declared his "ability and

1 willingness to represent the class." See Parra I, 2005 WL
2 6182338, at *18 (citations omitted). Taking the record as a
3 whole, the court finds unconvincing Bashas' argument that
4 plaintiff Estrada is not an adequate class representative
5 because he is not asserting an individual claim.

6 **ii. Former Employee**

7 Bashas' also endeavors to show that Mr. Estrada and the
8 potential class members do not have a shared interest because
9 he is a former Food City employee whose circumstances are
10 "vastly different" than those of the putative class. Def.'s
11 Resp. MCC (Doc. 190) at 54:27, n. 38. One such difference is
12 Mr. Estrada's lack of "interest in returning to Food City,"³²
13 which Bashas' argues renders "moot . . . the issue of
14 injunctive relief[.]" Id. Disregarding the nature of the
15 relief sought, plaintiffs respond that "[f]ormer employees may
16 represent current employees in a class action[.]" Pls.' Reply
17 (Doc. 207) at 24:1 (citations omitted).

18 These arguments are imported directly from the 2004 class
19 certification motion.³³ Both the law, and the plaintiffs'

20
21 ³² To support this assertion, Bashas' is relying upon an excerpt
22 from Mr. Estrada's deposition. See Def.'s Resp. MCC (Doc. 190) at 54:26
23 (citing "Estrada Depo p. 44 ll. 10-12"). There is no reason to doubt the
24 veracity of that statement. At the same time though, there is no way to
25 ascertain its accuracy because the excerpts provided in connection with the
26 supplemental briefs did not include that page. That is also the case for
27 the remaining excerpts from Mr. Estrada's deposition which Bashas' cites in
28 footnote 38 of its response to the motion for class certification. Such
inadvertent omissions are always bothersome, but they were all the more so
here where the combined briefs and record are in the range of 3,000 pages.

³³ Devoting its post-Dukes briefs exclusively to commonality and
typicality, Bashas' omitted any discussion of adequacy. In their post-
Dukes supplemental brief, plaintiffs direct the court to their "original
briefing" as to adequacy, among other things. See Pls.' Supp. Br. (Doc.
302) at 19:25-26. Therefore, because on remand this court must consider
whether each of the threshold Rule 23(a) requirements is met as to the

1 position along with it, have changed since that time however.
2 In 2004, plaintiffs were relying upon Rule 23(b)(2)³⁴ as the
3 basis for class certification of both the equal pay and
4 working conditions claims. In fact, in Parra I, this court
5 certified a class under that Rule only as to working
6 conditions. In the intervening years, in Dukes the Supreme
7 Court unanimously held that "individualized monetary claims
8 belong in Rule 23(b)(3)"³⁵ - not in Rule 23(b)(2). See
9 Dukes, 131 S.Ct. at 2558. Consequently, in light of Dukes,
10 now plaintiffs are seeking class certification of the equal
11 pay claim strictly on the basis of Rule 23(b)(3).

12 That shift takes the issue of injunctive relief

13 _____
14 equal pay claim, necessarily it has resorted to the parties' original, pre-
15 Dukes' arguments.

16 ³⁴ That Rule provides:

17 A class action may be maintained if Rule 23(a)
18 is satisfied and if: . . .

19 the party opposing the class has acted
20 or refused to act on grounds that apply
21 generally to the class, so that final
22 injunctive relief or corresponding
23 declaratory relief is appropriate respecting
24 the class as a whole[.]

25 Fed.R.Civ.P. 23(b)(2).

26 ³⁵ In relevant part, that Rule reads as follows:

27 A class action may be maintained if
28 Rule 23(a) is satisfied and 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).

1 completely out of the equation insofar as the pay claim is
2 concerned. Not only that, if ultimately plaintiffs were to
3 prevail on their pay claim, Mr. Estrada, as well as other
4 putative class members (current and former hourly Food City
5 employees), would be entitled to recover monetary damages,
6 despite the fact they are no longer employed there. See
7 Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81, 87
8 (S.D.N.Y. 2001) (in analyzing adequacy, finding that
9 "[b]ecause this is a suit primarily for money damages stemming
10 from past actions, it is not relevant that only one of the
11 named Plaintiffs is still employed as a delivery person[]").
12 The Supreme Court in Dukes recognized as much, stressing that
13 "if a backpay action were properly certified for class
14 treatment under (b)(3), the ability to litigate a plaintiff's
15 backpay claim as part of the class would not turn on the
16 irrelevant question whether [h]e is still employed at [the
17 defendant store]." Dukes, 131 S.Ct. at 2560 (emphasis in
18 original). Thus, plaintiff Estrada's former employee status
19 does not weaken a finding that he is an adequate class
20 representative insofar as the plaintiffs are seeking monetary
21 damages for their equal pay claim.³⁶

22 The same is true with respect to Bashas' litany of the
23

24 ³⁶ By curtailing the relief which they are seeking as to their pay
25 claim, plaintiffs have negated altogether Bashas' argument that as a former
26 employee Mr. Estrada is an inadequate class representative because he lacks
27 a shared interest with the class as to injunctive relief. If plaintiffs
28 were still seeking such relief, the result would be different, see Ellis I,
657 F.3d at 986 (vacating district court's finding that the former
employees could adequately represent that class because they had "no
incentive to pursue injunctive relief[,] and hence they did not "share an
interest with class members whose primary goal [wa]s to obtain injunctive
relief[]" under Rule 23(b)(2)), but the fact remains that they are not.
Plaintiffs' equal pay claim seeks only monetary damages.

1 other "vastly different circumstances" which allegedly are
2 indicative of a conflict of interest, such that Mr. Estrada
3 would not adequately represent the class. See Def.'s Resp.
4 MCC (Doc. 190) at 54, n. 38. Bashas' does not explain, and
5 the court fails to see how, Estrada's termination, his
6 supposed lack of interest in working at A.J.'s or Bashas', or,
7 in the grocery industry generally, and his doubling in pay,³⁷
8 render him an inadequate class representative. Moreover,
9 plaintiff Estrada is seeking the same relief as the putative
10 class - monetary damages. His claimed injury also is the same
11 as the putative class - as a Hispanic Food City hourly
12 employee, allegedly he received less pay than his Caucasian
13 counterparts at A.J.'s and Bashas'. Consequently, not only is
14 there a "sharing of interest" between plaintiff Estrada and
15 the potential class members, but there is an "absence of
16 antagonism between" them. See Ellis I, 657 F.3d at 985
17 (citation omitted). Accordingly, plaintiff Estrada is an
18 adequate class representative pursuant to Rule 23(a)(4),
19 insofar as the pay claim is concerned.

20 . . .

21 **b. Aurelia Martinez**

22 ³⁷ Observing that plaintiff Estrada's pay "nearly doubled," Bashas'
23 strongly implies that that factor militates against a finding that he is an
24 adequate representative. See Def.'s Resp. MCC (Doc. 190) at 54:24, n. 38
25 (citing "Estrada Depo p. 7 l.21 - p. 8 ll.14"). This is one of the
26 deposition excerpts, mentioned earlier, which was not provided to the
27 court. In this instance, however, based upon Mr. Estrada's declaration,
28 the court was able to easily corroborate that his pay did nearly double
during his tenure at Food City. See Estrada Decl'n (Doc. 176) at 3:7-14,
¶ 8. At the end of the day that is immaterial though if, as plaintiffs
allege, Mr. Estrada's Caucasian counterparts at Bashas' and A.J.'s were
paid more for doing the same or similar work. Therefore, this asserted
doubling of pay does not mean that Estrada would be an inadequate class
representative.

1 Bashas' advances two other equally unpersuasive theories
2 as to why Ms. Martinez in particular is not an adequate class
3 representative. The first is that allegedly her claims are
4 weak, and the second is her credibility.

5 **i. Strength of Claims**

6 Bashas' disputes the legitimacy and sufficiency of Ms.
7 Martinez's claims because in June 1999, when she and her
8 husband filed for bankruptcy, she did not list her potential
9 claims in this lawsuit as a contingent and unliquidated claim
10 on their Schedule B form. Ms. Martinez signed the declaration
11 accompanying that Schedule under penalty of perjury. See
12 Def.'s Resp. MCC (Doc. 190) at 62:9-10. Further, between
13 October, 2002, when Ms. Martinez and her husband were
14 discharged in bankruptcy, and the April 4, 2002, commencement
15 of this action, Bashas' points out that Ms. Martinez did not
16 amend Schedule B to include any potential claims herein.
17 These omissions, Bashas' contends, "suggest[] either that (1)
18 [Ms. Martinez] has no legitimate claims, or (2) she knew that
19 any potential claim had no value." Id. at 61:15-16; 62:18-20.
20 The court declines to make either inferential leap, especially
21 when there is no factual or legal basis for so doing.

22 Ms. Martinez did not become a named plaintiff until more
23 than four and a half years after she and her husband filed for
24 bankruptcy. Therefore, the court agrees with plaintiffs that
25 it is not surprising that Ms. Martinez did not mention this
26 lawsuit during the bankruptcy. Furthermore, during the six
27 month overlap of the pendency of this action and the Martinez
28 bankruptcy, Ms. Martinez's involvement in this action was
peripheral. She was simply a member of a *proposed*, but

1 uncertified, class. Until a decision on class certification,
2 including the scope of the class, Ms. Martinez had no way of
3 knowing whether she would actually become a class member. In
4 fact, the possibility of Ms. Martinez becoming a named
5 plaintiff did not occur until December 4, 2003, more than a
6 year after the bankruptcy discharge, upon the filing of a
7 motion to amend the complaint to include Ms. Martinez as a
8 named plaintiff. And, it was not until March 11, 2004, that
9 the FAC, adding Ms. Martinez as a named plaintiff, actually
10 was filed. This particular factual situation does not give
11 this court any reason to doubt the adequacy of Ms. Martinez as
12 a class representative.

