CASE NO. 15-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RUDOLPH A. KARLO,

Plaintiff-Appellant,

vs.

PITTSBURGH GLASS WORKS, LLC,

Defendant-Appellee.

On Appeal From The Western District of Pennsylvania, No. 2:10-cv-01283
(The Honorable Judge Terrence F. McVerry, presiding)

BRIEF FOR APPELLEE

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AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, Defendant-Appellee Pittsburgh Glass Works, LLC ("PGW") states that until approximately April 21, 2016, it was an indirect, wholly-owned subsidiary of KPGW Holding Company, LLC and that PPG Industries, Inc., a publicly traded company, was a minority owner of KPGW Holding Company, LLC. PGW is presently an indirect wholly-owned subsidiary of LKQ Corporation. LKQ Corporation is a publicly traded company. AIG, Inc. (f/k/a/ Chartis, Inc.) has issued an insurance policy that has been implicated in this matter.

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JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over all claims and parties in this appeal except Rudolph Karlo's individual age discrimination claim. As discussed in more detail *infra* (Argument §I), on October 2, 2015, a Rule 54(b) final judgment entered on the summary judgment rulings for Plaintiffs' age discrimination claims. (A129.)[1] On October 7, 2015, Plaintiffs Karlo and Mark McLure filed a notice of appeal of that judgment. (A1.) McLure settled all of his claims against PGW and is no longer a party. No other appeal-related document was filed within 30 days of the final judgment.

Because the notice of appeal did not mention any remaining Plaintiff beside Karlo, and did not specify any orders other than the final judgment on Karlo's age discrimination claim, the notice did not perfect the appeal for the other Named Plaintiffs, the Opt-in Plaintiffs or the decertification order. Thus, the Court lacks jurisdiction over all parties, except Karlo, and all claims except Karlo's age discrimination claim.

[1] Citations to pages of the appendices are referenced as "A__." Citations to the record below (A145-146, A582-625) are indicated by docket entry as "Dkt. __."

STATEMENT OF ISSUES

1. Whether this Court has jurisdiction over any parties or claims except Karlo's individual disparate impact age discrimination claim where Karlo's notice of appeal omits the remaining Plaintiffs and lacks reference to the decertification order?

2. Whether the district court's decertification of the collective action was clearly erroneous where the Opt-ins were not similarly situated to the Named Plaintiffs; all having ***different*** job titles, duties, work locations and, critically, ***different*** decision-makers using ***different*** criteria to choose employees for inclusion in the reduction in force ("RIF")?

3. Whether the district court was within its discretion to bar Plaintiffs' experts where those experts fail to rely on sufficient facts, ignore or manipulate data, employ unreliable methodologies that are not generally accepted in the relevant specialty, and where their opinions lack "fit" because they fail to apply accepted methodology to the facts of ***this*** case?

4. Whether the district court's entry of summary judgment on Plaintiffs' disparate impact age discrimination claims was proper where Plaintiffs: (i) failed to present anything more than a then-barred statistical expert opinion to support their claim and (ii) Plaintiffs sole theory for disparate impact was to base their claim on an over-50 age-based subgroup?

4a. Whether Plaintiffs waived appeal of summary judgment on their disparate treatment claims by failing to raise that issue in the opening appellate brief?

STATEMENT OF RELATED CASES AND PROCEEDINGS

The facts and issues presented in the above-captioned case have not been previously before this Court, nor are they currently before any other court. Although this appeal arises from a 54(b) final judgment as to fewer than all claims, the district court found that the summary judgments on the disparate treatment and disparate impact age discrimination claims are "separable and distinct – factually and legally from the individual retaliation claims," which remained before the district court. (A123.) Karlo's unrelated retaliation claim was tried before a jury. Post-trial proceedings are on-going.

STATEMENT OF THE CASE

Plaintiffs Karlo, William Cunningham, Jeffrey Marietti, and David Meixelsberger ("Named Plaintiffs"), along with now-dismissed Plaintiffs McLure, Benjamin Thompson and Richard Csukas, brought a claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. ("ADEA") on behalf of themselves and all others similarly situated. (Dkt. 1.) On May 9, 2012, the district court conditionally certified a collective action, facilitated notice, and permitted discovery regarding salaried PGW employees, 50 years of age or older,

who were terminated in RIF on March 31, 2009. (A176-177.) PGW sought interlocutory review of the conditional certification order, *inter alia*, regarding whether disparate impact claims based on age subgroups are cognizable under the ADEA. (Dkt. 187 at 1-2.) Plaintiffs opposed the motion, noting that the subgrouping issue was not final and could be revisited at the decertification stage. (Dkt. 195 at 9; Dkt. 201 at 2-3.) The district court denied the interlocutory appeal, explaining that the conditional certification order was not a "final ruling" on any issues, including subgrouping, and the court's "merely conditional" holding "ruled only that Plaintiffs are entitled to provide notice and take discovery as to the putative class." (A628.)

Eleven individuals opted into the conditionally certified case (the "Opt-ins"). (Dkt. 206-216.) Seven Opt-ins and two original Plaintiffs settled or withdrew, leaving four Opt-ins and the five Named Plaintiffs. (Dkt. 247, 325-326, 352-355.)

On March 31, 2014, after more than sixty depositions, the district court decertified the collective action, finding the Opt-ins were not similarly situated to the Named Plaintiffs, and the Opt-ins were dismissed. (A44-45.) PGW then moved to bar Plaintiffs' experts and for summary judgment. (Dkt. 372-376, 380-382.) The district court first granted PGW's motion to bar Dr. Campion's opinions on statistics and human resource practices and Dr. Greenwald's on implicit social

bias. (A81.) The district court then granted PGW's summary judgment motions regarding Plaintiffs' disparate impact and disparate treatment claims. (A116.)

Thereafter, the district court granted Plaintiffs' motion to certify Rule 54(b) final judgments. (Dkt. 453; A129.) Karlo timely filed a notice of appeal as to the final judgment entered on the summary judgment rulings. (A1.)

STATEMENT OF FACTS

A. PGW's Formation.

PGW was formed on October 1, 2008, following the sale of the auto-glass assets of PPG Industries, Inc. ("PPG"). (A84.) PGW included several core businesses around North America, including: (i) original equipment manufacture ("OEM") of automotive glass, for which it maintained a Manufacturing Glass Technology Department ("Manufacturing Technology") in Harmarville, Pennsylvania; (ii) software ("GTS"); (iii) automotive-replacement glass distribution ("ARG"); (iv) insurance claim administration ("LYNX"); and (v) glass treatment. (*Id.*)

B. The 2008-09 Downturn in the Automotive Industry.

As PGW formed, GM, Ford, and Chrysler requested bailouts from Congress. (*Id.*) Given the direction of the industry and economy, PGW took several steps to combat deteriorating sales, including closing two manufacturing facilities, consolidating distribution systems, and instituting process-improvement actions and supply-chain optimization. (A84-85.) PGW also terminated ten to twelve

percent of its salaried workforce in December, 2008. (A85.) In early 2009, with the economy still in free-fall, PGW undertook additional measures to meet the challenges of lower demand, including temporarily laying off hourly workers, reducing plant operation hours, suspending salary increases, freezing new hires, suspending 401K contributions and bonuses, and reducing salaries. (*Id*.) PGW also closed the Evart, Michigan plant, effective March 31, 2009, eliminating 18 salaried employees. (A87.) Notably, the Evart employees were not included in the March 31, 2009 RIF. (*Id*.)

C. The March 2009 Reduction in Force.

On March 31, 2009, PGW terminated 100 salaried employees. (A87.) This RIF impacted every part of the company, including over forty locations and/or divisions of PGW. (*Id*.) The widespread terminations included: (i) 44 from ARG at over 20 locations; (ii) 34 from OEM's eight plants and groups; (iii) 13 from ARG Truckload & Services; (iv) 8 from sales; and (v) 1 from New Product Development. (*Id*.)

PGW did not provide any specific guidelines or training with regard to this RIF. (A9.) Rather, upper management issued a general directive for each department to cut a targeted percentage of their budget, and then relied entirely on individual unit directors to identify work that needed to be done and personnel necessary to perform that work. (*Id.*)

1. Named Plaintiffs

Named Plaintiffs worked in Manufacturing Technology in Harmarville, Pennsylvania for the OEM business. (*Id*.) Gary Cannon was their director and made the termination decisions. (A11-13.) Cannon evaluated the whole group and decided which employees to retain based on departmental needs. (*Id*.)

After years of working with the Named Plaintiffs under PPG, Cannon had full knowledge of their skills. (A12.) The Named Plaintiffs all held Senior Technical Assistant job titles, except for Marietti, who was a Technical Assistant. (A13-16.) Cannon selected six salaried associates for the RIF, including the Named Plaintiffs, without considering the age of any employee. (A12-A13.) Post-RIF, most of Karlo's job functions were outsourced to other firms and two older employees absorbed his ongoing tasks. (A13.) Cunningham's ongoing tasks were absorbed by three employees, two older and one younger (by one year). (A16.) Marietti's tooling work was outsourced and his ongoing tasks were absorbed by three employees, two older and one younger (by four years). (*Id*.) Meixelsberger's ongoing tasks were absorbed by two older employees. (A17.) Named Plaintiffs all pointed to one younger retained employee, Steve Horcicak. (A93.) However, Horcicak had a unique skillset as he was the only employee with expertise in fracture mechanics, which Cannon viewed as important. (*Id*.)

Before the RIF, of the 27 salaried associates in Manufacturing Technology, only three were younger than 46. (A640, ¶20.) After the RIF, the group's average age changed from 52.42 to 52.04. (A640, ¶21.) Employees over age 55 increased to 38% (8/21) of the group from 37% (10/27) before the RIF. (*Id*.)

