No. _____

IN THE

Supreme Court of the United States

CHRISTIAN ENG, *et al.*,

Petitioners,

v.

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY

Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are disparate impact claims under Title VII limited to only unlawful employment practices where the discriminatory impact is observable within the 180-day statutory window?

2. Does the continuing violations doctrine — which makes actionable all acts pursuant to a continuing policy or practice of discrimination, so long as one act in furtherance of that policy or practice occurs within the statutory limitations period — apply to all systemic violations of Title VII?

PARTIES TO THE PROCEEDING

The petitioners are Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong, all of whom were plaintiffs and appellees in the courts below.

The respondent is the Port Authority of New York & New Jersey, which was the defendant, appellant, and cross-appellee in the courts below.

The Port Authority Police Asian Jade Society of New York & New Jersey Inc. was a plaintiff and appellee in the courts below. It has no parent or publicly held company owning 10% or more of the corporation's stock.

Additional plaintiffs, appellees, and cross-appellants below, who are not parties here, were Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, affirming in part and reversing in part the judgment of the district court, is reported at 685 F.3d 135 (2d Cir. 2012), and is reproduced at App. 1a–50a. The opinion of the United States District Court for the Southern District of New York, applying the continuing violations doctrine to claims challenging systemic discrimination in respondent's promotion policies, is published at 681 F. Supp. 2d 456 (S.D.N.Y. 2010), and reproduced at App. 51a–76a. The district court's judgment, which includes the jury verdict form, is reproduced at App. 77a–94a.

JURISDICTION

The court of appeals entered its judgment on July 10, 2012. Petitioners filed a timely petition for rehearing *en banc* on July 24, 2012, which the court of appeals denied on September 25, 2012. *See* App. 95a–96a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileged of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Section 703(k)(1)(A) of Title VII provides:

> (k) Burden of proof in disparate impact cases
>
> (1) (A) An unlawful employment practice based on disparate impact is established under this subchapter only if –
>
> (i) a complaining party demonstrates a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national

> origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .
>
> (1) (B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k).

Section 706(e)(1) of Title VII provides in pertinent part: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

Section 706(g)(1) of Title VII provides in pertinent part: "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1).

STATEMENT OF THE CASE

A unanimous jury found that respondent the Port Authority of New York & New Jersey (the "Port Authority") (1) maintained promotion practices for the rank of Sergeant that had a disparate impact upon Asian-American police officers; (2) maintained a pattern or practice of intentional discrimination against Asian-American police officers for promotion to Sergeant; and (3) that petitioners were qualified for promotion, that petitioners' ethnicity was a motivating factor in the Port Authority's decision not to promote the petitioners, and the decision was made within 180 days of petitioners' filing of charges of discrimination. On appeal, the Second Circuit reversed in part on the grounds that certain portions of petitioners' disparate impact claim are time-barred because the continuing violations doctrine is not applicable to any discrimination claim relating to promotion.

The opinion below, relying on decisions of the Fourth, Eighth, Ninth, and Tenth Circuits, conflicts with this Court's prior rulings as well as the statute itself. This Court has previously applied the continuing violations doctrine to Title VII claims that are cumulative in nature, and nothing in Title VII limits disparate impact claims by subject matter. Moreover, at least three circuits (the First, Sixth, and, more recently, the Ninth) have held that this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), did not reach – and thus left standing – application of the continuing violations doctrine to systemic violations of Title VII. The split in the circuits is clear and entrenched and has been recognized by other federal courts, leading

commentators, and the Equal Employment Opportunity Commission (the "EEOC").

This Court should grant this petition for a writ of certiorari to correct the Second Circuit's reading of *Morgan*, to resolve the intractable split in the courts of appeals with respect to the continuing violations doctrine, and to establish uniformity among the lower courts.

A. Proceedings in the District Court.

On January 31, 2001, the Asian Jade Society (a fraternal organization of Asian-American police officers employed by the Port Authority) filed a charge of discrimination with the EEOC on behalf of its members, claiming that the Port Authority had, through its discriminatory promotion policies and practices, denied Asian-American police officers promotions because of their race. On August 29, 2003, the EEOC determined that there was reasonable cause to believe the Port Authority had violated Title VII, and on January 25, 2005, the Department of Justice issued a right-to-sue letter. On April 15, 2005, petitioners brought suit against the Port Authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, alleging that the Port Authority's promotion policies and practices deliberately discriminated against Asian-American police officers and had a disparate and adverse impact on Asian-American police officers.