13 Continuing to question the strength of Ms. Martinez's
14 claims, because she did not disclose them during her
15 bankruptcy, Bashas' argues that such "[w]eakness or
16 illegitimacy in a proposed class representative's case is an
17 "independent reason to doubt the adequacy of [her]
18 representation.'" Def.'s Resp. MCC (Doc. 190) at 63:7-8
19 (quoting Robinson, 167 F.3d at 1157) (other citations
20 omitted). This argument is unpersuasive.

21 In the first place, this court agrees that "[t]he
22 adequacy prong of Rule 23(a) isn't the place to try to
23 litigate the merits of a case." Norris-Wilson, 270 F.R.D. at
24 605-06. "In fact, 'nothing in either the language or history
25 of Rule 23 . . . gives a court any authority to conduct a
26 preliminary inquiry into the merits of a suit in order to
27 determine whether it may be maintained as a class action.'"
28

1 Id. (quoting United Steel Workers, 593 F.3d at 808
2 (alterations in original) (other citations omitted).

3 Second, Bashas' main authority, Robinson, is non-binding
4 Seventh Circuit precedent and distinguishable in one very
5 critical respect. There, a correction officer applicant
6 brought a Title VII putative class action. Challenging that
7 applicant's adequacy as a class representative, the defendant
8 employer came forth with evidence showing that that applicant
9 "had been turned down because of his very poor employment
10 record, which among other things contained an unexplained 27-
11 month gap between jobs." Robinson, 163 F.3d at 1156. Due to
12 that employment history, the district court denied class
13 representative status to that applicant. Holding, *inter alia*,
14 that class certification was properly denied, the Robinson
15 Court reasoned:

16 [I]f when class certification is
17 sought it is already apparent --
18 as it was here because of Robinson's
19 employment history as shown on the
20 application that he submitted to
the Sheriff's office -- that the class
representative's claim is extremely
weak, this is an independent reason to
doubt the adequacy of his representation.

21 Id. at 1157 (citations omitted). The Court further reasoned,
22 that if a named plaintiff's "claim is a *clear* loser at the
23 time he asks to be made class representative, then approving
24 him as a class representative can only hurt the class." Id.
25 at 1158 (emphasis in original).

26 In sharp contrast to Robinson, the asserted weakness in
27 Ms. Martinez's claims -- her failure to disclose them during
28 bankruptcy -- has nothing whatsoever to do with the merits.

1 According to Bashas', Ms. Martinez's claims herein are weak
2 because she did not disclose them during bankruptcy. Bashas'
3 does not assert, and it would be hard-pressed to, that Ms.
4 Martinez's pay claim is "extremely weak," much less a "clear
5 loser" on the merits. Thus, Ms. Martinez's failure to
6 disclose her potential claims is not "an independent reason to
7 doubt the adequacy of her representation." See Robinson, 167
8 F.3d at 1156 (citations omitted).

9 **ii. Credibility**

10 Emphasizing that Ms. Martinez signed the declaration
11 accompanying the Schedule B Form under penalty of perjury,
12 Bashas' strongly implies that Ms. Martinez has credibility
13 issues which impact her adequacy as a class representative.
14 "[C]redibility is a relevant consideration with respect to the
15 adequacy analysis[.]" Keegan, 2012 WL 2250040, at *14
16 (internal quotation marks and citations omitted). At the same
17 time, however, "credibility problems must relate to issues
18 directly relevant to the litigation or there are confirmed
19 examples of dishonesty, such as a criminal conviction for
20 fraud." Id. (internal quotation marks and citations omitted).
21 Thus, even if the court were to find, which it does not, that
22 Ms. Martinez's credibility is at issue because she did not
23 disclose this lawsuit during bankruptcy, such credibility
24 issue would not impact her ability to serve as a class
25 representative.

26 To this point, the focus has been upon the first prong of
27 adequacy - the absence of antagonism and sharing of interests
28 between the named plaintiffs and the absentee class members.

1 As the foregoing discussion shows, there has been no showing
2 that either plaintiffs Estrada or Martinez have any conflicts
3 with putative class members. That is only the first prong of
4 the adequacy test, however. As to the second, "will the named
5 plaintiffs and their counsel prosecute the action vigorously
6 on behalf of the class[,]" Ellis I, 657 F.3d at 985 (internal
7 quotation marks and citation omitted), in Parra I this court
8 found that they would by implication. See Parra I, 2005 WL
9 6182338, at *20 - *22. To be sure, at that time, the court
10 was discussing appointment of class counsel pursuant to
11 Fed.R.Civ.P. 23(g), and not adequacy under Rule 23(a)(4).
12 There is no reason to revisit the issue of whether class
13 counsel will vigorously prosecute this action, however,
14 because Bashas' has not raised any other issues in that regard
15 beyond those raised and resolved in Parra I.

16 Additionally, "[i]n assessing whether class
17 representatives and their counsel will vigorously prosecute a
18 class action litigation, courts may consider the actual
19 progress of the proceedings to that point." Buckland v. Maxim
20 Healthcare Services, Inc., 2012 WL 3705263, at *6 (C.D.Cal.
21 Aug. 27, 2012) (internal quotation marks and citation
22 omitted). Although this action has not progressed beyond the
23 class certification stage, it is not due to the failure of
24 plaintiffs' counsel to vigorously prosecute this action. In
25 fact, their continued involvement at every step of this rather
26 complicated and protracted litigation, makes it abundantly
27 clear that despite the passage of time, they remain willing
28 and able to vigorously prosecute this action.

1 In short, as with the other Rule 23(a) requirements, the court
2 finds that the adequacy requirement has been satisfied.
3 Having shown that all four elements of Rule 23(a) are met as
4 to the pay claim, the next issue is whether this action
5 "fit[s] into one of the three categories described in
6 subdivision (b)[]" of Rule 23. Shady Grove Orthopedic
7 Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 130 S.Ct.
8 1431, 1437, 176 L.Ed.2d 311 (2010) (internal quotation marks
9 omitted)).

10 **B. Fed.R.Civ.P. 23(b)(3)**

11 As previously discussed, after Dukes, plaintiffs are
12 seeking class certification of their pay claim solely pursuant
13 to Rule 23(b)(3). That Rule, "as an adventuresome innovation,
14 is designed for situations in which class-action treatment is
15 not as clearly called for." Comcast, 133 S.Ct. at 1432
16 (internal quotation marks and citations omitted). "That
17 explains Congress's addition of procedural safeguards for
18 (b)(3) class members beyond those provided for (b)(1) or
19 (b)(2) class members (e.g., an opportunity to opt out), and
20 the court's duty to take a "'close look'" at whether common
21 questions predominate over individual ones." Id. (quoting
22 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S.Ct.
23 2231, 138 L.Ed.2d 689 (1997)).

24 Certification pursuant to Rule 23(b)(3) "is appropriate
25 'whenever the actual interests of the parties can be served
26 best by settling their differences in a single action.'" "
27 Hanlon, 150 F.3d at 1022 (quoting 7A Charles Alan Wright,
28 Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure

1 § 1777 (2d ed.1986) ("Wright & Miller"). The "only
2 prerequisites" for certification under Rule 23(b)(3) "are that
3 'the questions of law or fact common to class members
4 predominate over any questions affecting only individual class
5 members, and that a class action is superior to other
6 available methods for fairly and efficiently adjudicating the
7 controversy.'" Dukes, 131 S.Ct. at 2558 (quoting
8 Fed.R.Civ.P.23(b)(3)). The questions of predominance and
9 superiority "are interrelated because '[i]mplicit in the
10 satisfaction of the predominance test is the notion that the
11 adjudication of common issues will help achieve judicial
12 economy.'" York v. Starbucks Corp., 2011 WL 8199987, at *31
13 (C.D.Cal. Nov. 23, 2011) (quoting, *inter alia*, Valentino v.
14 Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)).

15 **1. Predominance**

16 "[T]here is substantial overlap between" the test for
17 commonality under Rule 23(a)(2) and the predominance test
18 under 23(b)(3). Wollin v. Jaguar Land Rover North America
19 LLC, 617 F.3d 1168, 1172 (9th Cir. 2010). However, "[i]f
20 anything, Rule 23(b)(3)'s predominance criterion is even more
21 demanding than Rule 23(a)." Comcast, 133 S.Ct. at 1432
22 (citing Amchem, 521 U.S. 591, 623-24, 117 S.Ct. 2231).
23 Consequently, "the presence of commonality alone is not
24 sufficient to fulfill Rule 23(b)(3)." Hanlon, 150 F.3d at
25 1022. The predominance inquiry "trains on legal or factual
26 questions that qualify each class member's case as a genuine
27 controversy." Amchem, 521 U.S. at 625, 117 S.Ct. 2231. In
28 contrast to Rule 23(a)(2), "[t]he predominance analysis under

1 Rule 23(b)(3) focuses on the relationship between the common
2 and individual issues in the case and tests whether proposed
3 classes are sufficiently cohesive to warrant adjudication by
4 representation." Wang, 709 F.3d at 835 (internal quotation
5 marks and citation omitted). As the Supreme Court recently
6 emphasized in Amgen, "Rule 23(b)(3) requires a showing that
7 *questions* common to the class predominate, not that those
8 questions will be answered, on the merits, in favor of the
9 class." Amgen, 133 S.Ct. at 1191 (emphasis in original).
10 Hence, "the office of a Rule 23(b)(3) certification ruling is
11 not to adjudicate the case; rather, it is to select the
12 metho[d] best suited to adjudication of the controversy fairly
13 and efficiently." Id. (internal quotation marks omitted).