2. Opt-In Breen

Michael Breen, a production supervisor, worked at the Crestline, Ohio plant. (A17.) Crestline plant manager, Jason Skeen, made the decision to include Breen in the RIF. (*Id*.) Skeen used an earlier forced ranking compiled by his managers and Breen ranked near the very bottom. (*Id*.) Skeen included Breen in the RIF for performance reasons. (*Id*.) Crestline's HR manager, Jim Phillips, created a unique decisional unit matrix ("DUM") to include with Breen's paperwork. (*Id*.) Breen claims he was replaced by three employees, all less than three years his junior. (*Id*.)

3. Opt-In Clawson

Matthew Clawson worked as a Project Engineer in the Evansville Plant. (A18; A649, ¶58.) Evansville plant manager, Keith Holmes, and HR director, Sarah Leider, made the decision to terminate Clawson. (A18.) Holmes decided that he needed electrical engineering experience, which Clawson lacked. (*Id*.) After selecting Clawson, Leider compiled a DUM of the other engineers. (*Id*.) Clawson's job responsibilities were absorbed by two older plant employees. (*Id*.)

4. Opt-In Shaw

Stephen Shaw was a marketing manager for LYNX. Although LYNX operated call centers in Kentucky and Florida, Shaw worked in Pittsburgh. (A18; A652, ¶68.) Gary Eilers, General Manager supervising LYNX, along with John Wysseier, a Director, made the decision to terminate Shaw because his position could be eliminated and duties absorbed by a supervisor one year younger than Shaw and another employee four years older. (A19; A652-653, ¶¶70-71.) According to Shaw, another employee who was six years younger also assumed some of his duties. (A19.)

5. Opt-In Titus

John Titus worked at ARG's Irving, Texas warehouse as an Area Service Manager. (A19.) Territory director, Todd Fencak, decided to consolidate Titus's job with a call-center manager position at the same location. (*Id*.) Fenack determined Titus would require six to nine months' training for the call-center tasks, while the call center manager possessed experience with Titus' tasks. (A19-20.) Fencak, using training he received from PGW on restructuring, forced rankings and termination decisions, based his decision on position, location and performance. (A19.)

SUMMARY OF ARGUMENT

Apart from Karlo's appeal of summary judgment entered on his disparate impact claim, Plaintiffs' appeal should be dismissed because this Court lacks jurisdiction over claims that were not perfected in the notice of appeal. Plaintiffs' further failure to identify their intention to appeal the district court's decertification order also deprives this Court of jurisdiction over that claim.

Beyond jurisdiction, the district court should be affirmed on the merits. Plaintiffs' straw-men arguments – that all rulings in this case turned on the over-50 subgrouping question and that the law of the case doctrine was violated – are baseless and should be rejected for the following three reasons, addressed in the same order as considered by the district court:

First, decertification was proper because the Named Plaintiffs were not similarly situated to any Opt-in. While all Named Plaintiffs were part of the same group, had similar positions, and worked for the same manager who included them in the March 2009 RIF, no Opt-in was similar. The Opt-ins had different job titles, duties, locations and, critically, decision-makers who used different procedures in selecting employees for the RIF.

Second, Plaintiffs' experts were properly excluded because their opinions failed to comply with the requirements of F.R.E. 702. Campion's statistical opinion was riddled with data manipulations and unreliable methodology that, at

best, revealed his bold attempt to mine the data to create statistical evidence and, at worst, revealed a willful attempt to mislead the court and, eventually, the jury. In either event, Campion's refusal to consider sufficient facts in his opinion and his refusal to adopt generally accepted statistical principles provided proper grounds for the district court to bar his testimony. Regarding Campion's HR opinion and Greenwald's implicit bias theory, the court also properly excluded them because the opinions lacked sufficient facts, failed to use reliable methodology and did not "fit" with the facts of this case. Greenwald admittedly did nothing to link his theories to this case. Likewise, Campion's HR opinion did little more than present general theories about HR best practices with no application to the case at hand. Because neither expert did anything specific related to this case, the district court properly barred the opinions for lack of "fit." At a minimum, the district court's careful consideration of the facts relied upon by the experts was a far cry from an abuse of discretion and those orders should be affirmed.

Third, the district court's entry of summary judgment on the Named Plaintiffs' age discrimination claims should be affirmed because they failed to present any remaining question of fact. Regarding the disparate treatment claims, Plaintiffs waived their appeal by failing to raise any argument in their opening brief. But even if an argument were presented, Plaintiffs were unable to present any evidence of a retained employee who was similarly situated and sufficiently

younger than any Plaintiff. For the disparate impact claims, Plaintiffs concede that, absent Campion's rigged statistical opinion, Plaintiffs presented no other evidence sufficient to withstand summary judgment regardless of whether or not the collective action was defined by a subgroup of older workers. Moreover, while the issues above present sufficient bases to affirm the district court's rulings, its rejection of subgrouping is in line with the reasoning adopted by every federal appellate court that has decided the matter and should be affirmed. Ruling otherwise would create an unworkable framework where employers would be faced with innumerable, impossibly difficult disparate impact analyses for any employment action involving workers over the age of 40; an outcome not suggested by the language of the ADEA.

ARGUMENT

I. Jurisdiction Only Exists Over Karlo's Individual Discrimination Claims.

A. Standard of review on jurisdiction.

Jurisdictional review is plenary. *United States v. Pelullo*, 178 F.3d 196, 200 (3d Cir. 1999). The Court must make an independent determination that it has jurisdiction over an appeal. *Papotto v. Hartford Life & Acc. Ins. Co.*, 731 F.3d 265, 269 (3d Cir. 2013). Where, as here, jurisdiction is lacking over certain claims and parties, the appeal for those claims and parties must be dismissed. *Id.*

B. The notice of appeal is deficient regarding other parties and claims.

FRAP 3 provides that a notice of appeal must "specify the party or parties taking the appeal" and "designate the judgment, order, or part thereof being appealed." FED. R. APP. P. 3(c). FRAP 4 provides that a notice of appeal must be filed "within 30 days ***after*** entry of the judgment or order appealed from." FED. R. APP. P. 4(a)(1)(A) (emphasis added). An appellant's failure to comply with these rules deprives this Court of jurisdiction and may not be waived, even for good cause. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). As the Supreme Court recently explained, "an unnamed party leaves the notice's intended recipients - the appellee and court - unable to determine with certitude whether that party should be bound by an adverse judgment or held liable for costs or sanctions" and, as a result, "[t]he party could sit on the fence, await the outcome, and opt to participate only if it was favorable." *Gonzalez v. Thaler*, 132 S. Ct. 641, 652 (2012) (internal quotation marks and citations omitted) *quoting, in part, Torres*, 487 U.S. at 318.

Here, the caption on the notice of appeal defined "Plaintiffs" as "Rudolph A. Karlo and Mark K., [*sic*] McLure." (A1.) The body of the notice then provided that "Plaintiffs ***in the above-captioned case***…" were appealing the October 2, 2015, order. (*Id*. (emphasis added).) Only Karlo and McLure, were specifically described in the notice and no other parties or orders were mentioned. *United*

States v. Carelock, 459 F.3d 437, 441 (3d Cir. 2006) (failing to name correct parties, among other deficiencies, deprived court of jurisdiction). While notice pleading requirements have been liberalized, there remains a minimum threshold Plaintiffs must – but did not – meet to perfect an appeal. *See Massie v. U.S. Dep't of Hous. & Urban Dev.*, 620 F.3d 340, 348 (3d Cir. 2010) (noting that appellants may use "et al" – not present on the notice in this case – to sufficiently describe all plaintiffs in notice of appeal). In the 30-days following the entry of final judgment, Plaintiffs made no other filing related to the appeal.[2] Thus, Karlo is the only remaining party with a perfected appeal.

Moreover, dismissed Opt-ins (Breen, Clawson, Shaw and Titus) were not named in ***any*** timely document. While Rule 3(c)(3) provides that in a "class action," notice is sufficient if it names one representative of the class, the instant case is not a class action and thus does not fall within this carve out. Rather, the instant case is a collective action, which the Supreme Court found "is not tantamount" to a class action. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013). As a result, the notice was not sufficient as to the four dismissed Opt-ins.

[2] On November 17, 2015 – 46 days after entry of final judgment – Plaintiffs filed an appearance and civil information sheet listing the three other Named Plaintiffs (Cunningham, Marietti and Meixelsberger). However, that filing cannot serve as the "functional equivalent" of a notice of appeal since it came more than 30 days ***after*** entry of final judgment. *Cruz v. Melendez*, 902 F.2d 232, 236 (3d Cir. 1990).

Because the Opt-ins are not parties to this appeal, there is no live case or controversy regarding their dismissal. (A3-A46.) Therefore, their challenge to the decertification order should be dismissed as moot. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013).

The notice also failed to specify that Plaintiffs were seeking review of the decertification order. Jurisdiction over unspecified orders only exists if: (1) there is a connection between the specified and unspecified order, (2) the intention to appeal the unspecified order is apparent, and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues. *Lusardi v. Xerox Cor.*, 975 F.2d 964 (3d Cir. 1992) (no jurisdiction over decertification order that was not mentioned in notice of appeal); *accord Rosillo v. Holten*, 817 F.3d 595, 597 (8th Cir. 2016). Here, as in *Lusardi*, there is no connection between (i) the decertification order and (ii) the order certifying the summary judgment ruling as final. Indeed, even the district court noted that Plaintiffs said "very little" about the decertification order in seeking entry of a final judgment. (A124.) As a result, Plaintiffs' intent to appeal the decertification order did not become apparent during the 30-day period following the entry of final judgment. Finally, PGW will be prejudiced because it has made litigation and settlement strategy decisions in reliance on the finality of the decertification order. For these reasons, the Court

should dismiss the appeal of all Plaintiffs, except Karlo, and should also dismiss Karlo's appeal of the decertification order.