During the relevant time period (1996–2005), a police officer interested in promotion to the rank of Sergeant had to take and pass an examination, which would place him or her on an "eligibility list" for a period of time. Promotions off of the eligibility list were made in small waves throughout the life of

each eligibility list (typically three years). Each petitioner was on one or more eligibility lists during the relevant time period.

Petitioners did not challenge the promotional examination itself or the eligibility lists which resulted. Rather, petitioners challenged the process by which the Port Authority made promotions off of the eligibility lists, which resulted in zero promotions of eligible Asian-American officers during most of the relevant time period. The Port Authority did not disclose its process at the time, but petitioners proved at trial that the Port Authority had a regular process in place whereby commanding officers recommended officers for promotion, only those recommended candidates were evaluated, promotion folders were then compiled for those candidates, and promotions were made by the Superintendent, sometimes with the input of a Chiefs' Board. At trial, petitioners presented claims to the jury for (1) disparate impact, (2) pattern-or-practice of disparate treatment, and (3) individual disparate treatment. On their disparate impact and pattern-or-practice claims, petitioners challenged all acts in furtherance of the Port Authority's promotion policy from 1996–2005.[1] On the individual disparate treatment claims, petitioners challenged only specific promotion decisions within the 180-day statute of limitations period. On March 26, 2009, the jury returned a unanimous verdict in petitioners' favor on all three

[1] Although petitioners' disparate impact and pattern-or-practice claims challenged an ongoing practice that began in 1996, the maximum back pay damages sought by petitioners extended back only to October 1999 — within the two-year statutory maximum under 42 U.S.C. § 2000e-5(g).

theories of liability and awarded back pay and compensatory damages.[2]

After the verdict, the Port Authority moved to set aside the jury's verdict for petitioners or, alternatively, for a new trial and for remittitur. As relates to this petition, the Port Authority argued that: (1) the jury was improperly instructed to consider events outside the limitations period for purposes of establishing liability; and (2) the jury's damages included time-barred claims and were otherwise excessive. The Port Authority argued that under this Court's decision in *Morgan*, the continuing violations doctrine cannot be applied to any claim under Title VII relating to promotions, even if plaintiffs challenge a systemic promotion policy, as opposed to discrete promotion decisions.

The district court denied the Port Authority's motion in its entirety. The district court observed that *Morgan* drew a distinction between discrete acts and ongoing unlawful employment practices, such as a hostile work environment. App. at 64a–66a. In *Morgan*, this Court held that a hostile work environment "cannot be said to occur on any particular day" and is based on the "cumulative effect of individual acts." *Morgan*, 536 U.S. at 116. Each act that contributed to that environment was "part of one unlawful employment practice, [and] the employer may be liable for all acts that are part of this single claim." *Id.* at 118. The district court held that petitioners' disparate impact and pattern-or-practice claims challenged systemic and cumulative

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[2] Four other plaintiffs involved in the lawsuit did not prevail on the disparate treatment claims and received no damage award.

violations committed by the Port Authority, and are thus subject to the continuing violations doctrine under *Morgan*. App. at 64a–66a.

B. Proceedings in the Court of Appeals.

On appeal, the Port Authority again argued that it was entitled to a new trial because: (1) evidence predating the onset of the limitations period should not have been admitted; (2) the evidence at trial was insufficient to support the jury's verdict; and (3) the damages and equitable relief were premised on time-barred claims and were otherwise excessive. The Second Circuit affirmed in part and reversed in part.

As pertinent to this appeal, the Second Circuit held that the continuing violations doctrine does not apply to petitioners' disparate impact theory because, under the court's reading of *Morgan*, employment practices relating to promotion must always be treated as "discrete acts of discrimination and thus do not implicate the continuing violation doctrine." App. at 35a. The court also held that under its reading of *Lewis* v. *City of Chicago*, 130 S. Ct. 2191 (2010), the Port Authority was entitled to treat its promotion process as lawful because it went unchallenged for 180 days after its adoption.[3] App. at 39a–40a.

