IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTIE VAN, CHARMELLA LEVIEGE, MARIA PRICE, HELEN ALLEN, JACQUELINE BARRON, THERESA BOSAN, SHRANDA CAMPBELL, KETURAH CARTER, MICHELLE DAHN, TONYA EXUM, JEANNETTE GARDNER, ARLENE GOFORTH, CHRISTINE HARRIS, ORISSA HENRY, LAWANDA JORDAN, DANIELLE KUDIRKA, TERRI LEWIS-BLEDSOE, CONSTANCE MADISON, CEPHANI MILLER, MIYOSHI MORRIS, STEPHANIE SZOT, SHIRLEY THOMAS-MOORE, ROSE THOMAS, TONI WILLIAMS, BERNADETTE CLYBURN, MARTHA CORBIN, ANGELA GLENN, LADWYNA HOOVER, OGERY LEDBETTER, LATRICIA SHANKLIN, ANTOINETTE SULLIVAN, DERRICKA THOMAS, and NICHEA WALLS, each individually and on behalf of all similarly situated persons,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

Case No. 1:14-CV-08708

Honorable Sharon Johnson Coleman
Honorable Sidney I. Schenkier

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DENY CLASS CERTIFICATION

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INTRODUCTION

With this motion, defendant Ford Motor Company asks this Court to deny the request in plaintiffs' Second Amended Complaint ("SAC") that this case proceed as a class action. Ford bases this request on a development independent from the class discovery currently underway: On August 1, 2017, Ford and the Equal Employment Opportunity Commission ("EEOC"), acting pursuant to the statutory conciliation procedures that are the "preferred means" of resolving Title VII disputes, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted), entered into an agreement that will largely moot the relief plaintiffs seek in this case. Among other things, Ford and the EEOC agreed—as the SAC requests—to a panel of independent monitors to ensure equal employment opportunity at the two Ford plants at issue; to a series of court-enforceable commitments by Ford to prevent sexual or racial harassment or discrimination at the plants; and to a fund of at least $7.75 million, and up to $10.125 million, to provide monetary relief to the individuals whom plaintiffs' counsel seek to represent in this putative class action.

Where, as here, there is an alternate, statutorily-preferred process that provides the putative class with a fast, free mechanism for obtaining virtually all the relief they seek, class certification should be denied on two grounds. First, plaintiffs cannot carry their burden to prove—as Rule 23(b)(3) requires—that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Second, plaintiffs cannot "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), since they are "propos[ing] that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense" to obtain what is already "on offer." *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011). Because the Court is in a position to ascertain now—without further class proceedings, or lengthy merits discovery—that plaintiffs will be unable to establish the superiority of their proposed class action or their adequacy as class representatives, the Court should deny class certification.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are 31 current and former employees of Ford's Chicago Assembly Plant ("CAP") or Chicago Stamping Plant ("CSP"). In the SAC, plaintiffs allege sexual harassment and sex discrimination in violation of Title VII, and race discrimination in violation of § 1981 and Title VII, purportedly on behalf of themselves and all others similarly situated, as well as a number of individual claims. *See* SAC ¶¶ 2-3. Plaintiffs seek to represent a class defined as "all present or former female employees at [CAP] and [CSP] from 2012 through the present," *id.* ¶ 75, as well as "potential" sub-classes that include "all female African American employees alleging race claims," *id.* ¶ 76. Plaintiffs seek both equitable and monetary relief, including an order that Ford "implement effective steps to eliminate and remediate harassment and discrimination," an injunction preventing "Ford from discriminating against or harassing the Named Plaintiff[s] and Ford's employees," the "appoint[ment of] a monitor to supervise workplace conditions," "back pay," "lost future earnings," "compensatory damages," and "punitive damages." SAC at 192 (Prayer for Relief). Plaintiffs allege that they will seek to certify the class "under Fed. R. Civ. P. 23(b)(2), or in the alternative, pursuant to Fed. R. Civ. P. Rule 23(b)(3)." *Id.* ¶ 71.