14 The Ninth Circuit recognizes that "'there is clear
15 justification for handling the dispute on a representative
16 rather than an individual basis' if 'common questions present
17 a significant aspect of the case and they can be resolved for
18 all members of the class in a single adjudication[.]'" Mazza,
19 666 F.3d at 589 (quoting, *inter alia*, Hanlon, 150 F.3d at
20 1022). In contrast, "'if the main issues in a case require
21 the separate adjudication of each class member's individual
22 claim or defense, . . . , a Rule 23(b)(3) action would be
23 inappropriate.'" Keegan, 284 F.R.D. at 256 (quoting, *inter*
24 *alia*, Zinser v. Accufix Research Institute, Inc., 253 F.3d
25 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir.
26 2001)). "This is because, *inter alia*, the economy and
27 efficiency of class action treatment are lost and the need for
28 judicial supervision and the risk of confusion are

1 magnified.'" Id. (quoting Zinser, 253 F.3d at 1186). "Courts
2 must thus separate the issues subject to 'generalized proof'
3 from those subject to 'individualized proof' to determine
4 whether plaintiffs have satisfied the predominance
5 requirement." Ellis II, 285 F.R.D. at 537 (citation omitted).

6 The predominance analysis "'begins . . . with the
7 elements of the underlying cause of action.'" Stearns, 655
8 F.3d at 1020 (quoting Erica P. John Fund, Inc., v. Halliburton
9 Co., 563 U.S. ----, ----, 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24
10 (2011)). Here, plaintiffs are alleging that "Bashas' two-
11 tiered wage policy constitutes disparate treatment and/or has
12 had a disparate impact on Hispanic Food City workers in
13 violation of Title VII and Section 1981." Pls.' Supp. Br.
14 (Doc. 302) at 21:3-5. Resolution of that "central *liability*
15 issue[] . . . involves no individual questions[,] " plaintiffs
16 argue. Id. at 21:2-3; 21:5 (emphasis in original).
17 Plaintiffs further argue that the "only individual
18 determination to be made" -- the amount of back pay -- "does
19 not defeat class certification." Id. at 21:6; 22:1 (citing
20 Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1089
21 (9th Cir. 2010)). And, as plaintiffs are quick to point out,
22 the Ninth Circuit in Parra II rejected Bashas' argument that
23 "[t]he claimed difficulties in the calculations of damages, as
24 they affected the various class members . . . preclude[d]
25 class certification." Parra II, 536 F.3d at 979. What is
26 more, just recently, the Ninth Circuit reaffirmed its long-
27 held view that "'[t]he amount of damages is invariably an
28 individual question and does not defeat

1 class action treatment.'" Leyva v. Medline Industries Inc.,
2 2013 WL 2306567, at *3 (9th Cir. May 28, 2013) (quoting
3 Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975) (other
4 citation omitted).

5 Perhaps because the Supreme Court in Dukes clarified that
6 "individualized monetary claims[,] " such as plaintiffs' back
7 pay claims herein, "belong in Rule 23(b)(3)[,]" Dukes, 131
8 S.Ct. at 2558, Bashas' agrees that individual damage issues
9 alone do not defeat class certification under that Rule. See
10 Stearns, 655 F.3d at 1026 (citing Yokoyama, 594 F.3d at 1094)
11 ("We have held that the mere fact that there might be
12 differences in damage calculations is not sufficient to defeat
13 class certification.") Nonetheless, Bashas' insists that
14 plaintiffs have not established predominance because
15 "[q]uestions regarding liability would require . . . highly
16 fact-specific inquiries regarding whether or not the
17 Plaintiffs' alleged discriminatory pay . . . w[as] the result
18 of discrimination or some other, non-discriminatory factor."
19 Def.'s Supp. Br. (Doc. 301) at 19:26-20:1. This argument is
20 based upon two faulty assumptions - one pertaining to the
21 nature of plaintiffs' pay claim and the other to the proof in
22 that regard.

23 Although plaintiffs have explicitly renounced their
24 Subjective Placement claim, Bashas' still insists that
25 plaintiffs' pay claim involves "subjective decision-making[]"
26 where "individual store managers, acting at their own
27 discretion, decided where to *place* employees on the wage
28 scale." Def.'s Resp. (Doc. 304) at 7:19 (citations omitted);

1 6:22-23 (emphasis added). From Bashas' standpoint, the
2 exercise of that discretion "set the employees' wage history
3 in motion, and it is a key issue in this case." Id. at 6:23-
4 25. Characterizing plaintiffs' pay claim in that way, Bashas'
5 posits that defending such a claim would involve assessing
6 "numerous . . . subjective decisions regarding placement of
7 members, in the proposed class, on the pay scales." Id. at
8 8:13-15. Such an assessment is incompatible with a finding of
9 predominance in Bashas' view.

10 Perhaps Bashas' argument would have some validity if
11 plaintiffs were still pursuing their Subjective Placement
12 claim, but they are not. At the risk of repetition,
13 plaintiffs' pay claim is based strictly on Bashas' wage
14 scales, and is independent of their foregone Subjective
15 Placement claim. Thus, the ostensibly individualized nature
16 of that Subjective Placement claim is not germane to the issue
17 of whether common issues predominate with respect to
18 plaintiffs' pay claim, predicated solely upon Bashas' wage
19 scales.

20 The second faulty assumption under which Bashas' is
21 operating is that "[p]laintiffs have not produced any actual
22 evidence that Bashas' operated under a single, common policy
23 of discrimination." Def.'s Supp. Br. (Doc. 301) at 20:2-3.
24 As discussed with respect to commonality, plaintiffs have
25 identified a specific employment policy, *i.e.*, Bashas' wage
26 scales, which have caused a pay disparity. See Ellis II, 285
27 F.R.D. at 538 (finding predominance where "[p]laintiffs . . .
28 presented significant proof that Costco operates under a

1 common, nationwide promotion system for [certain] positions
2 and have identified specific employment practices that have
3 caused a disparity in promotions[.]"). Further, because
4 plaintiffs contend that Bashas' wage scales are
5 "discriminatory, both under a disparate treatment and a
6 disparate impact theory[,] . . . [r]esolution of Plaintiffs'
7 challenge to those [wage scales] will resolve significant
8 issues with respect to the class as a whole and this dwarfs
9 the individualized issues[.]" See *id.* (citing *Stinson v. City*
10 *of New York*, 282 F.R.D. 360, 382 (S.D.N.Y. 2012) ("`Class-wide
11 issues predominate if resolution of some of the legal or
12 factual questions that qualify each class member's case as a
13 genuine controversy can be achieved through generalized proof,
14 and if these particular issues are more substantial than the
15 issues subject only to individualized proof.'" (quoting *Moore*
16 *v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002))).

17 More closely considering plaintiffs' specific theories of
18 liability, disparate treatment and disparate impact, yields
19 the same result. On that point, the court finds persuasive
20 the reasoning in *Ellis II*. There, with respect to the
21 disparate treatment claim, the court explained:

22 whether Defendant has engaged in a
23 pattern or practice of discrimination
24 such that all class members are entitled
25 to a presumption of discrimination under
26 the *Teamsters* method of proof³⁸ is a common

27 ³⁸ "As the Supreme Court reaffirmed in *Dukes*, pattern-or-practice
28 cases alleging disparate treatment under Title VII typically follow a
bifurcated, burden-shifting structure laid out by *Int'l Broth. of Teamsters*
v. United States, 431 U.S. 324 (1977):

We have established a procedure for trying
pattern-or-practice cases that gives effect to
[Title VII's] statutory requirements. When the

1 issue subject to classwide resolution. This
2 'pattern and practice question predominates
3 because it has a direct impact on every
4 class member's effort to establish liability
5 and on every class member's entitlement
6 to . . . monetary relief.' Ingram v. The
7 Coca-Cola Co., 200 F.R.D. 685, 699
8 (N.D.Ga. 2001) (certifying (b)(3) class of
9 plaintiffs alleging a pattern or practice
10 of race discrimination in employment under
11 Teamsters framework); see also Williams
12 v. Mohawk Indus., Inc., 568 F.3d 1350,
13 1357 (11th Cir. 2009) ("Common issues of fact
14 and law predominate if they ha[ve] a direct
15 impact on every class member's effort to
16 establish liability and on every class
17 member's entitlement to injunctive
18 and monetary relief.") (internal citations
19 and quotation marks omitted).

20 Ellis II, 285 F.R.D. at 538 (footnote added). The Ellis II
21 court similarly explained as to plaintiffs' disparate impact
22 claim:

23 whether Defendant's facially neutral
24 policies and practices have a disparate
25 impact on class members, and whether those
26 practices are nonetheless justified by
27 business necessity, are similarly
28 issues best addressed with respect to
the entire class. . . . Adjudicating these
issues on a classwide basis is necessary before
any individualized proceeding can occur.

Id. (citations and footnote omitted). Adopting that
rationale, the court finds that the common questions regarding
liability as to the pay claim are "a significant aspect of

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. . . .
At this phase, the burden of proof will shift to the
company, but it will have the right to raise any
individual affirmative defenses it may have, and to
demonstrate that the individual applicant was
denied an employment opportunity for lawful reasons. . . .

Ellis II, 285 F.R.D. at 505 (quoting Dukes, 131 S.Ct. at 2552 n. 7)
(internal quotations and citations omitted).

1 th[is] case and they can be resolved for all members of the
2 class in a single adjudication[.]” See Mazza, 666 F.3d at 589
3 (internal quotation marks and citations omitted).

4 Before addressing superiority, the court also must
5 consider whether plaintiffs’ damages can be determined on a
6 classwide basis. See Comcast, 133 S.Ct. at 1432 (“the proper
7 standard for evaluating certification” requires a showing
8 “that damages are capable of measurement on a classwide
9 basis[.]”). In Comcast, an antitrust action, the district
10 court accepted one of plaintiffs’ four theories of antitrust
11 impact, but rejected the other three theories. Despite that
12 limitation, the plaintiffs relied on a regression model that
13 “did not isolate damages resulting from any one theory of
14 antitrust impact.” Comcast, 133 S.Ct. at 1431).