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[3] The court also held, *sua sponte*, that the disparate treatment, pattern-or-practice theory of liability is not available to private, non-class plaintiffs. The court further held that background evidence from outside the limitations period was admissible and that the evidence presented at trial was sufficient to sustain the jury's findings on liability regarding disparate impact and individual disparate treatment.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision effectively restricts Title VII disparate impact claims to exclude certain subject-matters and to require an observable impact within 180 days. This is inconsistent with the statute as well as this Court's prior decisions. Given the large number of disparate impact claims filed nationally, the current conflict frustrates the remedial purposes of Title VII, incentivizes employers to delay the observable effects of discriminatory policies, and encourages plaintiffs to file discrimination claims prematurely.

Moreover, in the wake of this Court's decision in *Morgan*, the courts of appeals are intractably divided over the proper application of the continuing violations doctrine to cases in which the employer acted pursuant to a systematic policy or practice of discrimination. Some courts, as well as the EEOC, hold that *Morgan* does not prevent the application of the continuing violations doctrine to systemic violations — if a single discriminatory policy or practice continues into the filing period, all of the component acts of the policy or practice are considered timely, and a plaintiff may recover relief for any of those acts. Other courts of appeals reject the idea that employers can be liable for acts occurring outside the filing period, even if the acts were committed pursuant to a single policy or practice of discrimination.[4]

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[4] This Court's 2010 decision in *Lewis* held that both the adoption and the application of an employment practice are separately actionable under a disparate impact theory. 130 S. Ct. at 2198-99. However, this Court did not address the continuing violations doctrine because petitioners in that case

I. The Decision Below Conflicts with the Decisions of This Court and with Title VII.

This Court should grant the petition for a writ of certiorari because the Second Circuit's decision conflicts with this Court's precedents as well as with the text and purposes of Title VII. The decision below effectively precludes any challenges to systemic policies and practices if they relate to promotion (or hiring, transfer, or termination). It also immunizes discrimination where the violation of Title VII is based on the cumulative effect of individual outcomes over a period greater than the statute of limitations window.

1. It is well-established that disparate impact and disparate treatment are different claims. While the latter addresses instances of overt discrimination, disparate impact claims address facially neutral policies that have a disproportionately adverse effect on minorities. *See* 42 U.S.C. § 2000e-2(k); *Lewis*, 130 S. Ct. at 2197; *Ricci* v. *DeStefano*, 557 U.S. 557, 577–78 (2009). Thus, a plaintiff bringing a disparate impact claim need not show discriminatory intent, but must establish that the employment practice "had a significantly discriminatory impact" on a protected group. *Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982); *see also Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

In reaching its conclusion that *any* employment practice relating to promotions must be treated as a series of discrete acts, the Second Circuit relied on this Court's discussion of a single plaintiff's

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abandoned that theory in favor of a present violation theory. *Id.* at 2200.

disparate treatment claims in *Morgan*, and Justice Ginsburg's dissent in *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), to reason that every promotion act is individually actionable, and a worker knows immediately if she is denied a promotion. App. 37a–38a. This argument highlights the fundamental error in the Second Circuit's holding.

While a single promotion decision may be actionable under a *disparate treatment* theory, and an employee may be on notice of a potential *disparate treatment* claim at the time of the decision, it does not follow that each promotion decision is actionable under a *disparate impact* theory, or that employees are on notice of a *disparate impact* claim. This Court has explicitly held that although disparate treatment and disparate impact claims are both directed at the same evil, they are not coextensive; "some claims that would be doomed under one theory will survive under the other." *Lewis*, 130 S. Ct. at 2199–2200.

To be sure, some employment practices relating to promotion (or, for that matter, hiring, transfer, or termination) are discrete acts with immediate effects.[5] However, other employment practices must be viewed in the aggregate for purposes of disparate impact liability because the impact only exists (and is only observable) on a cumulative basis. For example, where, as here, an ongoing promotion practice results in a handful of promotions every few months over an extended period, the impact of the

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[5] For example, disparate impact claims frequently arise in the context of challenges to the results of qualifying tests. *See, e.g.*, *Lewis*, 130 S. Ct. 2190; *Ricci*, 557 U.S. 557.

practice is not observable until there is a sufficient number of promotions to analyze. Plaintiffs cannot possibly be on notice of a disparate impact claim before the defining element of the claim can be properly pleaded. *See Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). As this Court acknowledged in *Lewis*, it would be a puzzling result to "induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact." 130 S. Ct. at 2200.[6]

Thus, contrary to the Second Circuit's holding, the existence of a disparate treatment claim relating to promotions on day one of an employment practice is not coextensive with the existence of a disparate impact claim on day one. *Lewis*, 130 S. Ct. at 2199–2200.