Plaintiffs filed their original complaint in November 2014. Dkt. 5. The operative complaint—the SAC—was filed in April 2016, and on August 23, 2016, the Court entered the parties' agreed Order for Discovery and Case Management, providing for an extensive class discovery process, which is scheduled to last until November 16, 2017. Dkt. 86; Dkt. 112; Dkt. 126. As of this date, Ford has taken the depositions of 28 of the 31 plaintiffs, while plaintiffs have deposed 13 witnesses. The parties anticipate that as many as 70 additional depositions will be conducted prior to the close of class discovery. *See* Dkt. 86. This will be followed by briefing on class certification, which is not expected to conclude until April 2018. *See* Dkt. 112. If plaintiffs prevail in certifying a class, the merits discovery phase will commence. Assuming merits

discovery were to begin promptly after class certification briefing, and last at least as long as class discovery, merits discovery would not be completed until the summer of 2019 at the earliest.

As a prerequisite to commencing this suit, certain of the plaintiffs filed charges with the EEOC, making the same allegations they now assert on behalf of themselves and the putative class. *See, e.g.*, Dkt. 59-1 (Van EEOC Charge). Those charges initiated an investigation by the EEOC, which led to negotiations with Ford that resulted in a final conciliation agreement (the "EEOC Agreement"). That agreement was executed on August 1, 2017 and is attached as Exhibit A.

In this agreement, Ford—without admitting any liability or wrongdoing—has committed to provide virtually all the relief that plaintiffs have demanded on behalf of themselves and the putative class. Ford has agreed, among other things, to comply fully with Title VII, EEOC Agreement ¶ 5, to maintain robust, EEOC-approved anti-harassment and mutual respect training programs, *id.* ¶¶ 11-16, to appoint a Human Resources professional to oversee the plants' handling of harassment and retaliation claims, *id.* ¶¶ 19-22, and to a panel of independent monitors for at least three years to oversee the plants, *id.* ¶¶ 25-37. In addition, Ford has agreed to establish an administrative claims process for all women and African-Americans who were employed by Ford at either CAP or CSP at any time from January 1, 2010 to August 1, 2017, making all of these individuals eligible to receive monetary compensation from a settlement fund of at least $7.75 million and up to $10.125 million. *Id.* ¶¶ 38-39. This claims process is sufficiently simple and straightforward that claimants need not hire an attorney to participate, and thus, will not have to pay any portion of their award to counsel. All costs associated with the claims process are borne by Ford. *Id.* ¶ 40. Moreover, a claimant is entitled to file a claim and discover the monetary relief available to her under the EEOC Agreement without affecting the viability of her individual claims because the release of individual claims is a condition only to *receiving* an award. *Id.* ¶¶ 48-49.

Eligible claimants will receive their awards within approximately one year of application, *see id.* ¶¶ 38-55—well before any plaintiff in this case could receive any monetary relief (even if plaintiffs were to prevail), given that merits discovery likely will not have even *begun* within a year.

STANDARD OF REVIEW

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotation marks omitted). "To be entitled to class certification, a plaintiff must satisfy each requirement of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as one of the subsections of Rule 23(b)." *Starr v. Chicago Cut Steakhouse, LLC*, 75 F. Supp. 3d 859, 870 (N.D. Ill. 2014) (citing *Messner v. Northshore Univ. HealthSystem.*, 669 F.3d 802, 811 (7th Cir. 2012)). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) and Rule 23(b) have been satisfied." *Holmes v. Godinez*, 311 F.R.D. 177, 212 (N.D. Ill. 2015) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (brackets omitted)). It is plaintiffs' "burden [to] show[] by a preponderance of the evidence" that certification is proper. *Starr*, 75 F. Supp. 3d at 871 (internal citation omitted). This is true "[i]rrespective of which party makes the motion" regarding class certification. *Fedotov v. Peter Roach & Assoc.*, 354 F. Supp. 2d. 471, 478 (S.D.N.Y. 2005). "Failure to meet any of the Rule's requirements precludes class certification." *Harper v. Sheriff of Cook Cty.*, 581 F.3d 511, 513 (7th Cir. 2009) (internal quotation marks omitted).