II. The District Court Properly Decertified The Collective Action.

A. Standard of review on decertification.

Should the Court reach the merits of the decertification order, the district court's factual findings are reviewed for clear error. *Zavala v. Wal Mart Stores Inc.*, 691 F.3d 527, 534 (3d Cir. 2012) ("anticipat[ing] that certification decisions will typically be subject to review under the clear-error prong of this type of abuse of discretion review, as only fact-finding should be at issue"). Plaintiffs only challenge the district court's factual determination, not the legal standard that it applied. (Karlo Br. 31.) Thus, the deferential clear error standard is appropriate. 691 F.3d at 535; *see also Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) ("Clear error review is deferential"); *United States v. Richards*, 674 F.3d 215, 220 (3d Cir. 2012) (same). The district court's factual findings must stand so long as they are "plausible in light of the record viewed in its entirety" and this Court should not reverse even if "it would have weighed the evidence differently." *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 345 (3d Cir. 2013).

Ignoring binding authority that is directly on point, Plaintiffs propose a plenary standard. (Karlo Br. 30-31.) Plaintiffs are wrong. Where, as here,

Plaintiffs challenge decertification based on the facts in the record, *Zavala* requires review for clear error. 691 F.3d at 535.

B. The District Court's determination that Plaintiffs are not similarly situated is not clearly erroneous.

To maintain certification of a collective action, plaintiffs must prove they are similarly situated by a preponderance of the evidence. *Zavala*, 691 F.3d at 537. The district court correctly concluded that Plaintiffs did not meet that burden. (A36.) Plaintiffs cannot establish clear error by the district court. (Karlo Br. 34-35.) Instead, Plaintiffs argue that two non-binding decisions, *Owens v. Bethlehem Mines Corp.*, 108 F.R.D. 207 (S.D. W. Va. 1985) and *Hyman v. First Union Corp.*, 982 F. Supp. 1 (D.D.C. 1997) require certification any time a case concerns a RIF. (Karlo Br. 33-34.) To the contrary, the occurrence of a RIF, in and of itself, does not render plaintiffs similarly situated. *See Mueller v. CBS, Inc.*, No. 99-1310 (W.D. Pa. Dec. 9, 2002) (attached at Dkt. 289-1); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D. N.J. 1987); *Koren v. Supervalu, Inc.*, No. 00-1479, 2003 WL 1572002, at *16 (D. Minn. Mar. 14, 2003); *cf. Jarosz v. St. Mary Med. Ctr.*, No. 10-3330, 2014 WL 4722614, at *7-8 (E.D. Pa. Sept. 22, 2014) (decertifying collective action based on disparate employment settings and decentralized implementation of challenged policy). The decertification ruling here should be affirmed because the district court applied the standard set forth in *Zavala* and

properly determined that the distinct nature of the facts relating to the Opt-ins and Named Plaintiffs rendered them not similarly situated.

1. The district court correctly relied on binding and persuasive precedent.

Plaintiffs seek to abolish the Third Circuit's well-established, two-tiered approach to collective action certification. *Zavala*, 691 F.3d at 536. Under this approach, at the initial conditional certification stage, plaintiffs need only make a "modest factual showing" that proposed notice recipients are similarly situated. *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1523 (2013). At final certification or decertification, however, plaintiffs must establish by a preponderance of the evidence that the opt-ins are in fact similarly situated to the named plaintiffs. *Zavala*, 691 F.3d at 537.

Plaintiffs' argument that *Zavala* and related FLSA certification cases are "inapposite" is absurd. (Karlo Br. 35.) Plaintiffs ignore that the ADEA expressly incorporates the FLSA's collective action mechanism. 29 U.S.C. §626(b); *Zavala*, 691 F.3d at 534, n. 3 (noting the "use [of] FLSA and ADEA cases interchangeably, as the ADEA imports by reference the collective action provision and 'similarly situated' standard of the FLSA"). Courts in this Circuit recognize that FLSA final certification decisions are not only on point, they are binding precedent. *See Aquilino v. Home Depot, U.S.A., Inc.*, No. 04-04100 PGS, 2011 WL 564039, at *8-11 (D.N.J. Feb. 15, 2011) (decertifying collective action) (relied on by district

court and unchallenged by Plaintiffs on appeal); *Lugo v. Farmer's Pride Inc.*, 737 F. Supp. 2d 291, 316 (E.D. Pa. 2010) (same).

Moreover, Plaintiffs fail to meaningfully distinguish *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *Kuznyetsov v. W. Penn Allegheny Health Sys., Inc.*, No. 10-948, 2011 WL 6372852 (W.D. Pa. Dec. 20, 2011); and *Martin v. Citizens Fin. Grp., Inc.*, No. 10-260, 2013 WL 1234081 (E.D. Pa. Mar. 27, 2013), which all support that decertification is appropriate where, as here, there are "substantial variances among plaintiffs' day-to-day job duties and employment settings..." (A38.) As discussed above, the district court concluded that the Named Plaintiffs and Opt-ins held various job titles and duties, worked at different plants, were subject to decentralized decisions by diverse managers for inclusion in the RIF, and would be subject to individualized defenses. (A36-38.) The challenged cases all present scenarios where decertification was appropriate because of such differences.

Plaintiffs also ask this Court to ignore *Zavala* in favor of dated, inapposite Eleventh Circuit decisions that do not apply a two-tiered approach to certification: *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) and *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). Both are distinguishable because, in those cases, unlike here, "all [plaintiffs] held the same job title." 79 F.3d at 1219. Moreover, in *Hipp*, the Eleventh Circuit recognized that "[i]t may have been

prudent for the district court […] to have decertified" because the plaintiffs were not similarly situated. *Id.* The Eleventh Circuit nevertheless affirmed certification, using a deferential "abuse of discretion" standard – which, strikingly, Plaintiffs here reject. (Karlo Br. 30-31.) Because this Circuit has conclusively adopted a two-tiered approach, *Hipp* and *Grayson* are inapposite. *See Zavala*, 691 F.3d at 536.

Plaintiffs finally make an irrelevant argument, claiming *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), limits the reach of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). This is untrue and, for this case, inapplicable. First, *Tyson Foods* expressly found its holding "is in accord with *Wal-Mart.*" 136 S. Ct. at 1048. Second, the district court did not rely on *Wal-Mart* to decertify the collective action. (A3-A43.)

2. The district court's factual determination that the Plaintiffs are not similarly situated was well-supported by the record.

Here, the district court correctly determined that the Named Plaintiffs and Opt-ins were not similarly situated for a number of reasons: (1) the Named Plaintiffs, who all worked at PGW's Harmarville facility, were not "similarly situated" to the Opt-ins, all of whom all worked at different plants in different positions (A36); (2) the nine putative Plaintiffs held "seven different titles with varied job duties in two separate divisions of PGW and across five locations in which no less than six decision-makers independently included them in the RIF"

(*id.*); (3) "the RIF deficiencies cited by Plaintiffs varied from manager to manager and location to location" (A37); and, (4) PGW's individualized defenses would vary for each Plaintiff, such that "representative testimony would do little to streamline this action." (*Id.*; *see also* A639-655.)

While Plaintiffs characterize the record as including "nine plaintiffs with *some* individualized evidence," the district court found "substantial dissimilarities between the [Named Plaintiffs] and Opt-in[s]." (*Compare* Karlo Br. 35 (emphasis added) *with* A37.) Here, the record amply supports that the RIF was conducted on a decentralized basis, with individual managers and departments developing their own procedures and criteria. The record further supports that the Opt-ins worked at different plants/departments and in different positions from the Named Plaintiffs. They also were subject to different decision makers' processes. The district court did not commit clear error in finding the Named Plaintiffs and Opt-ins are not similarly situated.

Plaintiffs misrepresent the record and argue that PGW failed to use "RIF guidelines that had previously been in place in the organization." (Karlo Br. 39.) This is simply not true. PGW formed only months before the RIF and had no previous RIF guidelines. (Dkt. 307-1 at 12-13.) Instead, PGW did not use its predecessor company's RIF guidelines. (Dkt. 307-1 at 12-13.) Importantly, the district court considered these facts and concluded that individual managers were

given discretion to select employees for inclusion in the RIF and that they did not use a uniform policy, whether a RIF guideline or otherwise. (A37.) The district court decided that the facts, as a whole, were "not sufficient to bind the collective together in light of the substantial dissimilarities between the Representative and Opt-in Plaintiffs." (A37.) This finding is not clearly erroneous.

Moreover, Plaintiffs' argument – that PGW had a uniform policy not to employ a policy – does not work. First, a uniform policy, in and of itself, is not generally sufficient to prove that Plaintiffs are similarly situated at the final certification stage. *See, e.g.*, *Aquilino*, 2011 WL 564039, at *11 ("evidence that an employer uniformly classified a position as exempt is not enough, in and of itself, to prove that plaintiffs are similarly situated for an FLSA collective action"); *Bamgbose v. Delta-T Grp., Inc.*, 684 F. Supp. 2d 660, 668 (E.D. Pa. 2010) (finding plaintiffs not similarly situated despite "uniform classification of the workers").

Nonetheless, Plaintiffs posit that the "single policy" here was the lack of a uniform policy. It defies logic to argue that the absence of a uniform policy could render plaintiffs similarly situated when, as discussed above, even the existence of a uniform policy alone would be insufficient. This is especially true, where, as here, the decision-makers at issue did not employ a single policy. Indeed, all of the Named Plaintiffs worked in the same group at Harmarville and were selected for inclusion in the RIF by Cannon, who based his decision on the continuing needs of

his department. (A11-12.) On the other hand, the Opt-ins worked in different locations doing different jobs and were subject to different decision-making for the RIF. (A17-A20.) Based on these facts, the district court correctly concluded that the Opt-ins are not similarly situated to the Named Plaintiffs. This finding is not clearly erroneous.

