UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEKETA MCKNIGHT-NERO.,

Plaintiff, individually and on behalf of all others similarly situated,

v.

WALMART, INC.

Defendant.

Civil Action No.: 1:20-cv-1541

PLAINITFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

INTRODUCTION AND STATEMENT OF FACTS

Plaintiffs are immunocompromised consumers that must shop for necessities during the COVID-19 global pandemic. They seek class certification for this action to ensure that retailers like Walmart, provide them equal opportunity to shop safely.

Plaintiffs allege that Walmart designates exclusive shopping times during the COVID-19 pandemic for people with disabilities and shoppers who have an impaired immune system, or identify as "immunocompromised." (See Doc. 1, ¶8). Plaintiffs allege that Walmart's' policy affording "immunocompromised" consumers the opportunity to shop during exclusive shopping periods is not unequal. (See Doc. 1, ¶9). Plaintiffs allege that Walmart relies on security or door guards to subjectively identify prospective consumers who are "immunocompromised." *Id.* Plaintiffs allege that this policy is discriminatory because the sole perception of the security or door guard, will exclude and adversely affect immunocompromised consumers. (See Doc. 1, ¶10-11).

Plaintiffs allege that that Walmart's policy of posting door guards or hired security to determine who is immunocompromised or not, is an unfair policy that disproportionally impacts those

with unseen or non-visible disabilities, and increases their risk of harm by shopping with the general public. (See Doc. 1, ¶49). Consequently, Plaintiffs bring claims pursuant to the D.C. Human Rights Act, Americans with Disabilities Act, and for Negligence against Walmart. (See Doc. 1, ¶33-60).

STANDARD OF REVIEW

Class certification motions have their own distinct burdens and fact finding requirements. *Parker v. Bank of Am., N.A.*, 99 F. Supp. 3d 69, 80 (D.D.C. 2015). The D.C. Circuit has not yet spoken to the precise burden of proof applicable to establishing that the requirements of Rule 23 have been met; however, courts in this Circuit have routinely applied a preponderance of the evidence standard. *See In re Navy Chaplaincy,* No. 07–mc–269, 306 F.R.D. 33, 46, 2014 WL 4378781, at *9 (D.D.C. Sept. 4, 2014) ("The proponent of class certification must prove by a preponderance of the evidence that the requirements of Rule 23 are satisfied."); *In re Rail Freight Fuel Surcharge Antitrust Litig.,*287 F.R.D. 1, 22 (D.D.C.2012) ("Although the D.C. Circuit has not yet had occasion to provide much guidance on these questions ... the Court concludes ... that it should apply a preponderance of the evidence standard of proof[.]" (internal citations omitted)), *vacated on other grounds,*725 F.3d 244 (D.C.Cir.2013).

ARGUMENT

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013) (citation omitted). Class certification is governed by Federal Rule of Civil Procedure 23, which requires a plaintiff to demonstrate that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions. *SeeRichards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006).

That is, the proponent of certification must establish: '(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.' " *Burton v. Dist. of Columbia*, 277 F.R.D. 224, 228 (D.D.C. 2011), *citing Daskalea v. Wash. Humane Soc.,* 275 F.R.D. 346, 355 (D.D.C.2011) (citing *Richards v. Delta Air Lines, Inc.,* 453 F.3d 525, 529 (D.C.Cir.2006) (quoting Fed.R.Civ.P. 23(a)). " These four requirements are commonly referred to in shorthand as numerosity, commonality, typicality, and adequacy of representation, respectively." *Id.* " Second, certification of the proposed class must be appropriate under at least one of the three categories enumerated in Rule 23(b)." *Id.*

1. Plaintiffs meet the Numerosity Requirement.

The first requirement that must be met for class certification is numerosity: that "the class is so numerous that joinder of all members is impracticable." *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 206 (D.D.C. 2018), *citing* Fed. R. Civ. P. 23(a)(1). To establish numerosity, a party need not provide a precise number of class members as long as there is a reasonable basis to estimate it. See, e.g., *Howard v. Liquidity Services Inc.*, 322 F.R.D. 103, 117 (D.D.C. 2017). Courts have typically considered a class of at least forty members to presumptively meet the requirement of numerosity. See, e.g., *Barnes v. District of Columbia*, 242 F.R.D. 113, 121 (D.D.C. 2007).

