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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, DEBORAH GUNTER AND CHRISTINE KWAPNOSKI, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

WAL-MART STORES, INC.,

Defendant.

Case No: C 01-2252-CRB

PLAINTIFF-INTERVENORS' NOTICE OF MOTION AND MOTION TO INTERVENE

DATE: August 19, 2016

TIME: 10:00 am

LOCATION: Courtroom 6, U.S. District Court, San Francisco Courthouse

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NOTICE OF MOTION TO INTERVENE

Please take notice that on August 19, 2016, at 10:00 am, or as soon thereafter as this motion may be heard, before the Honorable Charles R. Breyer, U.S. District Court, San Francisco Courthouse, Courtroom 6 – 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Intervenors Joyce Clark, Suzanne Hewey, Kristy Farias, Lucretia Johnson, Hilda Todd, and Kristin Marsh, on behalf of themselves and all others similarly situated, will, and hereby do, move for an order granting them leave to intervene as plaintiffs in this action. This motion is based on this Notice of Motion, the supporting memorandum of points and authorities, the Declaration of Christine E. Webber, and all accompanying attachments thereto, all papers and records on file in this case, and any further evidence or argument submitted at the hearing.

RELIEF REQUESTED

Plaintiff-Intervenors request that leave to intervene as parties plaintiff for purpose of pursuing an appeal of the denial of class certification.

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I. INTRODUCTION

Courts have long recognized the right of absent class members to intervene at the conclusion of litigation, for the purpose of appealing a denial of class certification. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (putative class member had right to intervene to appeal denial of class certification after final judgment was entered on individual claims of named plaintiffs). When this case was filed as a class action, the proposed Plaintiff-Intervenors reasonably relied upon Ms. Dukes and the other named plaintiffs to protect their interests as class members. Indeed, following the ruling denying class certification, Dkt. 991, the named plaintiffs sought interlocutory review of the decision, Dkt. 992. The Ninth Circuit declined to take up the case. Dkt. 998. If the named plaintiffs had litigated their cases through final judgment, they would then have had the opportunity to appeal the decision denying class certification. *McDonald*, 432 U.S. at 393. However, once the named plaintiffs settled their claims individually and stipulated to dismissal of their cases, Webber Decl. ¶¶ 2-3, the proposed Plaintiff-Intervenors could no longer depend upon the named plaintiffs to protect their interests as putative class members, and thus, they seek to intervene. Fed. R. Civ. P. 24; *McDonald*, 432 U.S. at 394.

II. ARGUMENT

A. Putative Class Members Are Routinely Permitted to Intervene Following Final Judgment for Purposes of Appealing Denial of Class Certification

Absent class members, such as these Plaintiff-Intervenors, have the right to intervene at the conclusion of litigation for the purpose of appealing a denial of class certification. *McDonald*, 432 U.S. at 394 (putative class member had right to intervene to appeal denial of class certification after final judgment was entered on individual claims of named plaintiffs); *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319-20 (9th Cir. 1997)(concluding district court erred in denying motion to intervene for untimeliness where putative class member filed motion after final judgment was entered on the named plaintiffs' individual claims to appeal denial of class certification);[1] *Koike*

[1] While the Ninth Circuit in *Suburban Propane Gas* concluded that the district court had abused its discretion in denying intervention on timeliness and justiciability grounds, it ultimately held that the error was harmless based on findings that the named plaintiffs were differently situated from many of the putative class members due to the bargaining power they wielded with which they might

v. Starbucks Corp., 602 F. Supp. 2d 1158, 1161-63 (N.D. Cal. 2009)(granting putative class member's motion to intervene to appeal denial of class certification filed fewer than 30 days after entry of judgment of individual claims where the named plaintiffs agreed as part of their individual settlements "not to appeal the denial of class certification"), *aff'd*, 378 F. App'x 659, 661 (9th Cir. 2010). Here, these Plaintiff-Intervenors have moved prior to dismissal of this action. *See Jou v. Kimberly-Clark Corp.*, No. 13-CV-03075-JSC, 2015 WL 4537533 (N.D. Cal. July 27, 2015).

In *McDonald*, the original named plaintiffs sought class certification, but the class allegations were stricken from the complaint on the grounds of numerosity. *McDonald*, 432 U.S. at 388. The original named plaintiffs sought interlocutory review under 28 U.S.C. § 1292(b), but the court of appeals declined to accept the interlocutory appeal. Subsequently, the parties settled the individual plaintiffs' claims and the case was dismissed. Following entry of final judgment, McDonald, a putative class member as defined in the original complaint, learned of the dismissal and that, despite their earlier attempt to appeal, the original class representatives did not now intend to appeal the denial of class certification. *Id.* at 389-90. McDonald sought to intervene for the purpose of appealing the adverse class determination order, 18 days after the final judgment, and prior to the 30 day deadline for noting an appeal. *Id.* at 390. The procedural history of *McDonald* is strikingly similar to the procedural history here, and the conclusion must be the same: Plaintiff-Intervenors here must be permitted to intervene for purposes of appealing the denial of class certification. As the *McDonald* Court held, the district court's refusal to certify a class was subject to appellate review after final judgment had the named plaintiffs appealed. *Id.* at 393. Once it became clear to the intervenor that the original class representatives were no longer acting to protect the interests of absent class members, she promptly moved to intervene to protect those interests. *Id.* at 394. This was the appropriate time for an intervenor seeking to appeal an adverse class certification ruling to intervene. *Id.*

Courts have acknowledged the interests of putative class members of uncertified classes to intervene where named plaintiffs no longer pursue class claims. *Koike,* 602 F. Supp. 2d at 1161.