2. The decision below also conflicts with the continuing violations doctrine, which is designed to account for the cumulative nature of certain claims, and allow a plaintiff "to delay suing until a series of acts by a prospective defendant blossoms into a wrongful injury on which a suit can be based." *Lewis* v. *City of Chicago*, 528 F.3d 488, 493 (7th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 2191. "Despite its name, it is a doctrine about cumulative rather than continuing violation." *Id.*

Nothing in Title VII or in the case law limits the continuing violations doctrine categorically by

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[6] Nor does it make sense that early victims of an unlawful practice are precluded from bringing a disparate impact claim even though the harm to them is integral to establishing the disparate impact.

subject matter. Although *Morgan* identified "termination, failure to promote, denial of transfer, or refusal to hire" as examples of discrete acts that "are easy to identify," 536 U.S. at 114, *Morgan* did not hold that all employment practices relating to termination, promotions, transfers, or hiring must *necessarily* be viewed as discrete acts which cannot also be manifestations of a systemic violation that is "continuing" and cumulative.

In *Morgan*, this Court applied the continuing violations doctrine to a hostile work environment claim on the ground that such a claim is based on the "cumulative effect of individual acts," and inherently "involves repeated conduct." *Id.* at 115. "The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* Because some disparate impact claims, like the one at issue here, also address the cumulative impact of a policy that manifests over time, the Second Circuit's refusal to apply the continuing violations doctrine to these claims is in conflict with *Morgan*.[7]

3. In addition, the decision below frustrates the remedial purpose of the Title VII by severely restricting disparate impact claims in a manner that is unprecedented and unsupported by the plain language of the statute. Under the Second Circuit's

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[7] As discussed below, *Morgan* did not strike down the Ninth Circuit's application of the continuing violations doctrine to systemic violations. 536 U.S. at 115 n.9. Multiple courts have interpreted this to mean that the continuing violations doctrine remains in effect for systemic violations. *See* Section II, *infra*.

holding, employment practices relating to promotion (or hiring, termination, or transfer) where the impact is not observable within 180 days of adoption of the practice are effectively immunized from liability. However, the plain language of the statute contemplates liability for certain acts preceding the 180 day filing period: § 2000e-5(g)(1) allows for recovery of back pay for up to two years prior to the filing of the charge. If Congress had intended to limit liability to conduct occurring within 180 days, it would not have permitted recovery for significantly more than 180 days of back pay.

The Second Circuit's holding also incentivizes employers to implement employment policies so that their impact is not observable within the statutory period, and encourages employees to file claims of disparate impact prematurely, in case a disparate impact is later observed.

II. There is an Acknowledged Division Among the Courts of Appeals Regarding the Applicability of the Continuing Violations Doctrine to Systemic Violations.

This Court should also grant the petition for a writ of certiorari to resolve an important question that has divided the courts of appeals since this Court's decision in *Morgan*, which deliberately left the question unresolved. Before *Morgan*, several circuits — including the Ninth Circuit — recognized two types of continuing violations: serial violations and systemic violations. The Ninth Circuit held that a plaintiff can establish a continuing violation either by showing "a series of related acts one or more of which are within the limitations period . . . if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations

period are sufficiently related to those occurring within the limitations period," or by showing "a systematic policy or practice of discrimination that operated, in part, within the limitations period — a systemic violation." *Morgan* v. *Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1015–16 (9th Cir. 2000), *rev'd on other grounds*, 536 U.S. 101 (2002). Systemic violations typically "involve 'demonstrating a company wide policy or practice' and most often occur in matters of placement or promotion." *Id.* at 1015–16 (quoting *Green* v. *L.A. Cnty. Superintendent of Schs.*, 883 F.2d 1472, 1480 (9th Cir. 1989)).