15 Both the district court and the Third Circuit declined to
16 entertain the defense argument challenging plaintiffs’
17 regression model because “those arguments would also be
18 pertinent to the merits determination[.]” Id. at 1433.
19 Finding “[t]hat reasoning to flatly contradict[.]” prior
20 Supreme Court precedent, and Dukes in particular, the Court
21 reversed the class certification order. Id. (citation
22 omitted). In reversing, the Comcast Court chastised the Third
23 Circuit for “simply conclud[ing] that respondents provided a
24 method to measure and quantify damages on a classwide basis,”
25 without deciding whether the methodology [was] a just and
26 reasonable inference or speculative.” Id. (internal quotation
27 marks and citation omitted)

28 In the present case, unlike Comcast, plaintiffs’

1 methodology (although not fully developed³⁹) for calculating
2 back pay demonstrates that such damages are "capable of
3 measurement on a classwide basis. See Comcast, 133 S.Ct. at
4 1433. "Here, unlike *Comcast*, if putative class members prove
5 [Bashas'] liability, damages will be calculated based on the
6 wages each employee lost due to [Bashas'] unlawful practices."
7 See Leyva, 2013 WL 2306567, at *3. If Bashas' is found
8 liable, it strikes the court, as the plaintiffs urge, that the
9 back pay determination "is a purely mechanical process[.]"
10 Pls.' Supp. Br. (Doc. 302) at 21:7. Furthermore, through a
11 computer program, and relying upon "objective factors" such as
12 "the individual employee payroll record (dates of employment
13 job position, hours worked) and the wage scale," which is part
14 of the record, the plaintiffs will be able to calculate back
15 pay losses for "each eligible class member[.]" Id. at 21:15-
16 18. Under this projected scenario, there is no concern, as
17 there was in Comcast, that "[q]uestions of individual damages
18 calculations will inevitably overwhelm questions common to the
19 class[]". See Comcast, 133 S.Ct. at 1433. In addition, also
20 in sharp contrast to Comcast, at least at this point,
21 plaintiffs' methodology for calculating back pay correlates
22 the "legal theory of the harmful event" with "the economic
23 impact of that event. See id. at 1435 (internal quotation
24 marks, emphasis and citation omitted). Having found

25
26 ³⁹ Plaintiffs "anticipate having an expert witness present" their
27 backpay "analysis[.]" consisting of "a mathematical calculation conducted
28 for each eligible class member to determine individual back pay losses."
Pls.' Supp. Br. (Doc. 302) at 21:17-19 (emphasis in original). The court
cannot fault plaintiffs for not having provided such an analysis in
conjunction with their prior filings, as they did not have the benefit, nor
could they have anticipated at that time, the Supreme Court's March 27,
2013 Comcast decision.

1 predominance, it is necessary to consider superiority, the
2 second Rule 23(b)(3) element.

3 2. Superiority

4 "[T]he purpose of the superiority requirement is to
5 assure that the class action is the most efficient and
6 effective means of resolving the controversy.'" Wolin v.
7 Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1175 (9th
8 Cir. 2010) (quoting Wright & Miller, § 1779 at 174); see also
9 Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th
10 Cir. 1996) (Superiority tests whether "class litigation of
11 common issues will reduce litigation costs and promote greater
12 efficiency.") "The superiority inquiry under Rule 23(b)(3)
13 requires determination of whether the objectives of the
14 particular class action procedure will be achieved in the
15 particular case." Hanlon, 150 F.3d at 1023 (citation
16 omitted). In turn, that inquiry "necessarily involves a
17 comparative evaluation of alternative mechanisms of dispute
18 resolution." Id. The Ninth Circuit recognizes that
19 "[d]istrict courts are in the best position to consider the
20 most fair and efficient procedure for conducting any given
21 litigation, . . . , and so must be given wide discretion to
22 evaluate superiority[.]" Bateman, 623 F.3d at 712 (internal
23 quotation marks and citations omitted).

24 Plaintiffs offer two reasons as to why "[c]lass
25 treatment is clearly the superior method for adjudicating the
26 pay claims." Pls.' Supp. (Doc. 302) at 22:20. First, class
27 certification would be less costly and more efficient.
28 Second, most of the putative class members "lack the

1 resources" to fund this litigation, and so would be "deterred
2 or prevented" from pursuing their discrimination claims. Id.
3 at 22:25-26.

4 Conversely, Bashas' asserts that plaintiffs have not
5 shown superiority because, first of all, there are only a
6 "limited number of allegedly affected named plaintiffs and
7 class members[.]" Def.'s Supp. Br. (Doc. 301) at 20:11-12.
8 Supposedly, superiority also cannot be shown because putative
9 class members "retain[] a strong incentive to bring their
10 claims individually[.]" Id. at 20:13-14. Finally, harkening
11 back to its familiar refrain that this lawsuit involves
12 "thousands of highly-individualized factual inquiries[,]"
13 Bashas' contends that is another reason why Rule 23(b)(3)
14 certification is "inappropriate." Id. at 20:18-19.

15 Class action in accordance with Rule 23(b)(3) is the
16 superior method of adjudicating plaintiffs' claims, despite
17 what Bashas' argues. Without class certification, as
18 plaintiffs accurately point out, each individual employee will
19 have to separately "prove . . . that [Bashas'] maintained a
20 two-tiered wage policy, that the policy . . .
21 disproportionately impacted Hispanic Food City employees,
22 and/or that the policy constituted disparate treatment based
23 upon national origin." Pls.' Supp. (Doc. 302) at 22:21-25.
24 Plainly, "[i]t is far more efficient to litigate" these
25 fundamental liability issues "on a classwide basis rather than
26 in thousands of individual and overlapping lawsuits." See
27 Wolin, 617 F.3d at 1176 (Rule 23(b)(3) class certification
28 proper in an "automobile-wear" case alleging "single,

1 defective alignment geometry[]" where "issues common to all
2 class members . . . can be litigated together[]"); see also
3 Jordan v. Paul Financial, LLC, 285 F.R.D. 435, 467 (N.D.Cal.
4 2012) (internal quotation marks and citation omitted) ("[A]
5 single action would be superior to maintaining a multiplicity
6 of individual actions involving similar legal and factual
7 issues.") As the Ninth Circuit reasoned in Wolin, "[f]orcing
8 individual[s] . . . to litigate their cases, particularly
9 where common issues predominate for the proposed class, is an
10 inferior method of adjudication." Wolin, 617 F.3d at 1176.

11 Further, in the present case, much like Wolin, "[p]roposed
12 class members face the option of participating in this class
13 action, or filing hundreds of individual lawsuits that could
14 involve duplicating discovery and costs that [potentially]
15 exceed the extent of proposed class members' individual
16 injuries." See id. Avoiding that latter scenario is the
17 precise reason for Rule 23(b)(3) class certification. See
18 Amchem, 521 U.S. at 615, 117 S.Ct. 2231 (quoting Advisory
19 Committee's Notes on Rule 23(b)(3)) (that Rule is intended "to
20 cover cases 'in which a class action would achieve economies
21 of time, effort, and expense, and promote . . . uniformity of
22 decision as to persons similarly situated, without sacrificing
23 procedural fairness or bringing about other undesirable
24 results.'"); see also York, 2011 WL 8199987, at *33 (citations
25 omitted)("Typically, a class action is superior if the case
26 presents a large volume of individual claims that could strain
27 judicial resources if tried separately and if each potential
28 plaintiff's recovery may not justify the cost of individual

1 litigation.") Indeed, the Ninth Circuit has consistently held
2 that "[w]here recovery on an individual basis would be dwarfed
3 by the cost of litigating on an individual basis, this factor
4 weighs in favor of class certification." Wolin, 617 F.3d at
5 1175 (citing Zinser, 253 F.3d at 1189; Hanlon, 150 F.3d at
6 1023).

7 Neither the supposedly "limited number" of potential class
8 members, or their assertedly "strong incentive" to
9 individually pursue their claims persuades the court that Rule
10 23(b)(3) is not the proper vehicle for plaintiffs to litigate
11 their claims. See Def.'s Supp. Br. (Doc. 301) at 20:11; and at
12 20:13. Bashas' initial argument against a finding of
13 superiority is that there are a "limited number" of putative
14 class members. Id. at 20:11. Bashas' failure to elucidate on
15 that point is troubling given its prior assertion that
16 plaintiffs are "seek[ing] to certify a class of at least
17 10,000[.]" Id. at 11:16. Moreover, that ten thousand figure
18 hardly seems "limited," especially considering that it is
19 based upon a "very modest assumption" of industry-wide
20 "turnover rates[.]" Id. at 11:17-18. Bashas' cannot have it
21 both ways; it cannot argue, in essence, that the class is too
22 large for commonality purposes, but not for superiority.

23 Additionally, in holding that numerosity had been shown
24 here, this court previously found, and Bashas' did not
25 dispute, that the putative class has "thousands of members[.]"
26 See Parra I, 2005 WL 6182338, at *14 (citing Mot. (Doc. 159)
27 at 18 [("Bashas' has employed between 3000 and 4440 Hispanic
28 workers in hourly positions in the Food City stores in each

1 year since 2000.)"]; Decl'n Drogin (Doc. 160) at Exhbt. 1.)
2 Hence, the number of potential class members does not render
3 Rule 23(b)(3) certification improper.

4 Likewise, the court is not convinced by Bashas'
5 "incentive" argument. Def.'s Supp. Br. (Doc. 301) at 20:13.
6 Bashas' postulates that plaintiffs have not shown superiority
7 because the putative class members "retain[] a strong
8 incentive to bring their claims individually," otherwise, they
9 "risk being precluded from asserting individual claims for
10 compensatory damages of up to \$300,000,⁴⁰ limited by the
11 applicable statutory cap, if they choose to 'tie their fates
12 to the class representatives.'" Id. at 20:13-17 (quoting
13 Dukes, 131 S.Ct. at 2559). Once again, Bashas' overlooks a
14 critical distinction between Dukes and the present case.