3. The law of the case doctrine is irrelevant to decertification.

Plaintiffs argue that the "law of the case" doctrine was violated because the district court "applied the same facts to the same law as Judge Fischer and made the opposite finding." (Karlo Br. 30.) Not so. Judge Fischer's conditional certification ruling was just that: ***conditional***. Both Judge Fischer and the Plaintiffs acknowledged as much. (A628; Dkt. 195 at 9; Dkt. 201 at 2-3.) Where a conditional certification order "expressly contemplates the possibility of later decertification," the law of the case doctrine does not prevent later decertification. *Lusardi v. Lechner*, 855 F.2d 1062, 1072 (3d Cir. 1988) (rejecting Plaintiffs' same argument and finding "no clear conflict or unwarranted re-examination" of conditional certification order by later decertification order). Here, the conditional certification was expressly "tentative" and subject to reexamination. (A172-173.)[3] Plaintiffs conceded the district court would "have the opportunity to conduct

[3] The district court later reiterated it had "ruled only that Plaintiffs are entitled to provide notice and take discovery as to the putative class. It has not made a final ruling on certification, and will not do so until discovery is complete with respect to the putative class." (A628.)

complete review of its preliminary and conditional certification of the class at the decertification stage, and [ ] its decision is by no means final." (Dkt. 195 at 9.) The law of the case doctrine has no application here.

And even if the law of the case doctrine were considered, the conditional certification order specified only that "Plaintiffs have made an adequate showing of similarity to surpass the relatively low hurdle of conditional certification […] this does not mean Plaintiffs have satisfied the ultimate burden they will face in achieving certification of this representative action. […] ***At present, the evidence is far from sufficient to carry the final burden***." (A172 (emphasis added).) Ironically, Plaintiffs concede on appeal that post-certification, "[d]iscovery…did not adduce ***any facts*** critical to whether the collective action should have remained certified that were not already developed during the pre-conditional certification round of discovery." (Karlo Br. 27 (emphasis added).) Thus, decertification was proper because Plaintiffs admit they failed to adduce any evidence – after more than sixty depositions – of additional facts critical to whether Plaintiffs were similarly situated.

III. The District Court Properly Excluded Plaintiffs' Experts.[4]

A. Standard of review regarding exclusion of experts.

A district court's examination of the admissibility of expert testimony under F.R.E 702 "turns on (1) the qualifications of the expert, (2) the sufficiency of the data underlying the expert's testimony, (3) the reliability of the expert's methodology, and (4) the expert's application of that methodology to the facts of the case." *Anders v. Puerto Rican Cars, Inc.*, 409 F. App'x 539, 542 (3d Cir. 2011) *citing* FED. R. EVID. 702. Where, as here, the district court correctly identified the factors for expert admissibility, application of those factors is reviewed for abuse of discretion. *Pritchard v. Dow Agro Sciences*, 430 F. App'x 102, 103 (3d Cir. 2011); *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 750 (3d Cir. 1994).

Plaintiffs claim that the district court's decision barring Campion's testimony on statistics is somehow special and subject to a *de novo* review. Not so. Even the case Plaintiffs cite, *Pritchard*, holds that the district court's exclusion of an expert opinion, like those excluded here, is "reviewed for abuse of discretion." 430 F. App'x at 103. Indeed, a district court's determination that an expert's "methodology and proposed testimony [was] unreliable and thus inadmissible" is

[4] Should the Court affirm the decertification and summary judgment opinions, it need not address the district court's exclusion of Greenwald and Campion's social science opinions as those decisions had no bearing on either decertification or summary judgment.

"an evidentiary ruling, separate and distinct from . . . any substantive question." *Id.* And while this Court should take a 'hard look' to see if the district court abused its discretion if an "exclusionary evidentiary ruling with respect to scientific opinion testimony will result in a summary or directed judgment," the review remains for abuse of discretion. *Paoli*, 35 F.3d at 750.

B. Campion's statistical opinions were properly barred.

Plaintiffs' argument regarding the district court's exclusion of Dr. Michael Campion's statistical opinion is based on a demonstrably false proposition. Contrary to their argument, the district court ***did not*** "exclude[] Campion's statistical analysis based . . . on a legal interpretation" or on the issue of whether or not "employees fifty and older cannot bring ADEA disparate impact claims, absent statistically significant disparate impact on employees forty and over." (Karlo Br. 19.) Rather, the district court held that Campion's opinion did not meet the standards of F.R.E. 702 because his report was based on insufficient and unreliable data and methodologies. (A70-71.) Plaintiffs ignore the district court's actual basis for barring Campion, and instead attempt to manufacture a fictitious legal question that would be subject to a more favorable standard of review.

Applying the correct "abuse of discretion" standard, the district court's decision should be affirmed because it properly barred Campion from presenting

testimony regarding his statistical analysis of PGW's March 2009 RIF[5] for two reasons (both under F.R.E. 702): (1) his analysis "is not based on sufficient data," and (2) "[his] methodology is not reliable." (A70.) Plaintiffs provide virtually no basis for reversing that ruling. Instead, they focus on determinations the district court did not make, like whether or not Campion was qualified to give a statistical opinion.[6] (Karlo Br. 22-24.)

Analyzing the actual rulings – insufficient data and unreliable methodology – the district court was well within its discretion. The order barring Campion should not be disturbed for at least three reasons: (i) Campion manipulated data and ignored relevant uncontested facts about that data in an attempt to rig his conclusions to benefit Plaintiffs; (ii) he refused to apply generally accepted statistical procedures; and (iii) his analysis was irrelevant and only considered the entire population of employees affected by the March 2009 RIF – not the Named Plaintiffs' Manufacturing Technology group. (A67.) Based on these

[5] Campion also submitted five other analyses, Analyses 2-6, but Plaintiffs concede those analyses "are not subject of this appeal" and, thus, PGW does not address the district court's proper decision to bar those analyses. (Karlo Br. 20, fn. 3.)

[6] The district court, for purposes of its decision, assumed that Campion was qualified. (*See* A70.) Plaintiffs' focus on qualifications is a complete non-sequitor. While PGW maintains its challenges to Campion's qualifications, because that was not a basis for the district court's ruling, PGW does not address it and reserves its rights.

determinations, the district court's decision to bar Campion's statistical opinion should be affirmed.

1. Dr. Campion's statistical analysis was not based on sufficient data.

The district court determined that Campion's analysis was not based on sufficient data because, "Campion included [terminated employees] as remaining with PGW after March 31, 2009 and relie[d] on the erroneous DUM rather than the Agreed Data Set." (A70; A459-460.) Nonetheless, Plaintiffs argue that "[t]he second factor under Rule 702 – regarding the sufficiency of the data – is satisfied because the parties stipulated to the data-set." (Karlo Br. 24.) This conclusory statement essentially concedes that the Court was within its discretion. Plaintiffs boldly ask this Court to ignore the district court's determination that Campion engaged in data manipulation when he refused to properly consider undisputed facts. (A70; A631-633.) That refusal properly resulted in exclusion of his opinion.

The district court was well within its discretion because Campion knowingly miscategorized workers' demographic data to falsely create a data set with a younger workforce remaining after the March 2009 RIF. (A459-460.) First, it is important to understand the demographic data that the parties agreed to use in this matter. As the district court explained:

> At the time of the RIF, PGW distributed with its severance documents a decisional unit matrix ("DUM") […] that listed employees' job titles and birth date. In order to match employees to the DUM the parties

> sought and received personnel records that were in control of non-party PPG, which continued to provide PGW with payroll system services under a then-existing transition agreement. The payroll data did, however, demonstrate errors in the DUM: certain individuals listed in the DUM were not in fact terminated; others were not included in the RIF but were subject to PGW's earlier decision to close a plant in Evart, Michigan (the "Evart Terminees"). Ultimately, the parties developed an agreed upon dataset for the March 2009 RIF.

(A65.) Though the parties arrived at an agreed upon data set, that set included *all potentially relevant* demographic data, it also included qualitative information so that both parties' experts would be able to evaluate and sort the data and correct the demonstrable errors in the DUM. (A631-633.) Campion ignored critical facts contained in that data, including that 18 individuals whose demographic data was included in the spreadsheet and the DUM had been terminated, not as part of the RIF but as part of an earlier plant closing in Evart, Michigan, their role at the company ended on March 31, 2009, and they did not remain with PGW after the March 2009 RIF. (A631-633; Dkt. 381-5 at 3-22.) Campion even admitted he was aware of these facts, but he did not consider them in his statistical analysis. (Dkt. 381-5 at 5-10.) Campion's overt refusal to properly classify those employees skewed the data to favor Plaintiffs' theory of the case.[7] (A459-460.) The district

[7] The district court did not engage in a battle of the experts and did not rely on PGW's experts in its ruling. But, PGW did present in the record the opinions of Dr. James Rosenberger, a Pennsylvania State University statistics professor. (Dkt. 381 at 11; A371, A384.) Rosenberger used Campion's same data set, but properly classified the 18 individuals terminated from Evart. (Dkt. 381 at 8; A372; A454-457.) Conducting the same statistical analysis as Campion over the properly

court barred Campion's testimony, in pertinent part, because of his data manipulation and refusal to consider sufficient facts. (A70.)

It is axiomatic that the district court has discretion to bar experts who ignore the facts of the case in forming their opinions. *See Pritchard*, 430 Fed. App'x at 104-5 (finding that the district court "was also on firm ground when she deemed unreliable [the expert's conclusion] that was not supported by evidence . . ."). Moreover, this Court has held that an expert's failure to properly consider the evidence in forming his conclusion, like Campion's failures here, warrants exclusion. *In re TMI Litigation*, 193 F.3d 613 at 688 (3d Cir. 1999), *quoting Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (upholding district court's exclusion of expert testimony and stating, "a reliable methodology 'cannot sanitize an otherwise untrustworthy conclusion.'"); *see also Heller*, 167 F.3d at 158-59 (upholding exclusion of expert because he ignored contrary evidence regarding temporal relationships and did not "reliably follow from the facts known to the expert.") The district court's determination that Campion failed

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classified set, Rosenberger found that there was no statistically significant evidence of disparate impact for any age subgroup. (A374-375, 382; A454-457.) Importantly, Rosenberger's assessment for a properly categorized data set finds no statistically significant evidence even if, as in Campion's analysis, generally accepted statistical methods (*i.e.* a correction to account for multiple tests on different slices of the same population such as the Bonferroni procedure) are not applied. (Dkt. 381 at 9; A377-379, A457.)

to consider the proper data alone is sufficient to bar his testimony and is within the court's discretion.