In *Morgan*, this Court reversed the Ninth Circuit's continuing violations doctrine as applied to serial violations, but did not reach the second type of continuous violation included in the Ninth Circuit's doctrine – the systemic violation. *Morgan*, 536 U.S. at 114. The Court explicitly noted that it had "no occasion to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants . . . ." *Id.* at 115 n.9. Systemic violations, however, encompass more than "pattern-or-practice" cases. Several circuits, including the Second Circuit, have used the terms "policy and practice" or "policy or practice" to reference cases involving a policy, which, while neutral on its face, has a disparate impact on a protected group. *See, e.g., Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001); *Mack* v. *Great Atl. & Pac. Tea Co., Inc.*, 871 F.2d 179, 183 (1st Cir. 2000). Because this Court did not reach the issue in *Morgan*, there is a conflict among the courts of appeals regarding the extent to which the continuing

violations doctrine remains applicable to systemic violations.

1. Three circuits — the First, Sixth, and, to a lesser extent, the Ninth — and a District Court for the District of Columbia have held that, post-*Morgan*, the continuing violations doctrine remains applicable to claims challenging an employer's discriminatory policy or practice, even where the employer enforces its policy through individual acts. *See Mansourian* v. *Regents of the Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010); *Thornton* v. *United Parcel Serv., Inc.*, 587 F.3d 27 (1st Cir. 2009); *Sharpe* v. *Cureton*, 319 F.3d 259 (6th Cir. 2003); *Tenenbaum* v. *Caldera*, 45 Fed. Appx. 416 (6th Cir. 2002); *Moore* v. *Chertoff*, 437 F. Supp. 2d 156 (D.D.C. 2006).[8] The EEOC has taken a similar position. *See* EEOC, COMPLIANCE MANUAL §2-IV.C, *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-2.

In *Thornton*, the First Circuit held that *Morgan* struck down the continuing violations doctrine as applied to serial violations, but not systemic violations. "[W]e have recognized that if a Title VII violation occurs in the wake of some continuing policy, itself illegal, then the law does not bar a suit aimed at the employer's dogged insistence upon that policy within the prescriptive period even if no discrete violation occurs during the period."

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[8] In some of these cases, the courts ultimately declined to apply the continuing violations doctrine because, unlike the petitioners here, the plaintiffs in these cases failed to prove the existence of discrimination pursuant to a company-wide policy. *See, e.g.*, *Thornton*, 587 F.3d at 33.

Thornton, 587 F.3d at 33 (quoting *Mack*, 871 F.2d at 183).

In *Sharpe*, the Sixth Circuit considered the continuing violations doctrine in the context of a § 1983 claim. Like the First Circuit, the Sixth Circuit recognizes two distinct categories of continuing violations: "those alleging serial violations and those identified with a longstanding and demonstrable policy of discrimination." *Sharpe*, 319 F.3d at 266. The Sixth Circuit held that systemic violations, which challenge a company's standard operating procedure, were not implicated by *Morgan*. *See also Bell* v. *Ohio State Univ.*, 351 F.3d 240, 248 (6th Cir. 2003) (holding *Morgan* does not implicate the second continuing violation exception, involving a longstanding policy of discrimination); *Tenenbaum*, 45 Fed. Appx. at 419 n.3 (holding Sixth Circuit's "longstanding and demonstrable policy" category of continuing violations was not cabined by the Supreme Court's decision in *Morgan*).

The Ninth Circuit, on which the Second Circuit relies, recently held that "*Morgan* left undisturbed our case law governing continuing systemic violations." *Mansourian*, 602 F.3d at 974 n.22. Because the plaintiffs in *Mansourian* — like the petitioners here — demonstrated an ongoing policy of discrimination, the Ninth Circuit held that plaintiffs' § 1983 claims with regard to certain acts outside the limitations period were not time-barred. *Id.* at 974. Notably, this Court has recognized that in the Ninth Circuit, systemic violations involve "demonstrating a company-wide policy or practice and most often occur

in matters of placement or promotion." *Green*, 883 F.2d at 1480; *see also Morgan*, 536 U.S. at 107.[9]

2. The Second Circuit departed from the courts of appeals decisions cited above, ignored *Morgan*'s deliberate silence on whether the continuing violations doctrine applies to systemic violations, and instead seized upon this Court's inclusion of promotions as one example of a discrete act, to categorically exclude all systemic violations relating to promotion from the continuing violation doctrine. App. 35a-39a. In support of its holding, the Second Circuit cites the Fourth Circuit's decision in *Williams* v. *Giant Food, Inc.*, 370 F.3d 423 (4th Cir. 2004), the Tenth Circuit's decision in *Davidson* v. *America Online, Inc.*, 337 F.3d 1179 (10th Cir. 2003), and the Eighth Circuit's decision in *Tademe* v. *Saint Cloud State Univ.*, 328 F.3d 982 (8th Cir. 2003).