15 The concern in Dukes was that the strategy of including
16 only backpay claims "created the possibility . . . that
17 individual class members' compensatory-damages claims would be
18 *precluded* by litigation they had no power to hold themselves
19 apart from." Dukes, 131 S.Ct. at 2559 (emphasis in original).
20 The Court explained:

21 If it were determined, for example, that
22 a particular class member is not entitled
23 to backpay because her denial of increased
24 pay or a promotion was not the product
25 of discrimination, that employee might
26 be collaterally estopped from independently
seeking compensatory damages based on
that same denial. That possibility underscores
the need for plaintiffs with individual
monetary claims to decide *for themselves*

27 ⁴⁰ Section 1981a(b)(3) imposes a statutory limitation on, among
28 other types of damages, compensatory and punitive damages in Title VII
suits against employers with more than 500 employees. Hemmings v.
Tidyman's Inc., 285 F.3d 1174, 1200 (9th Cir. 2002); 42 U.S.C.
§ 1981a(b)(3)(D).

1 whether to tie their fates to the
2 class representatives' or go it alone—a
3 choice Rule 23(b)(2) does **not** ensure that they
4 have.

5 Id. (italicized emphasis in original) (bold emphasis added).
6 Those concerns are absent here. Unlike a Rule 23(b)(2) class,
7 which is mandatory, a Rule 23(b)(3) class contains an opt-out
8 provision. See Fed.R.Civ.P. 23(c)(2)(B)(v). That latter Rule
9 is the sole basis for certifying plaintiffs' pay claim.
10 Therefore, as a result of Rule 23(b)(3)'s opt-out mechanism,
11 there is no risk, as there was in Dukes, where certification
12 was sought pursuant to Rule 23(b)(2), of depriving a putative
13 class member in this case of the opportunity of proceeding
14 with his or her own individual monetary claims.

15 Lastly, Bashas' argument that a class action is not a
16 superior method of adjudicating the pay claims because it
17 "would require thousands of highly-individualized factual
18 inquiries," rings hollow given the nature of those claims and
19 the relief sought, as previously discussed. See Def.'s Supp.
20 Br. (Doc. 301) at 20:18-19. Consequently, for the reasons
21 just discussed, the court finds that certification of a class
22 pursuant to Fed.R.Civ.P. 23(b)(3) with respect to plaintiffs'
23 pay claim satisfies the most fundamental test for superiority
24 -- "maintenance of this litigation as a class action is
25 efficient and . . . it is fair." See Wolin, 617 F.3d at 1175-

26 **C. Fed.R.Civ.P. 23(b)(3)(A)-(D)**

27 An examination of predominance and superiority involves
28 additional considerations. "In evaluating predominance and

1 superiority, the Court *must* consider: (1) the extent and
2 nature of any pending litigation commenced by or against the
3 class involving the same issues; (2) the interest of
4 individuals within the class in controlling their own
5 litigation; (3) the convenience and desirability of
6 concentrating the litigation in a particular forum; and (4)
7 the manageability of the class action.”⁴¹ Beck-Ellman v. Kaz
8 USA, Inc., 283 F.R.D. 558, 567 (S.D.Cal. 2012)(citing
9 Fed.R.Civ.P. 23(b)(3)(A)-(D); Amchem, 521 U.S. at 615-16, 117
10 S.Ct. 2231)) (emphasis added). These factors “require[] the
11 court to focus on the efficiency and economy elements of the
12 class action so that cases allowed under subdivision (b)(3)
13 are those that can be adjudicated most profitably on a
14 representative basis.” Zinser, 253 F.3d at 1190 (quoting 7A
15 Wright & Miller, § 1780 at 562). The application of four
16 enumerated factors, which the parties largely ignored,

17

18 ⁴¹ The Ninth Circuit in Bateman, was confronted with the issue of
19 whether Rule 23(b) “authorizes a court to consider whether certifying a
20 class would result in disproportionate damages.” Bateman, 623 F.3d at 713.
21 Because Rule 23(b)(3) “provide[d] little, if any guidance, on” that issue,
the Court recognized the propriety of expanding the inquiry thereunder to
include factors not listed in Rule 23(b)(3)(A)-(D):

22 Superiority must be looked at from the point of
23 view (1) of the judicial system, (2) of the
potential class members, (3) of the present plaintiff,
24 (4) of the attorneys for the litigants, (5) of
the public at large and (6) of the defendant. The
25 listing is not necessarily in order of importance
of the respective interests. Superiority must also
be looked at from the point of view of the issues.

26 Id. (quotation marks and citations omitted). Here, there is no need for the
27 court to delve into those non-listed factors because, first of all, a
consideration of those factors is discretionary, not mandatory. See id.
(emphasis added) (“A court *may* consider, other, non-listed factors[]” in
28 deciding whether to certify a class under Rule 23(b)(3).) Second, in
contrast to Bateman, the listed Rule 23(b)(3) factors encompass the concerns
relevant here to class certification thereunder.

1 buttresses the finding that Rule 23(b)(3)'s predominance and
2 superiority requirements are met here.

3 The first factor considers the interest of each member in
4 "individually controlling the prosecution or defense of
5 separate actions[.]" Fed.R.Civ.P. 23(b)(3)(A). Given the
6 "common questions affecting the class as a whole at the
7 liability stages of this matter, and given [the putative]
8 class members' ability to opt out [,]" the putative class
9 members in the present case "have a diminished interest in
10 individually controlling the common portions of this action."
11 See Ellis II, 285 F.R.D. at 539-540.

12 Further, "[w]here damages suffered by each putative class
13 member are not large, this factor weighs in favor of
14 certifying a class action." Zinser, 253 F.3d at 1190
15 (citation omitted). That is because the policy "at the very
16 core of the class action mechanism is to overcome the problem
17 that small recoveries do not provide the incentive" for
18 individuals to bring claims. Amchem Prods., 521 U.S. at 617.
19 Here, the FAC does not allege the specific amount of damages
20 sought, and the plaintiffs have given no indication as to
21 whether those damages are sizeable or not. In Parra II, the
22 Ninth Circuit estimated that the "hourly disparities
23 translate[d] to annual salary differences of around \$300 per
24 year to almost \$6,000 per year." See Parra II, 536 F.3d at
25 977. Recoveries in that range are relatively modest. For
26 both of these reasons, the first factor weighs in favor of
27 class certification.

28 The second factor is "the extent and nature of any

1 litigation concerning the controversy already begun by or
2 against class members[.]” Fed.R.Civ.P. 23(b)(3)(B).
3 Arguably, E.E.O.C. v. Bashas’, Inc., No. CIV 09-0209 PHX RCB,
4 wherein the EEOC is seeking to enforce an administrative
5 subpoena against Bashas’, fits the definition of such
6 litigation. The EEOC’s subpoena, the enforcement of which
7 Bashas’ has vigorously challenged, is “part of the EEOC’s
8 “ongoing investigation into whether Bashas’ has engaged in
9 discrimination against its Hispanic employees on the basis of
10 national origin with respect to wages and promotions.”
11 E.E.O.C. v. Bashas’, Inc., 828 F.Supp.2d 1056, 1059 (D.Ariz.
12 2011) (internal quotation marks and citation omitted).

13 The parties are fully aware of that action as they have
14 participated either directly or indirectly in that litigation.
15 For now, the details are not important; suffice it to say
16 that that case is pending in the Ninth Circuit Court of
17 Appeals. Given that Bashas’ EEOC action is in its relative
18 infancy, and the court would have to speculate as to how that
19 action might, at some future date, impact the present case, it
20 finds that the second factor also weighs in favor of class
21 certification.

22 The third factor, “the desirability or undesirability of
23 concentrating the litigation of the claims in the particular
24 forum[.]” also augurs in favor of class certification. See
25 Fed.R.Civ.P. 23(b)(3)(C). “Here, there is no reason to believe
26 that concentrating this action in this Court is undesirable,”
27 especially because “the proposed []class is composed of only
28 [Arizona] . . . employees.” See York, 2011 WL 8199987, at

1 *33.

2 The fourth and final factor considers "the likely
3 difficulties in managing a class action." Fed.R.Civ.P.
4 23(b)(3)(D). This factor looks to whether "the complexities
5 of class action treatment outweigh the benefits of considering
6 common issues in one trial[.]" Zinser, 253 F.3d at 1192
7 (citations omitted). If they do, "class action treatment is
8 not the superior method of adjudication." Id. (internal
9 quotation marks and citations omitted). This balancing test
10 "encompasses the whole range of practical problems that may
11 render the class format inappropriate for a particular suit."
12 Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 164, 94 S.Ct.
13 2140, 40 L.Ed.2d 732 (1974).

14 At this juncture, and without the parties' input, it is
15 difficult to conceive how the complexities of class
16 certification here would outweigh the benefits. Cf. In re:
17 Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 140
18 (2nd Cir. 2001) (Sotomayor, J.) ("[F]ailure to certify an
19 action under Rule 23(b)(3) on the sole ground that it would be
20 unmanageable is disfavored, and should be the exception rather
21 than the rule.") The court thus finds that this factor, too,
22 favors class certification pursuant to Rule 23(b)(3). If at
23 some point the pay claim does become unmanageable as a class
24 action, which the court does not anticipate, the court
25 "retains the flexibility to address problems with a certified
26 class as they arise, including the ability to decertify."
27 United Steel Workers, 593 F.3d at 807.

28 Overall, based upon the foregoing, the court finds that

1 the named plaintiffs' pay claim is properly certified pursuant
2 to Rule 23(b)(3). The court's analysis does not end here,
3 however, because although it previously certified plaintiffs'
4 working condition claim, the propriety of that certification
5 has become an issue after Dukes.

6 **II. Working Conditions Claim**⁴²

7 Rule 23(b)(2) provides in relevant part that if the
8 elements of Rule 23(a) are met, and if "the party opposing the
9 class has acted or refused to act on grounds that apply
10 generally to the class, so that final injunctive relief or
11 corresponding declaratory relief is appropriate respecting the
12 class as a whole[,] [a] class may be maintained[.]" Fed. R.
13 Civ. P. 23(b)(2). Pursuant to that Rule, in Parra I, this
14 court certified a class as to working conditions comprised of:

15 All Hispanic workers employed by defendant in
16 an hourly position at any Food City retail store
17 since April 4, 1998, who have been or may be subject
18 to the challenged disparate working conditions.