2. Campion's statistical methodology is unreliable.

Even assuming Campion used proper data and took into account the undisputed facts (which would have resulted in a finding that there was no statistically significant evidence of age discrimination, *infra* at fn. 7), his analysis was properly barred because he did not utilize generally accepted statistical methods. (A71.) Specifically, as the district court explained, Campion's analysis failed to use proper statistical procedures in at least two ways: first, "[he] relies on the 'four-fifths rule,' the reliability of which has been criticized; and, second, "[he] also offers a z-score approach [where he] claims to find evidence of disparate impact in older subgroups despite not finding any statistical significance in the base forty-plus age-group analysis . . . [and] does not apply any of the generally accepted statistical procedures (*i.e.*, the Bonferroni procedure) to correct his results for the likelihood of a false indication of significance." (A71.) The district court's assessment that these methods were unreliable was well within its discretion under F.R.E 702.

Barring Campion based on his use of the "four-fifths rule" was consistent with established precedent. "The '80 percent rule' or the 'four-fifths rule,' has come under substantial criticism, and has not been particularly persuasive, at least

as a prerequisite for making out a prima facie disparate impact case." *Stagi v. Nat'l R.R. Passenger Corp.*, 391 Fed. App'x 133, 138 (3d Cir. 2010). Thus, courts recognize that statistical tests should be used rather than mere reliance on the 4/5 Rule, particularly where – as is the case here – the group's population is small. *See Spence v. City of Philadelphia*, No. Civ. A. 03-CV-3051, 2004 WL 1576631, *9-10 (E.D. Pa. 2004) (collecting cases).

Recognizing the unreliable nature of the 4/5 Rule, Campion presented his own version of a z-score approach purporting to analyze the impact of the RIF on workers at age cutoffs other than age 40. He divided his analysis into four subgroups of 40+, 45+, 50+ and 55+ (but curiously not 60+, etc.). (Dkt. 381 at 4, 15; Dkt. 381-8 at 9.) Thus, Campion subgroups a single population and tests various hypotheses against that group. As the district court found, "[t]hat sort of subgrouping "analysis" is data-snooping, plain and simple." (A71.) Critically, Campion failed to provide any generally accepted statistical basis supporting use of the subgrouping methods he applied. In fact, Campion's own cited authority confirmed such an analysis was not appropriate because it did not include a method of correcting the analysis to account for the multiple tests of the same population. (Dkt. 381-16 at 3-4; Dkt. 381-8 at 9.) Moreover, in another case, Campion himself opined that subgrouping is an inappropriate method to use in testing discrimination. *See Brand v. Comcast Corp., Inc.*, 302 F.R.D. 201, 209 (N.D. Ill.

2014) (quoting Campion as stating, "[b]reaking down the . . . analysis into [smaller subgroups] reduces the sample size to the point where they have limited ability to detect . . . differences (*i.e.* they have low statistical power).") Campion, nonetheless, ignores the established statistical sources he purports to rely on and breaks with his own prior opinion to present an unreliable subgroup analysis.

Campion and Plaintiffs claim this analysis is appropriate because he "was testing the hypothesis that because age is a continuous rather than dichotomous variable, the likelihood of discrimination increases with age over 40." (Karlo Br. 26.) That argument is completely baseless. Initially, the decision to test the continuum of age, in and of itself, requires testing several hypotheses on the same dataset – *i.e.* data snooping. Specifically, it requires in this example, testing at least four separate hypotheses, 40+, 45+, 50+ and 55+. Proper statistical analysis requires a correction when conducting multiple testing of the same data set. (Dkt. 381 at 11-13; A456-458; A463-466.)

Most strikingly, however, Campion quits his analysis for 60+ and never provides analysis of what effect the RIF had on employees 60 and older. Stopping his analysis short at 55+ completely undercuts the argument that Campion was simply testing the hypothesis that "discrimination increases with age over 40" because he stopped performing the analysis once he found what he wanted. Analysis of the 6+0 subgroup reveals, contrary to Campion's "hypothesis," that

there is no statistically significant evidence of age discrimination for 60-and-older employees. (Dkt. 381 at p. 4; A376-382; A454-457.) Campion claims he did not analyze the 60+ group because the sample size was too low but provides no generally accepted statistical basis for that conclusion. (Dkt. 381-4 at 8.) He simply decided not to run the numbers and presents his *ipse dixit* conclusion. It appears, however, the real reason Campion refused to present any over-60 analysis is that it disproves his theory and demonstrates more clearly the dangers data-snooping. The district court was well within its discretion to bar that unreliable approach.

3. Campion's statistical analysis was also properly barred because it is irrelevant to any Named Plaintiff's claim.

After the district court decertified, Campion's statistical analysis of all individuals employed by PGW and those selected for job termination in the March 2009 RIF was rendered irrelevant. The remaining five Plaintiffs were employed at the same location and part of the same business group. (A639, ¶17.) They also reported to the same supervisor, Cannon, who made the decision to include each of the remaining Plaintiffs in the RIF. (*Id.*; A642-644, ¶¶30-36.)

Campion, however, never conducted a statistical analysis of that specific group. Instead, he only considered the statistical impact of the entire companywide RIF. (Dkt. 381 at 4, 12.) Thus, Campion failed to provide any statistics that would be relevant to the question of whether or not Cannon's

decisions resulted in statistically significant evidence of discrimination.[8] This failure presents a separate, proper basis for barring Campion's analysis.

4. No *in limine* hearing was required to bar Campion's statistical opinions.

Plaintiffs further argue that the district court erred by not holding an *in limine* hearing regarding Campion's statistical analysis. That argument is completely unsupported here, where the Court was presented with a full record, including several stages of fact statements and briefing after the close of fact and expert discovery. Critically, the parties' fact statements and briefing included all of the information the court needed to make a fully informed decision on the experts. Both parties' experts presented opening and rebuttal expert reports and participated in depositions that were transcribed and presented to the court. No additional hearing was necessary.

Plaintiffs' entire argument relied on this Court's holding in *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999). But Plaintiffs' attempt to extend that case to one with a complete record – like here – has been expressly rejected by this Court. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 154 (3d Cir. 2000); *Henry v. St.*

[8] It also would have been fruitless for Plaintiffs to present an analysis of the ages of individuals in the Manufacturing Technology group because, even if Campion had analyzed that relevant group, analysis would reveal that the average age of employees in the group barely changed as a result of the RIF and that people over the age of 55 actually benefited, increasing from 37% or the group to 38%. (A640, ¶¶20-21.)

Croix Alumina, LLC, 572 Fed. App'x. 114, 119 (3d Cir. 2014). In *Henry*, this Court quoted its own language from *Padillas* stating "[a]n in limine hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests with the sound discretion of the district court." 572 Fed. App'x at 119 *quoting Padillas*, 186 F.3d at 418. "A hearing is not required where the District Court is presented with a full record." *Id. citing Oddi*, 234 F.3d at 154. This Court explained, "the record in this case is immense and was entirely before the District Court when it ruled on the expert testimony. Plaintiffs do not explain how a hearing would have benefitted them, except to say that the Court should have given the []experts an opportunity to address its concerns." *Id.* (internal quotation marks removed). There is nothing different here. The record in this case is likewise immense and was entirely before the district court. Plaintiffs do not provide a single detail supporting the notion that any necessary information was not available to the district court for its *Daubert* ruling.

C. Greenwald's implicit bias opinion was properly barred.

Plaintiffs erroneously argue that the district court erred in excluding the opinion of Dr. Anthony Greenwald and that in doing so, it imposed an unworkable standard for experts. The district court, however, did not rely upon a new or unworkable standard; rather, it conducted an in-depth analysis of Greenwald's opinion, including the data and methods relied upon. The district court faithfully

performed its "gatekeeper" role and carefully subjected Greenwald's opinion to the requirements of Rule 702 and applicable Third Circuit standards. Based on this comprehensive analysis, the court ultimately concluded that Greenwald's opinion is not based on sufficient facts, is not reliable, and would not assist the fact finder in resolving an issue in this case. (A60.)[9] That ruling can in no way can be viewed as an abuse of discretion.

1. Greenwald's opinion is not based on sufficient facts or data.

Plaintiffs offered Greenwald to provide an opinion "'in the area of social psychological research on attitudes, prejudices, and stereotypes . . .'" (A52.) Greenwald's report is premised on his own invented research method – the Implicit Association Test ("IAT") which purportedly "infers the strength of mental association that links a social category (such as race, gender, or age group) with a trait (i.e., a stereotype) from testing procedures that are influenced by those associations in a manner not discerned by the respondents." (A405-406.) Greenwald's opinion was offered to "determine whether Plaintiffs' ages substantially motivated the defendants' [sic] actions…" (A52.)

[9] Plaintiffs claim that the district court found Greenwald was a qualified expert in his field. However, the district court opinion is silent on that point. (A60-63.) Because Plaintiffs do not offer any substantive argument on this subject, PGW simply states that it opposes Greenwald's qualifications and reserves its rights. (*See* Dkt. 380 at 4.)

The district court correctly concluded that Greenwald's opinion is not based on sufficient facts or data. (A60-61.) Greenwald did not speak with any current or former PGW employees nor did he interview the managers who took part in the RIF in question or subject any of those individuals to his self-invented IAT. (A60.)