In *Williams*, the Fourth Circuit held that the continuing violations doctrine does not apply to disparate treatment claims relating to failure to promote the plaintiff, even if a "pattern or practice" of discrimination is alleged. *Williams*, 370 F.3d at 429–30. In *Tademe*, the Eighth Circuit held that disparate treatment claims relating to the plaintiff's tenure and promotion were time-barred, notwithstanding the fact that he has asserted a pattern or practice of discrimination, because "*Morgan* makes clear that failure to promote, refusal

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[9] The Second Circuit cited a Ninth Circuit case from 2003, *Lyons* v. *England*, 307 F.3d 1092, 1107 & n.8 (9th Cir. 2003), but ignored the more recent *Mansourian* decision regarding systemic violations.

to hire, and termination are generally considered separate violations." *Tademe*, 328 F.3d at 988.[10]

Similarly, in *Davidson*, the Tenth Circuit rejected as time-barred the plaintiff's disparate treatment claims relating to two refusals to hire him, even though he alleged a company-wide policy. "*Morgan* implicitly overturns prior Tenth Circuit law in that plaintiffs are now expressly precluded from establishing a continuing violation exception for alleged discrete acts of discrimination occurring prior to the limitations period . . . . [e]ven if the discrete act was part of a company-wide or systemic policy." *Davidson*, 337 F.3d at 1185–86.

Notably, the cases upon which the Second Circuit relies all involve *disparate treatment* claims. None involve *disparate impact* claims.[11] As discussed

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[10] To be sure, a failure to promote can be a discrete act and petitioners' challenges to specific promotion decisions were properly subject to the statute of limitations. Although the decisions supporting the Second Circuit address the continuing violations doctrine as applied to promotions, none of the decisions addresses a challenge to a systemic violation under a disparate impact theory.

[11] The only circuit court to have previously addressed the continuing violations doctrine, after *Morgan*, with respect to a disparate impact claim is the Seventh Circuit. On remand after this Court's decision in *Lewis*, the Seventh Circuit stated that a continuing violation approach (had it not been abandoned by plaintiffs) would be incompatible with *Morgan*. *Lewis* v. *City of Chicago*, 643 F.3d 201, 203 (7th Cir. 2011). However, that comment was in the context of a prior finding that plaintiffs' claim was not cumulative in nature. *Lewis*, 528 F.3d at 493. Moreover, this Court specifically acknowledged the potential viability of a continuing violations theory if the argument had been preserved. *Lewis*, 130 S. Ct. at 2200.

above, *supra* Section I, these claims are not coextensive.[12]

The conflict among decisions from the circuit courts reflects a conscious disagreement about the extent to which the continuing violations survives *Morgan* with respect to systemic violations.

3. Leading employment discrimination commentators have noted the split in the circuits in the wake of *Morgan*. A prominent treatise notes:

> [C]onsidering that some courts also use the term "pattern or practice" to refer to cases brought by an individual alleging discrimination in an employer's policy that affects many employees, the reference by the *Morgan* Court suggests that the continuing violation theory could possibly still be used in claims alleging discrimination in an employer policy or practice, even if manifested in discrete acts. The impact of *Morgan* on claims involving a discriminatory policy has not been uniform.

Lex K. Larson, 4 *Employment Discrimination* § 72.08[5] & nn.41–43 (2d ed. 1994 & Supp. 2008).