19 Parra I, 2005 WL 6182338, at *22. Bashas' appealed only the
20 denial of class certification as to the pay claim, leaving
21 undisturbed the certification of the working conditions claim.

22 **A. Decertification**

23 Now, based upon Dukes' "newly clarified commonality
24

25 ⁴² Plaintiffs imply that Bashas' disregarded this court's order by
26 addressing the working conditions claim in its supplemental briefs. While
27 setting the post-Dukes briefing schedule, however, Bashas' explicitly
28 inquired as to the propriety of "rais[ing] the issue of reconsideration of
[this court's prior] certification of [the] store conditions" claim, or
whether the court wanted that issue addressed separately. Tr. (June 27,
2011) at 10:42:09 a.m. - 10:42:16 a.m. The court responded that it would
not "preclude" Bashas' from raising that claim in the supplemental briefs.
Tr. (June 27, 2011) at 10:42:26 - 10:42: 26 a.m. Consequently, the issue
of the continued certification of the working conditions claim is properly
before the court.

1 standard," Def.'s Resp. (Doc. 304) at 6:1-2, Bashas' "requests
2 that the Court reconsider . . . and deny" class certification
3 of the working conditions claim. Def.'s Supp. Br. (Doc. 301)
4 at 20:22-23. Bashas' response more accurately requests "de-
5 certif[ication]" of the working conditions claim, however, as
6 will soon become evident. Def.'s Resp. (Doc. 304) at 8:20
7 (emphasis added).

8 Interpreting Bashas' request as strictly one for
9 reconsideration, plaintiffs argue that it is "untimely[.]"
10 Pls.' Reply (Doc. 303) at 10:10. There are two prongs to this
11 argument. Neither is meritorious. First, plaintiffs note
12 that Bashas' did not appeal class certification of the working
13 conditions claim pursuant to Fed.R.Civ.P. 23(f). That Rule
14 allows a party, within 14 days after entry of the class
15 certification order, to file with the court of appeals a
16 petition for permission to appeal the granting or denying of
17 class certification. The filing of a Rule 26(f) petition is
18 separate and distinct from filing a reconsideration or
19 decertification motion, however. Therefore, although Bashas'
20 did not avail itself of Rule 23(f), it does not follow, as
21 plaintiffs' so strongly imply, that Bashas' current request is
22 untimely.

23 Second, plaintiffs baldly assert that Bashas' "did not
24 . . . timely" move "for reconsideration[.]" Id. at 10:7. Even
25 if the court were to agree,⁴³ it would not preclude Bashas'

26
27 ⁴³ LRCiv 7.2(g)(2) provides that "[a]bsent good cause shown, any
28 motion for reconsideration shall be filed no later than fourteen (14) days
after the date of the filing of the Order that is the subject of the
motion." LRCiv 7.2(g)(2). Bashas' did not seek reconsideration within 14
days after the filing of Parra I, and evidently that is the basis for
plaintiffs' untimeliness argument. Of course, such an argument presumes

1 from requesting decertification now. Bashas' request is
2 timely given the considerable latitude a district court has to
3 revisit the class certification issue. "A district court may
4 decertify a class at any time." Rodriguez v. West Publ'g
5 Corp., 563 F.3d 948, 966 (9th Cir. 2009)(emphasis added)
6 (citing Falcon, 457 U.S. at 160, 102 S.Ct. 2364) Federal Rule
7 of Civil Procedure 23(c)(1)(C) embodies that latitude: "An
8 order that grants or denies class certification may be altered
9 or amended before final judgment." Fed.R.Civ.P. 23(c)(1)(C).
10 Such an order is, therefore, "inherently tentative." Coopers &
11 Lybrand v. Livesay, 437 U.S. 463, 469 n. 11, 98 S.Ct. 2454, 57
12 L.Ed.2d 351 (1978). Thus, "[a] district court retains the
13 flexibility to address problems with a certified class as they
14 arise, including the ability to decertify." United Steel
15 Workers, 593 F.3d at 809 (emphasis added).

16 This flexibility extends "[e]ven after a certification
17 order is entered[.]'" Id. (quoting Falcon, 457 U.S. at 160,
18 102 S.Ct. 2364) (other citations omitted). Thus, "Rule 23
19 provides district courts with *broad authority at various*
20 *stages in the litigation* to revisit class certification
21 determinations and to redefine or decertify classes as
22 appropriate." Wang, 709 F.3d at 836 (citing Armstrong v.
23 Davis, 275 F.3d 849, 871 n. 28 (9th Cir. 2001), *abrogated on*
24 *other grounds by Johnson v. California*, 543 U.S. 499, 504-05,

25
26 _____
27 the absence of "good cause." In all likelihood, such a presumption is not
28 warranted here, however, because Dukes was decided more than five years
after Parra I. And, LRCiv 7.2(g)(1) allows for the possibility of
reconsideration, *inter alia*, based upon a showing of "new . . . legal
authority that could not have been brought to [the court's] attention
earlier." So even if the court were to treat Bashas' motion as one for
reconsideration, a strong argument could be made that it is untimely.

1 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005)) (emphasis added).
2 Indeed, somewhat presciently, relying upon Armstrong, Parra I
3 recognized that flexibility. See Parra I, 2005 WL 6182338, at
4 *14. The passage of time, therefore, is not a barrier to
5 Bashas' request for decertification of the working conditions
6 class, post-Dukes, as the foregoing shows.

7 The parties fundamentally disagree as to whether Dukes
8 affects certification of that class. Plaintiffs argue that
9 Dukes "has no impact[,] Pls.' Supp. Brief (Doc. 302) at 24:28,
10 whereas Bashas' contends that plaintiffs should not be allowed
11 to "maintain" their working conditions claim because
12 commonality, as articulated in Dukes, is missing here.
13 Def.'s Supp. Br. (Doc. 301) at 15:22.

14 **B. Standing**

15 The court is not at liberty to address that conflict
16 without resolving the prefatory issue of standing, although
17 the parties did not. See Pier 1 Imports (U.S.) Inc., 631 F.3d
18 939, 954 (9th Cir. 2011) (internal quotation marks and
19 citations omitted) ("[F]ederal courts are required *sua sponte*
20 to examine jurisdictional issues such as standing.") "Mindful
21 that 'Rule 23's requirements must be interpreted in keeping
22 with Article III constraints[]'" the court must determine
23 whether named plaintiffs, Estrada and Martinez have standing
24 to bring the working conditions claim. See Evans v. Linden
25 Research, Inc., 2012 WL 5877579, at *6 (N.D.Cal. Nov. 20,
26 2012) (quoting Amchem, 521 U.S. at 613, 117 S.Ct. 2231); and
27 In re Abbott Labs. Norvir Antitrust Litig., 2007 WL 1689899,
28 at *2 (N.D.Cal. June 11, 2007) ("[I]t is 'well-settled that

1 prior to the certification of a class, and technically
2 speaking before undertaking any formal typicality or
3 commonality review, the district court must determine that at
4 least one named class representative has Article III standing
5 to raise each class subclaim.'") (quoting Wooden v. Bd. of
6 Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1287-88 (11th
7 Cir. 2001)).

8 Standing is an issue because, as plaintiffs stress, they
9 are seeking "*only injunctive relief*" in connection with their
10 working conditions claim, Pls.' Supp. Br. (Doc. 302) at 25:20
11 (emphasis in original); but, plaintiff Estrada, as a former
12 Food City employee,⁴⁴ lacks standing to sue for injunctive
13 relief against his former employer. See Walsh v. Nevada Dept.
14 of Human Resources, 471 F.3d 1033, 1036, 1037 (9th Cir. 2006)
15 (former employee, who gave no indication in the complaint that
16 she was interested in returning to work for her former
17 employer, did not have standing to request injunctive relief
18 to force that former employer to "adopt and enforce lawful
19 policies regarding discrimination based on disability[]"); see
20 also Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1045 (9th
21 Cir. 1999) ("Unless the named plaintiffs are themselves

22
23 ⁴⁴ There is a discrepancy between the FAC and plaintiff Estrada's
24 declaration in support of class certification in terms of his employment
25 status. The FAC, filed March 11, 2004, alleges that plaintiff Estrada "is
26 employed by . . . Bashas' at a Food City Store." FAC (Doc. 116) at 3:4-5,
27 ¶ 7 (emphasis added). Estrada's declaration filed September 27, 2004,
28 explicitly declares, however, that he "worked at the Food City store . . .
from April 1999 until July 2002." Estrada Decl'n (Doc. 176) at 1:23-24,
¶ 1 (emphasis added). Given that unequivocal declaration, presumably the
FAC inadvertently alleges that Mr. Estrada was employed at a Food City
store in March, 2004. Thus, especially given that in Parra I this court
relied upon that declaration for Estrada's employment status, and that
finding has never been challenged, the court will continue to treat him as
a former Food City employee. See Parra I, 2005 WL 6182338, at *17.

1 entitled to seek injunctive relief, they may not represent a
2 class seeking that relief.").