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have avoided injury altogether and provided a defense to the claim of antitrust injury. 123 F.3d at 1321. These circumstances do not exist here.

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Courts have specifically rejected any claim that the conclusion of the original named plaintiffs' litigation renders the case moot: "The class's interest in a class action continues even when the plaintiff's individual claims have become moot." *Koike,* 602 F. Supp. 2d at 1161 (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1979). The same factors support intervention here.

It is also well established that the putative class member may intervene to serve as a class representative whether or not she had filed an EEOC charge, as she may rely upon the charges filed by the original class representatives. *Berry*, 98 F.R.D. at 248 (citing *Wheeler v. Am. Home Prods. Corp. (Boyle-Midway Div.)*, 563 F.2d 1233, 1239 (5th Cir. 1977)). *See McDonald*, 432 U.S. at 392-93 (rejecting argument that failure to comply with the statutory periods of limitations for filing an EEOC charge and civil suit prescribed by Title VII rendered a putative class member's post-judgment application for intervention time-barred).

B. Plaintiff-Intervenors Qualify for Intervention as of Right

Fed. R. Civ. P. 24(a) governs intervention as of right. Based on the four-part criteria established by the Ninth Circuit, plaintiff-intervenors must show the following: (1) their motion is timely; (2) they have "a significant protectible interest relating to class certification decision;" (3) they are "so situated that the disposition of the action may practically impair [their] ability to protect [their] interest[s];" and (4) their interests "[are] not adequately represented by the parties to the action." *Koike,* 602 F. Supp. 2d at 1160; *see Forest Conserv. Council v U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997); *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). These requirements are interpreted "broadly in favor of intervention." *Donnelly,* 159 F.3d at 409. Here, those factors are each satisfied.

1. Intervenors' Request Is Timely

The last of the original claims in this case has been settled. Webber Decl. ¶ 2-3. This motion was filed on July 14, 2016, prior to dismissal and entry of final judgment. Filing a motion to intervene for purposes of appealing an adverse class certification ruling is timely where, it is filed soon after final judgment, and before the time to appeal has expired. *McDonald*, 432 U.S. at 394-

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395; *accord Suburban Propane Gas*, 123 F.3d at 1320. Thus, filing *before* final judgment, as here, is clearly timely.

2. Intervenors Have a Significant Protectible Interest Relating to the Class Certification Decision

"An interest is significantly protectible if (1) it is protected under some law, and (2) the applicant shows a relationship between the legally protected interest and the [plaintiffs'] claims. *Koike,* 602 F. Supp. 2d at 1160 (citing *Donnelly*, 159 F.3d at 409). The protectible interest here is the Intervenors' ability to pursue their claims in the form of a "class action." 602 F. Supp. 2d at 1160. As recognized by the Supreme Court, there are significant benefits to pursuing claims in a class-action context, including the ability to "bring[] cases that for economic reasons might not be brought otherwise" through the reduction of "costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 & n.9 (1980). Courts have also recognized, as noted above, the important legal interest that putative class members have in intervening to take over as class representatives if the original representatives no longer pursue class certification. *Koike,* 602 F. Supp. 2d at 1161 (citing *Geraghty*, 445 U.S. at 403). Indeed, this interest is recognized and protected under Rule 23, which expressly provides that a court may allow class members to intervene "to protect class members and fairly conduct the action." Fed. R. Civ. P. 23(d)(1)(B).

"An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly*, 159 F.3d at 410. Here, the Complaint in Intervention contains the same allegations as the original Complaint and the most recent, Fourth Amended Complaint, regarding systemic discrimination and disparate impact against women at Wal-Mart, with respect to both pay and promotions. *Compare* Complaint in Intervention, attached hereto as Ex. 1, *with* Dkts. 3, 767. Thus, they challenge the same claims as those advanced by the named plaintiffs on behalf of the class following remand from the Supreme Court. The proposed Intervenors fall within the definition of the class that the named plaintiffs originally sought to represent. If a class had been certified, they would have had the right to appear through counsel. Fed. R. Civ. P. 23(c)(2)(B)(iv). A decision by the Ninth Circuit resolving class certification on

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appeal, therefore, will certainly affect the Intervenors.

The Intervenors' interest in proceeding with a class action pursuant to Fed. R. Civ. P. 23 is, therefore, "significantly protectible." *Koike,* 602 F. Supp. 2d at 1161.