Moreover, the district court determined that Greenwald failed to perform an independent or objective analysis, instead relying solely on deposition excerpts, and one full deposition transcript, all of which were selected by Plaintiffs' counsel to the exclusion of other relevant materials. (A60.) This critique does not, as Plaintiffs' suggest, create an unworkable expert framework in complex cases. Rather, the district court noted that an expert must perform an independent and reliable analysis based on available facts and information and not merely rely upon information cherry-picked by a litigant. (*Id.*) *See EEOC v. Bloomberg L.P.*, No. 07 CIV. 8383 LAP, 2010 WL 3466370, at *14 (S.D.N.Y Aug. 31, 2010) (relying solely on information fed by a litigant and not independently verifying the information undermines the reliability of an expert analysis); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 CIV. 8272 (RPP), 2003 WL 22124991, at *3 (S.D.N.Y. Sept. 15, 2003) (a litigant and its counsel have an interest in litigation and an expert should not be dependent on the information they supply). The district court also highlighted the fact that Greenwald "filtered his analysis through

the lenses of Campion's purported 'expert appraisal of the deposition material he examined.'" (A60.) In other words, Greenwald accepts at face-value Campion's erroneous conclusion that the statistics support a finding of age discrimination and in so doing, blindly assumes the existence of discrimination. That analysis ignores relevant facts and was properly barred. The district court did not abuse its discretion in concluding that Greenwald's opinion was not based on sufficient facts or data.

2. Greenwald's methodology is unreliable.

The district court also correctly concluded that Greenwald's methodology was unreliable. The court found Greenwald "cannot establish that his publicly available test was taken by a representative population – let alone any person or the relevant decision-makers at PGW." (A61.) Instead of analyzing the employment decisions at issue in the case, Greenwald merely cites to various publications and his own IAT. None of the PGW decision-makers took the IAT or have any discernible connection with the generalized social research cited by Greenwald. (Dkt. 380-3 at 6-7.) Greenwald's opinion only assumes that his general conclusions from the IAT would also apply to PGW. (Dkt. 380-3 at 5 and 15 (Greenwald Dep. ("Q: However, it was very clear to me in my questioning of you that you had not arrived at any conclusions regarding whether or not age discrimination actually occurred in this case. A: I was not asked to do that. I did

not try to do it.")).) Moreover, the district court correctly found that Greenwald failed to show that the IAT data is not skewed by those who self-select to participate or is otherwise subject to appropriate controls. (A61.) Based on this analysis, Plaintiffs cannot establish that the district court abused its discretion in excluding this opinion.

Plaintiffs also argue that Greenwald's methodology is "widely used in the field and validated by laboratory research studies…" (Karlo Br. 50.) Not so. Far from "widely used," Greenwald identifies only three studies using the IAT as a measure of implicit bias, and none of those studies relate to a RIF scenario or have any other relation to PGW's employment decisions in this case. (Dkt. 380-3 at 9-14; A414-415 at ¶27, n.3.) Greenwald and Plaintiffs' reliance on these studies does not establish that Greenwald's methods are reliable for application in ***this*** litigation. The district court correctly found that Greenwald's "IAT still says nothing about those who work(ed) at PGW." (A61.)

3. Greenwald's opinion does not assist the fact finder.

Finally, the district court correctly determined that Greenwald's opinion would not assist the trier of fact. (A61-62.) Indeed, the district court concluded that Greenwald's opinion did not "fit" given the "'substantial disconnect' between the abstract principle from which his general principle is derived and the facts of this case…." (A61-62.) The district court went on to explain that Greenwald's

opinion is actually more likely to *confuse* a jury or fact finder because, under a disparate impact theory of discrimination, evidence of implicit bias makes little sense given that motive is ***not*** at issue. (A63.) Greenwald's opinion also does not "fit" because, as the district court noted, Greenwald applied the wrong causation standard ("substantially motivated" versus the correct "but for") and this also could lead to jury confusion. (A62.) The district court, therefore, was well within its discretion to prevent Plaintiffs' attempts to use Greenwald's theories.

4. Plaintiffs' discussion of other cases involving Greenwald is irrelevant.

Plaintiffs devote a significant portion of their argument to a discussion of other published decisions barring Greenwald's expert testimony. (Karlo Br. 52-54.) Plaintiffs' argument, however, is irrelevant because the district court conducted its own analysis of Greenwald's opinion in this case, performing its "gatekeeper" role in accordance with the requirements developed in this Circuit and as detailed above. Moreover, the district court carefully considered opinions both admitting and excluding Greenwald's opinions. (A56-59.) Ultimately, the district court made a factual conclusion that the present case was similar to *Jones v. Nat'l Council of Young Men's Christian Associations of Unites States of Am.*, 34 F.Supp.3d 896, 899-900 (N.D. Ill. 2014) because in both cases Greenwald's opinion and testimony were not tied to the facts of the particular case. (A58, citing *Jones*, 34 F. Supp. 3d at 900.) The district court's assessment was correct.

D. Dr. Campion's HR practices opinion was properly barred.

Plaintiffs argue that the district court erred in excluding Campion's expert report on "reasonable human resources practices." Campion's HR practices report is essentially a list of idealized personnel practices in no way connected to this case. (A74.) The scope of Campion's HR opinion is, according to his own description, to determine whether PGW's "procedures conformed to reasonable HR principles and procedures for conducting RIFs based on the research and practice literature in HR." (A258.) Like with Greenwald, the district court conducted a careful analysis pursuant to Rule 702, as well as applicable Third Circuit standards, and ultimately concluded that Campion's HR practices opinion is unreliable, irrelevant, and unhelpful for the fact finder. (A74-75.)[10]

1. Campion's HR opinion is irrelevant and unhelpful for the fact finder

Campion's HR practices report is simply a list of twenty proposed "reasonable HR practices" for conducting a RIF; Campion suggests that PGW's failure to follow his list may, just *may*, give rise to the possibility that discrimination occurred. (A261-263.) He offers no opinion about causation in this case and does not opine as to what would have happened if PGW had followed his

[10] Plaintiffs claim that the district court conceded that Campion was qualified as to reasonable HR practices. The district court, however, made no such concession and did not address the adequacy of Campion's qualifications. (A63-75.) PGW does not concede Campion's qualifications and reserves its rights. (*See* Dkt. 382 at 5-8.)

idealized "reasonable HR practices" in conjunction with the RIF. (Dkt. 382-5 at 15-30 (Campion Dep. at 83-84, 99-100, 103-107); A261-263.) Campion even admits that he is unaware of any company that actually follows his "reasonable HR practices." (Dkt. 382-5 at 17-18 (Campion Dep. at 91-92).)

The majority of Campion's statements are merely *ipse dixit* conclusions and, thus, insufficient under F.R.E. 702. *See Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 157 (1999) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert") (internal citation omitted). At best, Campion's opinion is nothing more than a highly-prejudicial "untested hypothesis," which should be barred. *EEOC v. Wal-Mart Stores, Inc.*, No. 6:01-CV-339-KKC, 2010 WL 583681, at * 4 (E.D. Ky. 2010). In light of these factors, the district court concluded that Campion's opinion "sheds no light on the relationship between the alleged failures in the RIF and the impact on the remaining Plaintiffs, despite Plaintiff's inconsistent statements to the contrary." (A74.)

The district court not only conducted its own analysis, but its opinion is consistent with other cases excluding virtually identical HR practices reports. For instance, *Powell v. The Dallas Morning News L.P.*, excluded Campion's testimony about his reasonable HR practices in an ADEA disparate impact case related to a

RIF. 776 F. Supp. 2d 240, 2470 (N.D. Tex. 2011), *aff'd,* 486 F. App'x 469 (5th Cir. 2012). (*See also* A74.) In *Powell,* the court noted that Campion's "reasonable HR practices" are irrelevant under the ADEA. 776 F. Supp. 2d at 242, 266 (finding that Campion's "reasonable HR practices" did not rebut defendant's reasonable factor other than age defense). The district court also cited *Richter v. Hook-SupeRx, Inc.*, 142 F.3d 1024, 1032 n.4 (7th Cir. 1998), where the Seventh Circuit opined that a district court "adequately considered and rejected the testimony of [ ] Campion, who stated that the subjective decision-making process used provided the 'perfect atmosphere' for age stereotyping." Given that the district court here conducted its own analysis ***and*** considered well-reasoned decisions from other federal courts, Plaintiffs' claim that the district court's conclusion to exclude Campion was an abuse of discretion should be rejected.

2. Campion's HR opinion is unreliable.

The district court also concluded that Campion's HR opinion was unreliable. As with its consideration of Greenwald, the district court noted that Campion did not conduct his own analysis of the case at hand, rather he "reviewed deposition excerpts selected by and provided to him by counsel for Plaintiffs and applied those factual snippets to an untested hypothesis." (A.75.) The district court's bar of Campion's analysis as unsupported by an independent inquiry does not, as Plaintiffs suggest, create an unworkable standard. Instead, the district court merely

fulfilled its "gatekeeper" role in insuring the expert's opinion is reliable. *Bloomberg, supra*; *Rowe, supra*.

Moreover, Campion's reliance on the 20 "reasonable HR practices" was prepared solely for use in litigation – such a list exists nowhere in a single source outside of Campion's reports. As a result, the opinion is separately unreliable and should be excluded. *See, e.g., Mike's Train House, Inc. v. Lionel, L.L.C.,* 472 F.3d 398, 407-08 (6th Cir. 2006) (excluding as unreliable expert testimony created for the purposes of litigation and where the underlying methodology – reliance upon twenty-one "criteria" developed by the expert himself – had never been tested, subjected to peer review, possessed a known or potential rate of error, or enjoyed general acceptance); *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 687, 691 (8th Cir. 2001) (whether the expertise was developed for litigation, whether the theory or technique enjoys widespread acceptance, and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case are all relevant to screening expert opinions). (*See also* A505-510.) Because Campion's methodology and presumptions do not fit the facts of the case, they were properly excluded as unhelpful and unreliable. *See General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997). The district court did not abuse its discretion.