Plaintiffs, who are Walmart consumers, meet the standard for numerosity. Plaintiff alleges that Wal-Mart's unequal practices of relying on door security to subjectively identify prospective consumers, is applicable to all consumers that are considered immunocompromised. (See Doc. 1, ¶9-10, 33-60). While modest, Plaintiffs estimates this number to be in the "thousands". (See Doc. 1, ¶14).

Moreover, Walmart currently operates 4,753 retail stores in the United States.[1] These stores are open to the public, which include swaths of immunocompromised consumers. Given this, there is little doubt that the class is so numerous that joinder of all members is impracticable.

2. Plaintiffs meets the Commonality Requirement.

Second, the classes must meet the requirement of commonality: that "there are questions of law or fact common to the class." *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 206-07 (D.D.C. 2018), Fed. R. Civ. P. 23(a)(2). Commonality requires that the plaintiff class has "suffered the same injury." *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). The Supreme Court has explained that this does not mean "merely that they have all suffered a violation of the same provision of law." *Id.* Rather, the putative class's "claims must depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the clams in one stroke." *Id.*

If the plaintiff's contention that the defendant has engaged in a policy or practice that has consistently and uniformly injured the putative class members, the plaintiff must provide "significant proof " that such a policy or practice exists. *Parker v. Bank of Am., N.A.*, 99 F. Supp. 3d 69, 81 (D.D.C. 2015), *citing Wal–Mart,*131 S.Ct. at 2553 (emphasis added). In other words, the movant must do more than merely *allege* a common contention that conceivably could give rise to the conclusion that there has been the same classwide injury; he must support that allegation with significant evidence. *Id.* at 2553 ; *see alsoid.* at 2251 ("Rule 23 does not set forth a mere pleading standard.)

Resolution of the central issue for Plaintiffs' claims can be resolved in one stroke. Plaintiff alleges that Walmart has an unequal policy or practice that "provides exclusive shopping periods

[1] See https://corporate.walmart.com/our-story/our-locations#:~:text=Today%2C%20Walmart%20operates%20approximately%2011%2C500,million%20in%20the%20U.S.%20alone (Accessed August 13, 2020).

between the time of 6:00 am to 7:00, for senior citizens over the age of 65 and people who have an impaired immune system, or identify as "immunocompromised." (See Doc. 1, ¶8). Plaintiff Cheketa Knight-McNero, who is an immunocompromised shopper, captured Walmart's policy during her t visit in May 2020, in Washington, D.C. (See Ex. 1, Affidavit of McKnight-Nero, Ex. 1, Door Sign).

Plaintiffs' common contention is that Walmart's policy discrimination against consumers that are immunocompromised, and seeking to safely shop during the COVID-19 pandemic. Walmart's policy allows for security guards or doorman to restrict and select immunocompromised consumers from its stores, based on their own perception of a disability. Such a policy, (a) disproportionally impacts those with unseen or non-visible disabilities, and if denied entry, (b) increases Plaintiffs risk of contracting COVID-19, if they are not allowed in or forced to shop with the public. (See Doc. 1, ¶8-14) Classwide resolution for this policy includes, but not limited to, forcing Walmart to stop or restrict the Defendant from ever enforcing this policy at any of its 4,753 retail store locations.

3. Plaintiffs meets the Typicality Requirement.

Regarding typicality, Rule 23 does not require that the representative plaintiffs endured precisely the same injuries that may have been sustained by other class members, only that the harm complained of be common to the class, and that the named plaintiffs demonstrate a personal interest or threat of injury that is real and immediate, not conjectural or hypothetical. *Johnson v. Dist. of Columbia*, 248 F.R.D. 46, 53 (D.D.C. 2008), *citing, Bynum,*214 F.R.D. at 34. The typicality requirement is satisfied " if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Marisol,* 929 F.Supp. at 691. *See also Stewart v. Rubin*, 948 F.Supp. 1077, 1088 (D.D.C. 1996) *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997)(A named plaintiff's claim is typical " if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member's where his or her claims are based on the same legal theory.") The Rule requires that the named plaintiffs' claims be typical, not identical, and as such, this Court has

found the typicality requirement satisfied where "at least one named plaintiff has a claim relating to each challenged practice for which relief is [sought]." *Id.*

Plaintiffs meet the typicality requirement. Plaintiff McKnight-Nero endured the precise discriminatory policy or practice complained of, and maintained by the prospective class. McKnight-Nero alleges that she visited a Walmart location in May 2020 to shop for necessities during the COVID-19 pandemic. (See Doc. 1, ¶20). She alleges that the Walmart location provides "exclusive shopping [hours] for Seniors and Customers with Compromised Health." *Id. (See also Ex. 1).*

McKnight-Nero alleges that she sought to take advantage of the exclusive shopping hours for immunocompromised consumers. (See Doc. 1, ¶21-22). She alleges that she approached the store, but Walmart's security guard did not allow her entry because he believed that she was not immunocompromised. (See Doc. 1, ¶24). But Walmart's security guard guessed wrong.