3. Disposition of this Action Will Impair Intervenors' Ability to Protect Their Interests

If this action ends in final judgment without any appeal – as will be the case if no intervention is permitted – then that will impair the Intervenors' ability to protect their interests in class certification. As the Court laid out in *McDonald*, if the Intervenors are successful on appeal, then the class claims are timely, and if the Intervenors further succeed in persuading the court to certify a class, then the class statute of limitations would be based on the original named plaintiffs' filing. *McDonald,* 432 U.S. at 392. However, Intervenors who have not already filed EEOC charges would not have any timely claim if they are unsuccessful in obtaining reversal of the dismissal and ultimate certification of a class in this case. *Id.* (if McDonald had sought to pursue her individual claim, it would have been untimely; only by obtaining reversal of the class certification decision would her claim be timely). Even as to those Intervenors who did file timely EEOC charges, if they are not permitted to intervene here, and instead file a new class case resting on their EEOC charges, Defendant will seek dismissal of the class claims on the same ground as asserted in this action, and a final judgment in this action will thus have a "potential for a negative stare decisis effect" which "may supply that practical disadvantage which warrants intervention of right." *Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11th Cir. 2004) (citation omitted). In addition, the costs of bringing a new action likely far exceed the costs of intervening to appeal. *Koike*, 602 F. Supp. 2d at 1161. "Granting intervention ensures, as a practical matter, that neither cost nor the statute of limitations will prevent [Intervenors from] pursuing [their] claims as a class action." *Id.*

4. Intervenors Are No Longer Represented Adequately

The original named plaintiffs, although they previously sought interlocutory review of the denial of class certification, have now agreed to settle their claims and thus will not appeal. Therefore, they are no longer representing the interests of putative class members in pursuing an appeal. *McDonald*, 432 U.S. at 394.

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C. Plaintiff-Intervenors Qualify for Permissive Intervention

Rule 24(b) permits permissive intervention where the intervenor's claim shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). "An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly*, 159 F.3d at 412. As with as-of-right intervention, Fed. R. Civ. P. 24 generally receives a "liberal construction" in favor of permissive intervention. *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982). If these requirements are satisfied, the district court "is then entitled to consider other factors in making its discretionary decision on the issue of permissive intervention," including "the nature and extent of the intervenors' interest," "whether the intervenors' interests are adequately represented by other parties," and "whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Wit v. United Behavioral Health*, No. 14-cv-02346-JCS, 2016 U.S. Dist. LEXIS 15890, at *6-7 (N.D. Cal. Feb. 9, 2016); s*ee Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). The district court has broad discretion in granting permissive intervention and "must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Donnelly*, 159 F.3d at 412.

The Intervenors' allegations of classwide discrimination against women overlap precisely with the questions of law and fact raised by the original action. *Compare* Complaint in Intervention, attached hereto as Ex. 1, *with* Dkts. 3, 767. They share the same claims which raise common questions with those brought by the named plaintiffs in the original action. The Intervenors would have been members of the original proposed class, had it been certified.

As addressed with respect to as-of-right intervention, the Plaintiff-Intervenors have acted in a timely fashion in filing their motion to intervene.

Further, the Court has an independent basis for jurisdiction over the Plaintiff-Intervenors' claims. As set forth in the Complaint in Intervention, Intervenors' claims arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*., and the Court has jurisdiction over the matter

pursuant to 42 U.S.C. § 2000e-5(f), 28 U.S.C. §§ 1331 and 1343(a)(4). *See* Ex. 1, ¶ 7. In addition, each Plaintiff-Intervenor has exhausted her administrative remedies and complied with the statutory prerequisites of Title VII by timely filing charges of discrimination or otherwise by relying on the administrative exhaustion of the *Dukes* Plaintiffs or former class members. *See* Ex. 1, ¶ 8.

As with as-of-right intervention, courts examining permissive intervention also consider whether intervenors' interest "are adequately represented by other parties." For the same reasons set forth above regarding as-of-right intervention, the Intervenors are no longer represented by the original named plaintiffs.

As to whether the intervenors will significantly contribute to "the full development of the underlying factual interests in the suit" and to "the just and equitable adjudication of the legal questions presented," since the original plaintiffs have settled their claims, intervention is the only hope for developing a full record and just adjudication of the legal issues and, most significantly, obtaining appellate review.

As to "whether intervention will unduly delay the main action or will unfairly prejudice the existing parties," the timing of this motion will cause no delay as the individual claims of the named plaintiffs have been settled and what remains is the appeal of the order denying class certification, if the Court grants this motion. Intervention will not unfairly prejudice the named plaintiffs as their individual claims have been settled. Intervention will also not unfairly prejudice defendant as it was "put on notice by the original complaint of the possibility of classwide liability," and there "was always the risk that a putative class member might appeal the denial of class certification, and this is a risk [the defendant] assumed." *Suburban Propane Gas*, 123 F.3d at 1320.

III. CONCLUSION

For the foregoing reasons, the Plaintiff-Intervenors should be permitted to intervene for the purpose of pursuing an appeal and obtaining appellate review of the denial of class certification.

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Dated: July 14, 2016

Respectfully submitted,

/s/ *Joseph M. Sellers*

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