IV. The District Court Properly Entered Summary Judgment on Plaintiffs' Discrimination Claims.

A. Standard of review of summary judgment.

Review of a district court's grant of summary judgment is plenary. *Anderson v. Consolidated Rail Corp.*, 297 F.3d 242, 246-7 (3d Cir. 2002). "In deciding a summary judgment motion, [the Appellate Court is] obligated to 'view the evidence…through the prism of the substantive evidentiary burden' and determine 'whether a jury could reasonably find that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not." *Id.* (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "Summary judgment against a party who bears the burden of proof at trial, as do the plaintiffs here, is proper if after adequate time for discovery and upon motion, a party fails to make a showing sufficient to establish the existence of an element essential to that parties' case, and on which that party will bear the burden of proof at trial." *Id.* (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

B. The district court's entry of summary judgment should be affirmed.

The district court's entry of summary judgment was proper and should be affirmed because Plaintiffs failed to present sufficient evidence to support their individual claims. On appeal, Plaintiffs make only cursory arguments in support of their disparate impact age discrimination claims, and completely ignore their disparate treatment claims. The district court's entry of summary judgment should

be affirmed for three reasons. First, summary judgment on the disparate treatment claims should be affirmed because Plaintiffs failed to address those claims in their opening brief and, thus, waived any challenge. Even if Plaintiffs had addressed the disparate treatment claims, summary judgment was proper because no direct evidence of discrimination exists and Plaintiffs cannot present evidence that PGW retained someone similarly situated who was sufficiently younger. Second, summary judgment on Plaintiffs' disparate impact claims should be affirmed because they lacked any statistical proof to support their claims. Third, summary judgment also was warranted based on the district court's proper finding that an over-fifty-years-old subgroup claim is not cognizable under the ADEA.

1. The district court's summary judgment on Plaintiffs' disparate treatment claims should be affirmed.

Plaintiffs do not raise a single issue on appeal relating to the district court's entry of summary judgment on their individual disparate treatment claims. Summary judgment on those disparate treatment claims was, however, the main focus of the district court's summary judgment order – nine pages on that issue (A102-110) and only two on disparate impact. (A110-12.) Presumably, Plaintiffs do not challenge the district court's disparate treatment ruling because, as was made clear before the district court, no direct evidence of discrimination existed (A105-6) and "[n]one of the Plaintiffs can show that PGW retained someone similarly situated who was sufficiently younger." (A109.) Plaintiffs failure to

provide any argument for why summary judgment on their disparate treatment claims should be overturned, however, serves as a waiver of that argument and the district court's entry of summary judgment should be affirmed. *Harris v. Dow Chem. Co.*, 586 Fed. App'x 843, 846 (3d Cir. 2014) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue ... will not suffice to bring that issue before this court.'") (*quoting Laborers' Int'l Unition of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir 1994), *quoting Simmons v. City of Phila.*, 947 F.2d 1042, 1066 (3d Cir. 1991) (plurality opinion)).

2. The district court's summary judgment on Plaintiffs' disparate impact claims should be affirmed because they have no statistical evidence to support their claim.

Summary judgment on Plaintiffs' disparate impact claims was proper because the district court had already barred Campion from presenting his manipulated and unreliable statistical opinion "[a]nd 'without statistical proof, disparate impact is not established.'" (A111 (*quoting Cardelle v. Miami Beach Fraternal Order of Police*, 593 F. App'x 898, 902 (11th Cir. 2014) *and citing Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1115 (9th Cir. 2014); *Crawford v. Verizon Pennsylvania, Inc.*, 103 F. Supp. 3d 597, 609 (E.D. Pa. 2015)).) Plaintiffs present no argument for why their disparate impact claims should be permitted to proceed in the absence of any statistical evidence. In fact,

Plaintiffs admit their "discrimination claims…are no longer viable, as a practical matter, without the now-excluded statistical analysis of Dr. Michael Campion." (Dkt. 446 at 1.) Thus, the district court's entry of summary judgment on Plaintiffs' disparate impact claims was appropriate for that reason alone.[11]

In addition to being unreliable, Campion did not present any relevant statistical evidence because he failed to analyze Cannon's Manufacturing Technology group, of which all Plaintiffs were part. (A640 ¶ 20-21; *see also supra* at §III.B.3.) Although this was not the sole basis of the district court's summary judgment ruling, this separate lack of evidence also warrants affirming the district court's grant of summary judgment. *See Davis v. Warden Lewisburg USP*, 594 Fed. App'x. 60, 61 (3d Cir. 2015) ("We may affirm on any basis supported in the record"). Because Plaintiffs admit that they have no other "evidence" to support their disparate impact claims without Campion's barred statistical opinions and Campion's opinions do not even address the relevant group of employees, this Court need go no further to affirm summary judgment.

[11] Plaintiffs, in their brief, twice refer to a factually unfounded claim that "the district court was required to accept that in PGW's RIF, employees who were fifty and older had a 59% higher chance of being terminated in the RIF than employees under 50." (Karlo Br. 9 and 11.) Plaintiffs are wrong for two reasons. First, even the factual cite provided by Plaintiffs does not support this statement. (A189-90.) Second, the statistical issues addressed in the cited reference were not a basis for the district court's decertification and the Court had already issued its order barring Dr. Campion's manipulated and unreliable statistical opinions before summary judgment was considered. (A111.) Thus, Plaintiffs' purported fact is unsupported and irrelevant.

3. The district court's summary judgment on Plaintiffs' disparate impact claims should be affirmed because 50-and-older subgroup claims are not cognizable under the ADEA and are not law of the case.

a. 50-and-older subgroup claims are not cognizable.

Plaintiffs focus their appellate brief on the district court's alternative reason for granting summary judgment: that "an over-fifty-years-old subgroup is [not] cognizable under the ADEA." (A111.) The district court's holding was well-supported by case law because "[e]very court of appeals to face the issue has declined to recognize [Plaintiffs' theory] with regard to disparate impact claims." (*Id.*) Moreover, practical and policy reasons support excluding subgroup-based ADEA disparate impact claims.[12]

"The majority view amongst the circuits that have considered this issue [subgrouping in ADEA disparate impact cases] is that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger, and therefore it is improper to distinguish between subgroups within the protected class." (A111, fn. 19 (citing *Petruska v.Reckitt Benckiser, LLC*, No. 14-03663 CCC, 2015 WL 1421908, at *6 (D.N.J. March 26, 2015).) While the Third Circuit

[12] The Court need not address the subgrouping issue because the district court's decertification, expert exclusion, and other summary judgment rulings can all stand as separate bases for affirming the district court. Alternatively, if this Court adopts the well-settled reasoning that the district court and all appellate courts who have addressed the issue rely on, Plaintiffs' disparate impact claims will be disposed of outright.

has not yet ruled on this issue, "every court of appeals to face the issue has declined to recognize this theory with regard to disparate impact claims." (A111.) *See also E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948, 950 (8th Cir. 1999) (dismissing disparate impact claim for employees "aged 55 or older"); *Smith v. Tennessee Valley Auth.*, 924 F.2d 1059 (6th Cir. 1991) (only analyzing 40-and-over group to determine disparate impact); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372 (2d Cir. 1989) (rejecting over-50 subgroup). Plaintiffs' brief on appeal is virtually silent as to these appellate court decisions. Instead, Plaintiffs urge adoption of unbinding district court decisions allowing subgrouping, one of which is the conditional certification order in this case. (Karlo Br. 13.)

Contrary to Plaintiffs' argument, most district courts that have considered the issue, including courts in this Circuit, also have rejected disparate impact claims based on subgroups. *See Petruska*, 2015 WL 1421908, * 7 (rejecting 47.7-and-older subgroup); *Bingham v. Raytheon Tech. Servs. Co., LLC*, No. 1:13-CV-00211-TWP, 2014 WL 6388756, at *4 (S.D. Ind. Nov. 14, 2014) (rejecting use of subgrouping and noting that, as is the case here, "age groups appear to have been selected because it yielded the desired result—a showing of adverse impact—not because it was necessarily relevant to [plaintiff's] claim"); *Fulghum v. Embarq Corp.*, 938 F.Supp. 2d 1090, 1130-31 and n. 156 (D. Kan. Feb. 14, 2013) *aff'd in part, rev'd in part on other grounds*, 785 F.3d 395 (10th Cir. 2015); *Rudwall v.*

Blackrock, Inc., No. C09-5176TEH, 2011 WL 767965, at *10-11 (N.D. Cal. Feb. 28, 2011) (finding that it is improper to distinguish between subgroup of employees over age 40 in ADEA disparate impact analysis and citing the "overwhelming" authority favoring this position); *Schechner v. KPIX-TV*, C 08-05049 MHP, 2011 WL 109144, at *4 (N.D. Cal. Jan. 13, 2011), *aff'd,* 686 F.3d 1018 (9th Cir. 2012); *Kinnally v. Rogers Corp.*, CV-06-2704-PHX-JAT, 2009 WL 597211, at *10 (D. Ariz. Mar. 9, 2009) (agreeing "with the circuits that have rejected disparate impact claims based on age sub-groups"). Moreover, the Eastern District of Pennsylvania found the Second Circuit Court of Appeals' rationale for rejecting subgroups "persuasive." *See Myers v. Del. Cnty. Cmty. Coll.*, No. 05-5855, 2007 WL 1322239, at *10 n.1 (E.D. Pa. Mar. 9, 2007).