McKnight-Nero alleges that the denial is discriminatory under *inter alia* the Americans with Disabilities act and places immunocompromised shoppers' health at risk. (See Doc. 1, ¶46-60). Furthermore, McKnight-Nero's complaint demonstrates that this is not an isolated incident. McKnight-Nero provides additional evidence that similar discriminatory policies from similar stores like Walmart, have affected other immunocompromised consumers across the country (See Doc. 1, Exhibit 1).

4. Plaintiffs meets the Adequacy of Representation.

The final prerequisite to class certification, adequacy, requires a finding that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). There are two criteria for adequacy: " 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575, 326 U.S.App. D.C. 17 (D.C. Cir. 1997).

Plaintiff McKnight-Nero does not have an antagonistic or conflicting interests with the unnamed members of the class. Furthermore, "Plaintiffs' counsel, experienced civil rights class action litigators who have participated in multiple class actions, are capable of representing the interests of the class in a satisfactory manner." *See e.g. Selden v. Airbnb, Inc.*, No. 16-cv-00933 (CRC) (D.D.C. Nov. 1, 2016) (*on appeal*). Plaintiffs' counsel has also participated in numerous multi-party employment civil rights actions, in various districts around the country.

5. Plaintiffs meets At Least one of the Requirements Under 23(b)(2).

"After the requirements under Rule 23(a) are met, a putative class must demonstrate that it fits under one of Rule 23(b)'s class types. " *Johnson v. Dist. of Columbia*, 248 F.R.D. 46, 54 (D.D.C. 2008). Rule 23(b)(2) sets forth two basic requirements: (1) the party opposing the class must have " acted, refused to act, or failed to perform a legal duty on grounds generally applicable to all class members," and (2) " final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, must be appropriate." Fed.R.Civ.P. 23(b)(2).

To certify a Rule 23(b)(2) class for injunctive or declaratory relief, Plaintiffs must demonstrate that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Johnson v. Dist. of Columbia*, 248 F.R.D. 46, 54 (D.D.C. 2008), citing Fed.R.Civ.P. 23(b)(2); *Barnes,*242 F.R.D. at 122-23.

As demonstrated above, Plaintiff has identified the "act" or discriminatory policy that Walmart implements to all class members. Furthermore, Walmart has not indicated that it will or has stopped the policy or practice complained of by Plaintiffs, at any of its store locations. (See Doc. 13, Def. Mot. to Dismiss). Walmart's policy still allows for unqualified individuals, albeit security guards or agents or employees, to screen for immunocompromised consumers, and to determine based on perception alone, whether they are considered disabled or not. The policy violates various local, state, and federal

laws around the country. This includes the Americans with Disabilities Act and the D.C. Human Rights Act. At the very least, Walmart's unlawful policy is subject to injunctive or declaratory relief under Rule 23(b)(2).

Dated: August 20, 2020

By: */s/ Ikechukwu Emejuru*

Ikechukwu Emejuru
Emejuru Law L.L.C.
8403 Colesville Road
Suite 1100
Silver Spring, MD 20910
Telephone: (240) 638-2786
Facsimile: 1-800-250-7923
iemejuru@emejurulaw.com

Andrew Nyombi
KNA Pearl L.L.C.
8701 Georgia Avenue
Suite 606
Silver Spring, MD 20910
Telephone: (301) 585-1568
Facsimile: 1-800-250-7923
anyombie@knapearl.com

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August 2020, I served the foregoing Motion to Certify Class was filed via CM/ECF to the following:

John M. Majoras (Bar No. 474267)
Yaakov M. Roth (Bar. No. 995090
William G. Laxton Jr. (Bar No. 982688)
Debra R. Belott (Bar No. 993507)
51 Lousiana Avenue, NW,
Washington, DC 20001
Telephone: (202) 879-3939
jmmajoras@jonesday.com
yroth@jonesday.com
wglaxton@jonesday.com

dbelott@jonesday.com

Attorneys for Defendant Walmart, Inc.