ARGUMENT

In light of Ford's conciliation agreement with the EEOC, plaintiffs cannot establish by a preponderance of the evidence either of two necessary elements for class certification: (1) that a class action is "superior to other available methods" for obtaining relief under Rule 23(b)(3); or (2) that the plaintiffs will "fairly and adequately" protect the interests of the class under Rule

23(a)(4). Because further class discovery would serve no purpose other than to unnecessarily burden Ford, absent class members, and this Court, the Court should deny class certification now.

A. No Further Discovery Is Necessary To Deny Class Certification

A court need not wait until the end of class discovery or for a motion to certify to deny class certification. Rather, a "court *must* determine by order whether to certify the action as a class action . . . [a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A) (emphasis added). Thus, Rule 23 "does not preclude a defendant from bringing a 'preemptive' motion to deny class certification." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009); *see also Cook Cty. College Teachers Union, Local 1600 Am. Fed'n of Teachers, AFL-CIO v. Byrd*, 456 F.2d 882, 885 (7th Cir. 1972).

Motions to deny class certification prior to the completion of class discovery are appropriate where, as here, "the necessary factual issues may be resolved without discovery." *Kamm v. Cal. City Dev. Corp.*, 509 F.2d 205, 209-10 (9th Cir. 1975); *see also Imber-Gluck v. Google Inc.*, No. 5:14–cv–01070, 2015 WL 1522076, at *2 (N.D. Cal. Apr. 3, 2015). In other words, "it is only necessary to delay a decision where the existing record is inadequate for resolving the relevant issues." *Thornton v. State Farm Mut. Auto Ins. Co., Inc.*, No. 1:06-cv-00018, 2006 WL 3359482, at *4 (N.D. Ohio Nov. 17, 2006) (internal quotation marks omitted). In this case, the only information necessary for the "superiority" and "adequacy" determinations are the EEOC Agreement and the SAC. Because these documents are before the Court, there is no need for discovery to resolve this motion. *See, e.g.*, *id.* at *4 (no class discovery needed where settlement agreement "standing alone, compel[ed]" striking class allegations).

B. Plaintiffs' Putative Rule 23(b)(3) Class Action Is Not "Superior" To The Relief Afforded By The EEOC Agreement

Plaintiffs cannot establish an indispensable element of class certification under Rule

23(b)(3): "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action is "an exception" to the "usual rule" of individual litigation, *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 493 (7th Cir. 2012) (internal quotation marks omitted), and is only "the superior method for managing litigation *if no realistic alternative exists*," *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (emphasis added). Here, the requirements for the "exception" are not met because plaintiffs and putative class members have more than a realistic alternative to litigation—they have the "preferred" alternative of resolving their Title VII claims. *Mach Mining*, 135 S. Ct. at 1651. Congress created the EEOC to provide parties with "an opportunity to settle disputes through conference, conciliation, and persuasion" rather than litigation, *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 44 (1974), and that is precisely what Ford has done here. It has worked with the EEOC to establish an actually-available adjudicatory process through which eligible employees may obtain prompt, significant relief.*

Under this claims process, any individual may submit her claim for adjudication by an independent decision-maker, by filling out a claim form that provides detailed information regarding the alleged harassment, discrimination, or retaliation that she allegedly experienced on the basis of race or sex. Then, the Monitor Panel will assess the merits of the allegations and

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* Because plaintiffs seek monetary damages, they must meet the requirements for class certification under Rule 23(b)(3), not merely Rule 23(b)(2). *See Dukes*, 564 U.S. at 360-61 (Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages"). To the extent plaintiffs seek to certify a Rule 23(b)(2) class to obtain exclusively injunctive relief, certification likewise should be denied both because plaintiffs are not adequate representatives, *see infra* at 14-15, and because their claims for injunctive relief are mooted by the injunctive relief provided by the EEOC Agreement, *compare* SAC at 192 (Prayer for Relief) *with* EEOC Agreement ¶¶ 11-16, 19-22, 25-37. At minimum, even if the Court were to conclude plaintiffs' request for injunctive relief is not moot, their request for Rule 23(b)(3) certification should be denied and plaintiffs should be limited to seeking class certification for injunctive relief under Rule 23(b)(2) only.