3 Plaintiff Estrada's lack of standing does not foreclose
4 plaintiffs from pursuing their working conditions claim, so
5 long as plaintiff Martinez has standing. See Stearns, 655
6 F.3d at 1021 (internal quotation marks and citations omitted)
7 ("In a class action, standing is satisfied if at least one
8 named plaintiff meets the requirements."); see also Ellis I,
9 657 F.3d at 979 ("Because only one named Plaintiff must meet
10 the standing requirements, the district court did not err in
11 finding that Plaintiffs have standing.") Again presuming that
12 she still is a Food City hourly employee, plaintiff Martinez
13 has standing to represent the Rule 23(b)(2) injunctive relief
14 class as to working conditions. See Ellis I, 657 F.3d at 987
15 ("[O]nly current employees have standing to seek injunctive
16 relief." Ellis I, 657 F.3d at 988 (citing Dukes, 131 S.Ct. at
17 2559-60)).⁴⁵

18 **C. Governing Legal Standards**

19 Having found that one named plaintiff - Aurelia Martinez -
20 has standing as to the working conditions claim, the court can
21 now turn to the issue of possible decertification of that claim
22

23 ⁴⁵ In contrast to standing, Title VII exhaustion is a pre-condition
24 to bringing suit, and not jurisdictional. Zipes v. Trans World Airlines,
25 Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) (although
26 Title VII requires that plaintiffs timely exhaust administrative remedies,
27 "filing a timely charge of discrimination with the EEOC is not a
28 jurisdictional prerequisite to suit in federal court, but a requirement
that, like a statute of limitations, is subject to waiver, estoppel, and
equitable tolling[]"). For that reason, and because the parties did not
raise the issue of exhaustion with respect to the working conditions claim,
the court declines to address it *sua sponte*. See Mounts v. California,
2009 WL 1084214, at *4 (E.D.Cal. April 22, 2009) ("The court is unaware of
any authority that suggests that it has a *sua sponte* duty to address the
issue of failure to plead exhaustion of administrative remedies.")

1 post-Dukes. Decertification "is committed to the sound
2 discretion of the district court." West World Travel, Inc. v.
3 AMR Corp., 2005 WL 6523266, at *3 (C.D.Cal. Feb. 24, 2005)
4 (citation omitted), aff'd in part and rev'd in part on
5 different grounds, 265 Fed. Appx. 472 (9th Cir. 2008). "[A]
6 district court reevaluating the basis for certification may
7 consider its previous substantive rulings in the context of the
8 history of the case, and may consider the nature and range of
9 proof necessary to establish the class-wide allegations." Cruz
10 v. Dollar Tree Stores, Inc., 2011 WL 2682967, at *3 (N.D.Cal.
11 July 8, 2011) (internal quotation marks and citation omitted).
12 Likewise, "district courts retain the authority to amend or
13 decertify a class if, based on information not available or
14 circumstances not anticipated when the class was certified, the
15 court finds that either is warranted." Dukes II, 603 F.3d at
16 580 n. 4, rev'd on other grounds, Dukes, 131 S.Ct. 2541).
17 Thus, "[e]ven after a certification order is entered, the
18 judge remains free to modify it in the light of subsequent
19 developments in the litigation[,]'" United Steel Workers, 593
20 F.3d at 809 (quoting Falcon, 457 U.S. at 160) (other citations
21 omitted), including "changes in the law that make it no longer
22 proper for a class to be maintained." Estrella, 2012 WL
23 214856, at *5 (internal quotation marks and citations omitted);
24 see also Brady v. Deloitte & Touche LLP, 2012 WL 1059694, at
25 *4-*8 (granting motion to decertify a class because the
26 plaintiffs did "not show[] that the requirements of Rule
27 23(b)(3) [we]re met[]" after intervening Ninth Circuit and
28 Dukes decisions).

1 "In considering the appropriateness of decertification,
2 the standard of review is the same as a motion for class
3 certification: whether the Rule 23 requirements are met."
4 Brady, 2012 WL 1059694, at *5 (N.D.Cal. March 27, 2012)
5 (citation omitted). In Marlo v. United Parcel Serv., Inc.,
6 639 F.3d 942 (9th Cir. 2011), the Ninth Circuit found that on
7 defendant's decertification motion "[t]he district court . . .
8 properly placed the burden on [the plaintiff] to demonstrate
9 that Rule 23's class-certification requirements had been met."
10 Id. at 947-948. Thus, in contrast to the standard motion
11 procedure where "the proponent of a motion bears the initial
12 burden of showing that the motion should be granted, the Ninth
13 Circuit rule is that the party resisting the motion bears the
14 burden of showing that the motion should not be granted."
15 Campbell v. PricewaterhouseCoopers, LLP, 287 F.R.D. 615, 619
16 (E.D.Cal. 2012) (citing Marlo., 639 F.3d at 947.⁴⁶ That means
17 that here, the plaintiffs retain the burden of "showing that
18 class certification is still warranted[.]" Id.

19 As previously discussed, this court, along with many
20 others, is of the view that the Supreme Court's Dukes decision

21
22 ⁴⁶ Pre-Marlo, courts had held "that a party seeking *decertification*
23 of a class should bear the burden of demonstrating that the elements of
24 Rule 23 have *not* been established." See, e.g., Slaven v. BP America,
25 Inc., 190 F.R.D. 649, 651 (C.D.Cal. 2000) (emphasis in original); Gonzales
26 v. Arrow Fin. Servs. LLC, 489 F.Supp.2d 1140, 1153 (S.D.Cal. 2007). Even
27 post-Marlo, some courts have continued to allocate the burden in that way.
28 See, e.g., Dalton v. Lee Publications, Inc., 2013 WL 2181219, at *3
(S.D.Cal. May 20, 2013) (citations omitted); Cole v. CRST, Inc., 2012 WL
4479237, at *3 (C.D.Cal. Sept. 27, 2012); Estrella v. Freedom Financial
Network, LLC, 2012 WL 214856, at *4 (N.D.Cal. Jan. 24, 2012). Given the
Ninth Circuit's unequivocal holding in Marlo, however, this court agrees
that to the extent courts have found that on a motion to decertify, it is
the defendant's burden to "demonstrat[e] that the elements of Rule 23 have
not been established[,] . . . these cases are no longer good law." Negrete
v. Allianz Life Ins. Co. of N.Am., 287 F.R.D. 590, 598 n. 1 (S.D.Cal. 2012)
(internal quotation marks and citation omitted).

1 changed the legal landscape with respect to Rule 23(a)(2)'s
2 commonality requirement. That change, which could not have
3 been anticipated when the working conditions class was
4 certified in 2005, is more than ample justification for
5 considering whether the working conditions class still can be
6 maintained in light of Dukes.

7 **D. Commonality**

8 Plaintiffs assert that "certification of the working
9 conditions claim remains proper[]" because in Parra I this
10 court "identified a discriminatory practice[,] " which "meets
11 the standards for Rule 23(a) commonality." Pls.' Supp. Br.
12 (Doc. 302) at 25:16-17. Disagreeing Bashas' asserts that
13 plaintiffs have failed to "identify a specific policy or
14 practice[,] " much less one that "could have caused [the]
15 challenged working conditions. Def.'s Supp. Br. (Doc. 301) at
16 14:21-22; and Def.'s Resp. (Doc. 304) at 5:16 (emphasis in
17 original).

18 The sole legal basis for plaintiffs' argument that they
19 have identified a discriminatory practice is the following
20 excerpt from Parra I:

21 [P]laintiffs claim that [Bashas'] acted in
22 a discriminatory manner by maintaining
23 disparate working conditions in their stores.
24 Unlike the numerous claims of discrimination
25 articulated by the plaintiffs in *Monreal*,
26 **Plaintiffs here allege one main claim
27 of a discriminatory practice or policy.**
28 Although the facts of each individual complaint
may differ according to where and in what
position the class member worked, viewed
together they form a general claim that
[Bashas'] holds a discriminatory policy or
practice in relation to working conditions
offered in its Food City stores.

Id. at 25:7-8 (quoting Parra I, 2005 WL 6182338, at *20

1 (emphasis added by plaintiffs); see also Pls.' Reply (Doc. 303)
2 at 9:24 (same). Significantly, plaintiffs do not attempt to
3 explain how the quoted rationale applies to the issue of Rule
4 23(a)(2) commonality, especially after Dukes. Likewise,
5 Bashas' response did not address plaintiffs' reliance upon this
6 aspect of Parra I.

7 In any event, plaintiffs are disregarding the context of
8 the quoted rationale. At that point in Parra I, the issue was
9 not Rule 23(a)(2) commonality,⁴⁷ as it is now. Instead, the
10 issue was the certifiability of the working conditions claim
11 pursuant to Rule 23(b)(2).⁴⁸ That Rule focuses on the relief
12 sought, and more particularly, the availability of injunctive
13 or declaratory relief to the class as a whole. "The key to the
14 (b)(2) class is the *indivisible nature of the injunctive or*
15 *declaratory remedy* warranted – the notion that the conduct is
16 such that it can be enjoined or declared unlawful only as to
17 all of the class members or as to none of them." Dukes, 131
18 S.Ct. at 2557 (internal quotation marks and citation omitted)
19 (emphasis added). It strikes the court, however, that
20 indivisibility of the relief sought is a separate issue from
21 whether plaintiffs' working conditions claim satisfies Rule

23 ⁴⁷ Tellingly, despite the explicit finding in Parra I that "on the
24 issue of working conditions, the proposed class shares sufficient
25 commonality to satisfy the minimal requirements of Rule 23(a)(2)[,]"
26 plaintiffs did not even mention, much less rely upon, that finding to
27 establish commonality after Dukes. See Parra I, 2005 WL 6182338, at *16.
The court is compelled to agree with plaintiffs' concession, albeit
implicit, that the Parra I commonality finding could not withstand scrutiny
in light of Dukes.

28 ⁴⁸ Seeming to recognize that distinction, plaintiffs' reply argues
that "this court properly certified the working conditions claim *under Rule*
23(b)(2)[.]" Pls.' Reply (Doc. 303) at 6:18 (emphasis omitted) (italicized
emphasis added). But again, that is not the issue now.

1 23(a)(2)'s commonality requirement, particularly in the wake of
2 Dukes.

3 To be sure, "it is sufficient to meet the requirements of
4 Rule 23(b)(2) that class members complain of a pattern or
5 practice that is generally applicable to the class as a whole."
6 Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010)
7 (internal quotation marks and citations omitted). By the same
8 token, however, plaintiffs did not offer any legal support, and
9 research did not reveal any, to support the view that just
10 because Rule 23(b)(2) has been satisfied, so, too, has Rule
11 23(a)(2)'s commonality requirement. Therefore, the court is
12 not convinced that its Rule 23(b)(2) rationale in Parra I,
13 standing alone, supports a finding that plaintiffs have
14 satisfied Dukes' commonality standards. Accordingly,
15 plaintiffs have not met their burden of "affirmatively
16 demonstrating" their compliance with Rule 23(a)(2), Dukes, 131
17 S.Ct. at 2551, and, concomitantly, that the working conditions
18 class still should be certified.