Even the district court cases Plaintiffs rely on do not change the outcome. *Finch v. Hercules*, 865 F. Supp. 1104, 1129-30 (D. Del. 1994) and *Graffam v. Scott Paper Co.*, 848 F. Supp. 1, 3-5 (D. Me. 1994) are easily distinguishable as outlier opinions: they are contrary to the overwhelming weight of the authority and have not been followed by any other courts. In fact, many courts have expressly rejected these outlier opinions. *See, e.g., Schechner*, 2011 WL 109144 at *4 n.4 (rejecting *Finch* and *Graffam*, noting that "the overwhelming weight of authority" supports that protected group is only that of workers aged 40-and-over); *EEOC v. McDonnell Douglas Corp.*, 969 F. Supp. 1221, 1225, n. 5 (E.D. Mo. 1997).

Practically, allowing subgroup disparate impact claims for any discrete subgroup over 40 ***would make age the primary consideration*** for an employment decision – a result prohibited under the law. *See McDonnell Douglas*, 191 F.3d at 950. In its Decertification Order, the district court recognized the importance of these concerns, citing *McDonnell Douglas Corp.*:

> "[I]f [subgroup] claims were cognizable under the statute, a plaintiff could bring a disparate-impact claim despite the fact that the statistical evidence indicated that an employer's RIF criteria had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees outside the protected group. Congress could not have intended such a result." The court of appeals further recognized "that if disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in a RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force." Thus, as the court concluded, the "[a]doption of such a theory [ ] might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes."

(A33 (internal citations omitted).)

Plaintiffs argue that PGW – and the Second Circuit in the *Lowe* case – take an "alarmist view" and advance a "fanciful argument" that plaintiffs will be able to skew data to create an appearance of a disparate impact. (Karlo Br. 15.) Plaintiffs' position is wrong based on the facts of this case and at least one other case in this Circuit. First, Plaintiffs' own proposed statistical analysis in this case demonstrates that there is no evidence of a disparate impact at age 40 and that

same analysis carried out at age 60 demonstrates no evidence of disparate impact. (A186 and A377.) Thus, Plaintiffs here are picking and choosing what age groups to look at – even when those numbers are not "fanciful"[13] – and getting different, inconsistent results. But Plaintiffs go on to argue no plaintiff would use "fanciful" age subgroups. (Karlo Br. 15.) That position was disproven in *Petruska* where Plaintiffs presented a case examining purported evidence of age discrimination at the age cut-off of 47.7. 2015 WL 1421908, * 7.[14]

Allowing ADEA disparate impact subgrouping would create very real and unmanageable implications for employers and HR managers alike. *See McDonnell Douglas*, 191 F.3d at 950. Even if the number of potential classes were limited to "about 30 discrete values – from 40 years old to approximately 70 years – over which courts might see proposed subgroups," as was noted in the conditional certification opinion in this matter (A161), employers will have to analyze the effect of an employment decision on not only those thirty groups, but combine

[13] For instance, in this case neither party examined purportedly "fanciful" age groups (although Plaintiffs fail to articulate why subgroups such as 44 and older or 56 and older would be "fanciful" or, under their rationale, barred by the ADEA). Rather, Plaintiffs' own evidence, looking at "typical" subclasses without "arbitrary starting and ending points," demonstrates the danger of slicing and dicing subgroups.

[14] Ironically, the *Petruska* court noted that the 47.7 age breakdown advanced by plaintiffs in that case was similar to that which Judge Fischer believed, in her conditional certification opinion, would be "highly unlikely." 2015 WL 1421908, * 7, *citing Karlo v. Pittsburgh Glass Works, LLC*, 880 F. Supp. 2d 629, 640 at n. 8 (W.D. Pa. 2014) (dismissing ADEA claims based on subgrouping).

those analyses with considerations of every other protected class including race, gender and any others that state or federal law requires. The ADEA certainly did not contemplate that employers are required to achieve essentially impossible parity in a RIF. Additionally, as the district court in *Schechner* noted in declining to adopt subgrouping in ADEA disparate impact cases, "to the extent that employers gerrymander facially neutral policies to disfavor employees over the age of 50 or 60 while significantly favoring employees close to the age of 40, such practices would appear to be material evidence of disparate treatment discrimination." *Schechner*, 2011 WL 109144, at *4 n.4. Thus, employees subject to such practices –which are not present here – have recourse under the ADEA to pursue disparate treatment age discrimination claims; but, not disparate impact claims dependent on improper subgrouping.

Plaintiffs and their *amicus* also rely on *O'Connor* v. *Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 517 U.S. 308 (1996) in support of their argument. But *O'Connor* is a disparate treatment ADEA case which does not even discuss disparate impact claims. *Id; see also McDonnell Douglas*, 191 F.3d at 951 (noting that *O'Connor* is not relevant to disparate impact subgrouping claims because it was a disparate treatment case.) *O'Connor* says nothing about the issue of subgrouping within a protected class. *Id.* At most, *O'Connor* stands for the basic proposition that a plaintiff in an ADEA case must be able to show that he suffered

an adverse employment action "*because of his age.*" 517 U.S. at 312. Quite simply, *O'Connor* does not stand for the proposition that subgrouping is allowed in ADEA disparate impact claims.

b. The law of the case doctrine does not require the district court to allow Plaintiffs to proceed with their legally deficient over-50 subgroup claim.

Plaintiffs also incorrectly assert that Judge Fischer's opinions addressing subgrouping were the law of the case and, therefore, that the district court's summary judgment decision was in error to the extent that it presented a different opinion on the issue. As set out in detail above with respect to the discussion of decertification, the law of the case doctrine does not prevent this Court from reviewing the district court's decision. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review.") Moreover, to the extent that Judge Fischer expressed an opinion on the appropriateness of over-50 subgrouping in an ADEA disparate impact case, she did so at the ***conditional*** certification stage and made clear the ruling was not final. In her opinion denying PGW's request for interlocutory appeal, Judge Fischer highlighted that "with respect to *all* questions raised by the Defendant, the Court's opinion is merely conditional." (A628.) Judge Fischer expressly noted that her

subgrouping opinion "***cannot*** be qualified as a 'controlling question of law' at the conditional certification stage." (A630 (emphasis added).) This Court recognizes that the law of the case doctrine is not offended if an order expressly contemplates that it is conditional in status. *Lusardi*, 855 F.2d at 1072. Plaintiffs' law of the case argument is a red herring and should be summarily rejected.

Plaintiffs' claim that they were prejudiced because the district court revisited the conditional certification subgroup analysis is without merit. To begin, Judge Fischer expressly stated the opinion was "merely conditional" and was not a "controlling issue of law." (A628-630.) Judge Fischer merely allowed notice of a collective action to be sent to terminated employees over the age of 50 and for discovery to proceed. (*Id*. (noting that 50-and-over subgrouping "may have no bearing at the next stage of certification.") *See also Craig v. Rite Aid Corp.*, No. 08-CV-2317, 2010 WL 1994888, at *3 (M.D. Pa. Feb. 4, 2010) (cited at A630) (noting that the cost of discovery does not change the legal analysis of collective action claims).

Moreover, PGW sought interlocutory review of Judge Fischer's subgrouping analysis following the order granting conditional certification. PGW expressly argued that conditional certification would result in expensive and unnecessary discovery in the event Judge Fischer's ruling on subgrouping was later reversed. (Dkt. 187 at 7.) Plaintiffs opposed PGW's reasoning conceding that the district

court was "free to reexamine any issues decided in its initial conditional certification determination, including the propriety of subgroups" (*see* Dkt. 201 at 2-3) and that the district court "will have the opportunity to conduct complete review of its preliminary and conditional certification of the class at the decertification stage, and [ ] its decision is by no means final." (Dkt. 195 at 9.) As a result, Plaintiffs are not prejudiced because the district court did exactly what they argued it could do: reexamine the 50-and-over subgroup analysis. And, given their prior contrary arguments on the issue, Plaintiffs are estopped from now claiming prejudice. *See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003) (noting that taking "irreconcilably inconsistent" positions judicially estopped claim). Thus, Plaintiffs' claims of prejudice are without merit.

CONCLUSION

The district court thoroughly reviewed the record and determined that Plaintiffs' claims failed as a matter of law. First, the district court correctly decided that the Opt-in Plaintiffs and the Named Plaintiffs were not similarly situated, making decertification appropriate. That determination was not erroneous is any fashion. Next, the district court properly acted within its discretion and concluded that Plaintiffs' proposed expert opinions on statistics, implicit bias and purported human resource practices did not meet the requirements of Federal Rule

of Evidence 702 and barred such opinions. Finally, the district court correctly granted summary judgment on Plaintiffs remaining age discrimination claims. For all the reasons stated above and in the district court below, the district court's orders should be affirmed in their entirety.

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Respectfully submitted,

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COMBINED CERTIFICATES

The undersigned hereby certifies the following:

1. Robert B. Cottington, David S. Becker and Rachel E.A. Atterberry are members of the bar of this Court.

2. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,921 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in proportionally-spaced typeface font (14-point Times New Roman), and includes serifs.

4. I transmitted an original and six paper copies of the Brief of Defendant-Appellee to the Clerk and four paper copies of Defendant-Appellee Supplemental Appendix Volume 3 and Volume 4 (which is filed provisionally under seal), by Federal Express, priority overnight delivery, and I electronically filed the Brief and Appendices through the court's CM/ECF filing system. Also on that date, I certify that I caused a copy of the Brief and the Supplemental Appendices to be served upon the following counsel electronically through the Court's CM/ECF system and by Federal Express, priority overnight delivery, to:

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5. The electronically filed PDF version of the brief and Supplemental Appendix Volumes 3 and 4 and the hard copy versions of the brief and Supplemental Appendix Volumes 3 and 4 are identical.

6. In accordance with Third Circuit Local Appellate Rule 31.1(c), the electronic PDF file of the brief and Supplemental Appendix Volumes 3 and 4 were subjected to a virus scan using Symantec Endpoint Protection, version 12.1.4013.4013.

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