make an initial and individualized determination as to whether the claimant should be entitled to relief and if so, what level of relief to award. *See* EEOC Agreement ¶¶ 44-45. Next, the parties will have a 30-day period to review and object to the award, and the Panel will consider the objections before making a final determination, which will be judicially enforceable. *Id.* ¶¶ 45-47. All told, a claimant can expect to receive an award within one year of filing a claim form. *Id.* ¶¶ 38-55. Thus, through the EEOC-overseen claims process, individuals can obtain adjudications of their claims at *no cost*, and in a fraction of the time that would be required for judicial resolution of a putative class action lawsuit, which has no guarantee of success.

Where, as here, a parallel government-overseen administrative remedy provides a fair and efficient means of adjudicating claims brought on behalf of a putative class, courts routinely deny class certification on the basis of a lack of superiority. The seminal case is *Kamm v. California City Development Corporation*, 509 F.2d 205 (9th Cir. 1975). There, plaintiffs sought to represent a class of investors, who alleged that defendants had failed to disclose risks of investing in a land development. *Id.* at 206-07. Prior to discovery, defendants moved to strike the class allegations because they had settled a suit filed by the California government concerning the same alleged conduct, and that settlement allowed many class members to receive monetary relief. *Id.* at 208. The district court granted defendants' motion, and the Ninth Circuit affirmed, holding that the class action was not "superior" within the meaning of Rule 23(b)(3). *Id.* at 211-12. As the Ninth Circuit explained, "[s]ince the purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy, it seems consistent with that purpose to determine whether any administrative methods of settling the dispute exist." *Id.* at 211 (internal quotation marks omitted). The Ninth Circuit went on to articulate seven reasons why a class action was not "superior":

> (1) A class action would require a substantial expenditure of judicial time which would largely duplicate and possibly to some extent negate the work on the state level
> (2) The class action would [be complex] . . .
> (3) Significant relief had been realized in the state action . . .
> (4) The state court retained continuing jurisdiction
> (5) No member of the class is barred from initiating a suit on his own behalf
> (6) Although the class action aspects of the case have been dismissed, appellants' action is still viable [and]
> (7) Defending a class action would prove costly to the defendants and duplicate in part the work expended over a considerable period of time in the state action.

Id. at 212 (footnotes omitted).

Applying the so-called "*Kamm* factors," numerous courts have denied class certification under Rule 23(b)(3) where, as here, the putative class may obtain relief through resolution of a government enforcement action involving the same subject matter. *See, e.g.*, *Pattillo v. Schlesinger*, 625 F.2d 262, 265 (9th Cir. 1980) (class action not "superior" where claims could be adjudicated more efficiently through "ongoing administrative proceedings"); *Thornton*, 2006 WL 3359482, at *4 (striking class allegations where the underlying dispute already had been the subject of a settlement agreement between State Farm and Attorney Generals of 49 states); *Imber-Gluck*, 2015 WL 1522076, at *3 (denying class certification under *Kamm* on the basis of an FTC settlement that provided "complete refunds to the class members"); *Brown v. Blue Cross and Blue Shield of Michigan, Inc.*, 167 F.R.D. 40, 44-47 (E.D. Mich. 1996) (declining to certify class based in part on conditional settlement agreement between defendant-insurer and Attorney General and Insurance Commissioner which covered all members of the proposed class). Indeed, several courts have found that a class action is not "superior" under Rule 23(b)(3) where there is a pending government lawsuit or investigation—and thus, only the potential for a government-overseen remedy, not an actually available one. *See, e.g.*, *Ostrof v. State Farm Mut. Auto. Ins. Co.*, 200 F.R.D. 521, 532 (D. Md. 2001) (denying class certification in part based on state agency's

"authority to order individualized remedies if the circumstances warrant"); *In re Montgomery Cty. Real Estate Antitrust Litig.*, No. B–77–513, 1988 WL 125789, at *2 (D. Md. July 17, 1988) (*parens patriae* action was superior to "coextensive representation by private parties"); *Commonwealth of Pa. v. Budget Fuel Co.*, 122 F.R.D. 184, 186 (E.D. Pa. 1988) (same).