19 There are two other deficits in plaintiffs' attempt to
20 show commonality which are particularly noteworthy after
21 Dukes, as Bashas' points out. The first is plaintiffs'
22 failure to show that their working conditions claim
23 "depend[s] upon a common contention . . . that is capable of
24 classwide resolution[.]" See Dukes, 131 S.Ct. at 2551.
25 Unlike plaintiffs' equal pay claim where, as discussed
26 herein, "examination of all the putative class members'
27 claims for relief will produce a common answer to the crucial
28 question *why was I disfavored*[" plaintiffs have not made a
similar showing as to their working conditions claim. See

1 id. at 2552 (emphasis in original). In originally moving
2 for class certification, plaintiffs did list a number of
3 alleged common issues of law and fact. See Pls.' MCC (Doc.
4 159) at 19:22-21:12. But, in contrast to their pay claim,
5 plaintiffs have not explained how continued class
6 certification of the working conditions claim has "the
7 capacity . . . to generate common *answers* apt to drive the
8 resolution of th[is] litigation." See Dukes, 131 S.Ct. at
9 2551 (internal quotation marks and citation omitted)
10 (emphasis in original).

11 That omission is intertwined with the second weakness in
12 plaintiffs' commonality proof - the insufficiency of their
13 anecdotal evidence. The Dukes Court held that "significant
14 proof that Wal-Mart operated under a general policy of
15 discrimination" was entirely absent; and hence, plaintiffs
16 did not establish commonality. Dukes, 131 S.Ct. at 2553
17 (internal quotation marks omitted). In Dukes, plaintiffs
18 attempted to "identif[y] a common mode of exercising
19 discretion that pervade[d] the entire company" by relying
20 upon, *inter alia*, anecdotal evidence. Dukes, 131 S.Ct. at
21 2555-56. There, the anecdotes amassed ("120 affidavits
22 reporting experiences of discrimination - about 1 for every
23 12,500 class members - relating to only 235 out of Wal-Mart's
24 3,4000 stores") were relatively small given the class size
25 (1.5 million). Further, although the plaintiffs alleged that
26 Wal-Mart discriminated nation-wide, "more than half of the"
27 anecdotes were "concentrated in only six States. . . ; half
28 of all States ha[d] only one or two anecdotes; and 14 States

1 ha[d] no anecdotes about Wal-Mart's operations at all." Id.
2 at 2556 (citation omitted). The Dukes Court thus held that
3 "[e]ven if every single one of th[o]se accounts [wa]s true,
4 that would not demonstrate that the entire company operate[s]
5 under a general policy of discrimination, . . . which is what
6 respondents must show to certify a companywide class." Id.
7 (internal quotation marks, citation and footnote omitted).

8 The anecdotal evidence in the present case is similarly
9 weak. In 2004, Food City had 58 stores. Def.'s exh. 1
10 (Proulx Aff.) at 3, ¶ 8. Yet, plaintiffs are relying upon
11 only 11 declarations from putative class members, and two
12 other declarations. Those declarations, from current and
13 former Food City employees, describe purportedly substandard
14 working conditions in at most nine of the 58, or 15.5%, of
15 Food City stores. Moreover, four of those declarations
16 pertain to Food City store 59 which is "now closed." Def.'s
17 Supp. Br. (Doc. 301) at 6:25 (emphasis omitted). The thrust
18 of those declarations is that Food City stores have issues
19 with rodents, roaches, and poorly maintained equipment and
20 work areas. As in Dukes, however, even assuming the
21 veracity of all 13 of those accounts, "that would not
22 demonstrate that [Bashas'] operate[s] under a general policy
23 of discrimination" with respect to working conditions at its
24 Food City stores. See Dukes, 131 S.Ct. at 2556 (internal
25 quotation marks and citation omitted).

26 Besides the relatively few proffered declarations,
27 evidence is lacking "that the *entire class* was subject to
28 the same allegedly discriminatory practice[.]" Ellis I, 657

1 F.3d at 983 (emphasis added). Such evidence is lacking, in
2 part, because the record includes more than 80
3 countervailing declarations from Food City employees, many of
4 them Hispanic, from at least 33 different stores. See
5 generally Def.'s Resp. MCC (Doc. 190), exh. 50-135 thereto.
6 This broader spectrum of proof readily shows that not all
7 Food City stores are as plaintiffs depict through their few
8 selective declarations.

9 This is not surprising given the acquisition history of
10 the Food City stores. As delineated in the affidavit of
11 Michael Proulx, Bashas' Executive Vice President and Chief
12 Operating Officer, Def.'s Resp. MCC (Doc. 190), exh. 3
13 thereto at 4:17-18, in the decade between 1994 and 2004,
14 Bashas' rapidly "expanded[,] . . . , most notably in the Food
15 City format[.]" Id., exh. 1 thereto (Proulx Aff.) at 2, ¶ 8.
16 For example, in 1996, Bashas' acquired 16 Mega Foods stores,
17 twelve of which eventually became Food City stores. Id. at
18 4, ¶ 11. "Those stores were in vastly varying conditions."
19 Id. at 4, ¶ 12. "Some . . . were relatively new and in good
20 condition." Id. "Others were older stores that had
21 significant facility issues." Id. That was also the
22 situation when "[a]round 2001, Bashas' purchased some ABCO
23 stores, some of which were converted to Bashas' stores and
24 some of which were converted to Food City stores." Id. at 4,
25 ¶ 14. "Again, these stores were in a variety of different
26 conditions, ranging from being in good shape to needing much
27 improvement." Id.

28 This acquisition history is significant because, *inter*

1 *alia*, it further demonstrates the lack of a common answer to
2 the question of why was I disfavored as to working
3 conditions. Plaintiffs' meager anecdotal evidence,
4 especially when read in the context of the acquisition
5 history of Food City stores, "is too weak to raise any
6 inference that" the working conditions at all Food City
7 stores were substandard because those stores employ a higher
8 percentage of Hispanics than do A.J.'s and Bashas'. See
9 Dukes, 131 S.Ct. at 2556. In short, plaintiffs have not,
10 as they must post-Dukes, shown that "there was 'significant
11 proof that [Bashas] operated under a general policy of
12 discrimination[]'" with respect to working conditions that
13 could "affect the class as a whole." Ellis I, 657 F.3d at
14 983 (quoting Dukes, 131 S.Ct. at 2553. Accordingly,
15 because it cannot survive Dukes, the court decertifies the
16 working conditions class previously certified in Parra I.

17 In sum, for all of the reasons set forth herein, the
18 court grants plaintiffs' motion for class certification as
19 to the pay claim for monetary damages pursuant to
20 Fed.R.Civ.P. 23(b)(3), on behalf of current and former
21 employees. Named plaintiffs Gonzalo Estrada and Aurelia
22 Martinez shall serve as the class representatives for that
23 class. The court decertifies the working conditions class
24 previously certified in Parra I, however.

25 **III. Rule 23(f)**

26 Presumably, Bashas' is continuing to "request[]" that
27 upon class certification, this court "recommend the
28 acceptance of a Rule 23(f) appeal." See Def.'s Resp. MCC

1 (Doc. 190) at 82:14 (emphasis added). That Rule states, in
2 relevant part, that “[a] *court of appeals* may permit an
3 appeal from an order granting or denying class-action
4 certification under this rule if a petition for permission
5 to appeal is filed with the *circuit clerk* within 14 days
6 after the order is entered.” Fed.R.Civ.P. 23(f) (emphasis
7 added). Given the unequivocal language of that Rule, this
8 court disagrees with Bashas’ reading thereof. The authority
9 to permit an appeal from an order denying or granting of
10 class certification lies with the court of appeals – not
11 with the district court. It is equally clear that Rule
12 23(f) does not contemplate a recommendation of such an
13 appeal, as Bashas’ urges. The court thus denies Bashas’
14 request that this court recommend to the Ninth Circuit that
15 it accept an immediate appeal of the class certification
16 decision herein.

17 Relatedly, the court likewise presumes that Bashas’
18 continues to seek a stay “pending Ninth Circuit action.”
19 Def.’s Resp. MCC (Doc. 190) at 82:15. This court does
20 retain jurisdiction to stay its own order pending appeal.
21 See Fed.R.App.P. 8(a). However, Bashas’ has not explicitly
22 moved for such relief, and has not addressed the four-factor
23 balancing test which this Circuit applies in evaluating
24 whether to issue a stay. See *Leiva-Perez v. Holder*, 640
25 F.3d 962, 964 (9th Cir. 2011). Thus, to the extent Bashas’
26 motion can be read as seeking a stay pending appeal, the
27 court denies such relief.

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Conclusion

Accordingly, the court hereby **ORDERS** that Plaintiffs' Motion for Class Certification (Doc. 159) is **GRANTED** to the extent they are seeking certification of a class with respect to pay pursuant to Fed.R.Civ.P. 23(b)(3). In that regard, the court certifies a class as follows:

All Hispanic workers currently and formerly employed by defendant Bashas' Inc. in an hourly position at any Food city retail store since April 4, 1998, who have been subject to the challenged pay policies and practices.

IT IS FURTHER ORDERED that the working conditions claim is **DECERTIFIED**; and

IT IS FINALLY ORDERED that in conformity with Fed.R.Civ. P. 23(c)(2)(B), within **thirty (30) days** of the date of entry of this order, the parties shall submit jointly an agreed upon form of notice, a joint proposal for dissemination of the notice, and the time-line for opting out of the action. Plaintiffs must bear the costs of the notice, which shall include mailing by first-class mail.

DATED this 31th day of May, 2013.



Robert C. Broomfield
Senior United States District Judge

Copies to all counsel of record