Here, application of the *Kamm* factors demonstrates that a class action is not "superior" under Rule 23(b)(3). With respect to the related first and seventh *Kamm* factors, it is clear that—just as in *Kamm*—the maintenance of this case as a class action would require a substantial expenditure of judicial time and resources; largely duplicate the work that has already been done for the EEOC Agreement; and be extremely costly. *See, e.g.*, *Imber-Gluck*, 2015 WL 1522076, at *3. If this case were to continue as a putative class action, this Court would preside over, among other things, class discovery for at least an additional 3 months, with the parties engaging in up to 70 more depositions, followed by associated class certification briefing, as well as potential interlocutory appeal, summary judgment briefing, and a possible months-long trial. This would require a substantial investment of time and resources by the Court and by Ford that would needlessly duplicate the work the EEOC already has undertaken in the course of its lengthy investigation. *See, e.g.*, *id.* at *3 (class action not superior in part because of substantial expenditure of judicial time that would largely duplicate "the work of the 18 month FTC investigation"). If plaintiffs' request for class certification fails, absent class members will get nothing. Even if a class were certified, class members would then receive duplicate notices—first in connection with the EEOC Agreement, and then in connection with the belated class action—which could create the sort of confusion that one court has described as "an affront to justice and a wasteful exercise." *In re Montgomery Cty.*, 1988 WL 125789, at *2.

The second *Kamm* factor—the complexity of the purported class action—likewise counsels

against a finding of superiority. Given the sheer number of named plaintiffs in this case (31) and the highly individualized nature of their allegations, there is a low likelihood that plaintiffs will be able to satisfy the requirements of Rule 23. But, even if this Court were to certify a class, the case would not end there. The parties would only then *begin* to proceed with lengthy and costly merits discovery. The Court, moreover, could not decide the merits in a single sweep. Instead, it would be forced to hold a series of individualized "mini-trials" to grant individual monetary relief to each putative claimant. *See* SAC ¶¶ 89-91 (alleging different acts toward different plaintiffs at different times by different actors); *see also McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012) (observing in disparate impact case that even after certification, "hundreds of separate trials may be necessary to determine which class members were actually adversely affected"); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) (citing *Dukes*, 564 U.S. at 366-67) (explaining that "a defendant has a due process right . . . to present individualized defenses if those defenses affect its liability"). All these complexities are avoided through the EEOC Agreement, with its structure for claimants to receive tailored damages awards quickly and efficiently under established guidelines. *See* EEOC Agreement ¶¶ 44-50.

With respect to the third *Kamm* factor, it is undisputed that the EEOC Agreement provides putative class members with the opportunity to obtain significant relief. Indeed, the EEOC Agreement provides the putative class with "nearly all, if not all, of the possible sought relief in the [complaint]." *Imber-Gluck*, 2015 WL 1522076, at *3. In the SAC, plaintiffs seek compensatory damages, injunctive relief, and the appointment of a monitor. *See* SAC at p. 192 (Prayer for Relief). The EEOC Agreement provides for at least $7.75 million in monetary relief, and as much as up to $10.125 million; it bars Ford from taking any discriminatory or retaliatory actions; it requires a range of training and oversight procedures; and it provides for the appointment

of a panel of independent monitors for a period of three (3) years. *See* EEOC Agreement ¶¶ 11, 19, 25-26, 31, 38-39. Given that the putative class can obtain through this administrative remedy almost everything plaintiffs seek on their behalf in this litigation, there is no basis to conclude that a class action is a "superior" method for adjudicating plaintiffs' claims. *See, e.g.*, *Brown*, 167 F.R.D. at 46 (denying certification due to lack of superiority where "[t]he agreement entered into by the State and defendant . . . provides full co-pay relief on all but de minimis claims"). Simply put, the EEOC Agreement destroys superiority because "[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003).

Significantly, plaintiffs need not be provided with *everything* they seek in class litigation in order for the availability of alternative relief to defeat superiority. In *Kamm* itself, the court found that superiority was not established even though "not all members of the class appellants seek to represent will be protected by the . . . settlement; nor will the class recover an amount that is even close to that sought in the class action." *Kamm*, 509 F.2d at 211. Thus, even where the alternate relief "may not be perfect or may not be how plaintiffs' counsel would have advocated a settlement," courts have found that a class action is neither necessary nor superior "based on the uncertainty of litigation." *Brown*, 167 F.R.D. at 46-47; *see also Thornton*, 2006 WL 3359482, at *3. In other words, the question is not whether alternate relief will provide plaintiffs with all that they demand, but whether it provides sufficiently "significant relief" that litigating a putative class action, with all its delays, costs, and inherent uncertainty, is not "superior." This standard is satisfied by the comprehensive relief made available through the EEOC Agreement in this case. *See Imber-Gluck*, 2015 WL 1522076, at *3.

Here, the class action mechanism is not only unnecessary to afford putative class members

relief, but may actually prove *detrimental* to class members' recoveries. Participation in the claims process under the EEOC Agreement is costless to putative class members (and this Court), whereas any recoveries obtained by plaintiffs through this litigation may be reduced by attorneys' fees and costs. As the court in *Thornton* correctly recognized, "[p]otential class members will often recover more [from a government settlement] than they would in a private action when costs and attorneys' fees are factored in." *Thornton*, 2006 WL 3359482, at *3. Indeed, in a previous class action against Ford by plaintiffs' attorneys here, plaintiffs' counsel received a $2.75 million fee (and then improperly attempted to collect *additional* contingency fees from the plaintiffs, resulting in sanctions by the Illinois Supreme Court). *Warnell v. Ford Motor Co.*, 205 F. Supp. 2d 956, 958-59 (N.D. Ill. 2002); Dkt. 34-8 (suspending plaintiffs' counsel from the practice of law for thirty days); *see also Brown*, 167 F.R.D. at 45 (denying class certification in part because the state settlement would be costless whereas plaintiffs' counsel would potentially receive millions of dollars in connection with parallel class action); *Pattillo*, 625 F.2d at 265 (same).

Moreover, as the Supreme Court has noted, class actions can "take months, if not years," to resolve, and "may merely yield an opportunity [for absent class members] to submit a claim for recovery of a small percentage of a few dollars." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (internal quotation marks omitted). This case is no exception. Plaintiffs' continued pursuit of class certification, with 70 additional depositions, class discovery-related motions practice, and class certification briefing, would be time-intensive. Even if this Court were eventually to certify a class, there still would be no guarantee of a timely recovery for absent class members. Instead, individual issues would need to be adjudicated, such as damages and whether the individual class members experienced actionable harassment, further delaying any potential monetary award. Even if merits discovery in this case lasted only as long as class discovery—

which is unlikely—it would not conclude until the summer of 2019 at the earliest, which is long after claimants who participate in the EEOC process would *receive* their awards.

The fact that putative class members have the opportunity to receive significant, cost-free relief through the EEOC-overseen process is dispositive of the "superiority" inquiry. Nevertheless, the remaining *Kamm* factors also militate against a finding of "superiority." The fourth *Kamm* factor—the ability of the court to retain continuing jurisdiction over the matter—weighs against finding that the class action mechanism is superior, since the EEOC Agreement contains an express provision stating that it "may be specifically enforced in court by [the] EEOC," EEOC Agreement ¶ 59. With respect to the fifth *Kamm* factor—whether any member of the class is barred from initiating a suit on his own behalf—the EEOC Agreement makes clear that claims by individual plaintiffs who elect not to participate are not affected by the settlement. *Id.* ¶¶ 38-55. In terms of the sixth *Kamm* factor, as in *Kamm*, the individual claims of any claimants who choose not to participate in the EEOC conciliation process will remain viable, even if this case does not proceed on a class basis. Accordingly, each of the *Kamm* factors supports finding that plaintiffs have not—and cannot—meet the superiority requirement.

Apart from the *Kamm* factors, this case presents an additional and significant reason for denying class certification: Certifying a class in these circumstances—or even delaying a decision on this motion until the completion of costly class discovery—would undermine Congress's preference for voluntarily conciliation of Title VII claims. "[C]onciliation [is] the most important function of the EEOC," *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042 (7th Cir. 1982), and Congress specifically requires the EEOC to pursue these opportunities and avoid litigation where possible, *EEOC v. CVS Pharm., Inc.*, 809 F.3d 335, 342 (7th Cir. 2015). It is only where the EEOC is "'unable to secure' an acceptable conciliation agreement—that is, only if its attempt to conciliate

has failed—[that] a claim against the employer [may] go forward." *Mach Mining*, 135 S. Ct. at 1651 (quoting 42 U.S.C. § 2000e-5(f)(1)). Allowing plaintiffs to press forward with their attempts to certify a class in the face of such voluntary conciliation would undermine this statutory scheme. Indeed, it would discourage employers from offering prompt and complete relief to claimants through conciliation, if they still must incur the costs and risks of a putative class action brought on behalf of the very claimants covered by the conciliation agreement.

C. Plaintiffs Do Not Adequately Represent The Putative Classes

For a class to be certified under any section of Rule 23, plaintiffs must satisfy each element of Rule 23(a), including that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement of Rule 23 is essential "since due process requires that absent class members be adequately represented." *Susman v. Lincoln Am. Corp. et al.*, 561 F.2d 86, 90 (7th Cir. 1977).

The Seventh Circuit has made clear that adequacy is absent where the proposed class representatives seek relief that merely "duplicates a remedy" already available to the putative class. *In re Aqua Dots*, 654 F.3d at 752. In *Aqua Dots*, the Seventh Circuit affirmed the denial of class certification where the defendant voluntarily provided relief in the form of refunds or replacement products to the putative class, since the plaintiffs essentially sought to lead the class down a path that would result in *less*—rather than *more*—recovery. *Id.* at 750. As the court explained, "[a] representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain [relief] that already is on offer is not adequately protecting the class members' interests." 654 F.3d 748, 752 (7th Cir. 2011).

That is precisely the case here. Plaintiffs cannot meet their burden of proving that they are adequately protecting the interests of a putative class because, rather than helping the putative class members, they are "pursuing a remedy that is already available through a costly,

drawn-out, and unnecessary class action lawsuit." *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488 (S.D. Cal. 2013) (denying class certification on adequacy grounds and citing *In re Aqua Dots*); *see also Doster-Lighting, Inc. v. E-Conolight LLC*, No. 12-C-0023, 2015 WL 3776491, at *7-8 (E.D. Wis. June 17, 2015) (adequacy not satisfied given plaintiff's choice to pursue "litigation rather than a remedy already available"). As set forth above, the EEOC claims process provides plaintiffs with virtually all the relief they seek in the SAC, and does so at a fraction of the cost. Plaintiffs are thus seeking to do exactly what rendered the representatives in *Aqua Dots* inadequate: requiring the class "to bear attorneys' fees [and other costs] in order to obtain a remedy that is theirs for the asking already." *In re Aqua Dots*, 654 F.3d at 752.

* * *

The EEOC and Ford have reached an agreement that will amply compensate the putative class members in this case without imposing on them—or this Court—the costs and uncertainties inherent in class action litigation. Because this alternative process benefits putative class members, Ford, and the Court, advances the policy goal of conciliation under Title VII, and does not prejudice the right of any current or former employee to maintain an individual suit, the proposed class action is not superior within the meaning of Rule 23(b)(3). And because plaintiffs are continuing to pursue this class action with its associated high transaction costs to obtain what "already is on offer," *Aqua Dots*, 654 F.3d at 752, they are not adequately protecting the class members' interests within the meaning of Rule 23(a)(4). No class should be certified.

CONCLUSION

For the foregoing reasons, Ford's motion should be granted in its entirety.

DATED: August 17, 2017

Respectfully submitted,

/s/ Eugene Scalia

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2017, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which provided electronic service upon:

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