The EEOC Compliance Manual also conflicts with the holdings of the Second, Eighth, and Tenth Circuits. In describing the applicability of the

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[12] In *Ledbetter*, this Court held that a new disparate treatment claim does not arise with each "present effect" of past discrimination because discriminatory intent does not shift forward. "That reason has no application when, as here, the charge is disparate impact, which does not require discriminatory intent." *Lewis*, 130 S. Ct. at 2199.

continuing violations doctrine after *Morgan*, the EEOC provides an example strikingly similar to the petitioners' claims:

> In March 2003, CP files a charge alleging that Respondent discriminates against African-American applicants to its apprenticeship program. According to CP, he has applied for the apprenticeship program repeatedly since its initiation in September 2000 but has never been selected. The investigation reveals that African-American applicants for the apprenticeship program have been selected at a much lower rate than similarly qualified white applicants. Because Respondent's systematic discrimination against African-American applicants to the apprenticeship program constitutes a pattern or practice of discrimination, all discriminatory selection decisions under the program are timely.

EEOC, COMPLIANCE MANUAL § 2-IV.C.

4. The questions presented require resolution by this Court because clarity and uniformity are imperative to the administration of Title VII claims.

The confusion among the courts of appeals runs contrary to Congress's intent to enact a national, uniform solution to employment discrimination. Congress enacted Title VII to provide a national solution to a national problem: " [N]ational legislation is required to meet a national need which becomes ever more obvious. . . . [The Act] is designed

as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." H.R. Rep. No. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393. This Court has recognized the necessity for "uniform, fair and strongly enforced policies" as well. *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974).

The intractable split in the circuits on a plainly open question of law is unfair and untenable, especially in light of the significant number of disparate impact challenges filed nationally each year.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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December 21, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2011

(Argued: October 17, 2011 Decided: July 10, 2012)

Nos. 10-1904-cv(L), 10-2031-cv(XAP)

HOWARD CHIN, RICHARD WONG, SANRIT BOONCOME, MICHAEL CHUNG,
Plaintiffs-Appellees–Cross-Appellants,

THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, DAVID LIM, GEORGE MARTINEZ, STANLEY CHIN, MILTON FONG,
Plaintiffs-Appellees,

-v.-

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,
Defendant-Appellant–Cross-Appellee.

Before: MCLAUGHLIN, CABRANES, and LIVINGSTON,
Circuit Judges.

LIVINGSTON, *Circuit Judge*:

Plaintiffs-appellees, eleven Asian Americans currently or formerly employed as police officers by the Port Authority of New York and New Jersey ("Port Authority"), sued the Port Authority under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that they were passed over for promotions because of their race. The plaintiffs asserted three theories of liability for discrimination: individual disparate treatment, pattern-or-practice disparate treatment, and disparate impact. After a nine-day trial, a unanimous jury found the Port Authority liable for discrimination against seven of the plaintiffs under all three theories and awarded back pay and compensatory damages to each of those seven plaintiffs. The district court (Miriam Goldman Cedarbaum, *Judge*) also granted equitable relief to certain of the prevailing plaintiffs in the form of retroactive promotions, seniority benefits, and salary and pension adjustments corresponding with the hypothetical promotion dates that the jury apparently selected as a basis for calculating these plaintiffs' back pay awards.

On appeal, the Port Authority argues: (1) that evidence predating the onset of the statute of limitations should not have been admitted; (2) that the evidence was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) that the damages and equitable relief were premised on time-barred claims and were otherwise excessive. With regard to the plaintiffs' individual disparate treatment allegations, we hold that the district court properly admitted background evidence predating the onset of the limitations period and that

there was sufficient evidence for a reasonable juror to conclude that the Port Authority discriminated against the seven prevailing plaintiffs within the limitations period. The district court erred, however, in: (1) submitting the pattern-or-practice disparate treatment theory to the jury in this private, nonclass action; and (2) concluding that the "continuing violation" doctrine applied to the plaintiffs' disparate impact theory so that the jury could award back pay and compensatory damages for harms predating the onset of the statute of limitations. We therefore vacate the back pay for four of the plaintiffs, whose awards correspond with hypothetical promotion dates beyond the limitations period, as well as the injunctive relief for three of the same plaintiffs, and we also vacate the award of compensatory damages for all seven prevailing plaintiffs. We remand for a new trial on damages as to all seven prevailing plaintiffs and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitations period.

The four plaintiffs who did not prevail at trial cross-appeal, arguing that the district court erred by excluding expert testimony from an industrial psychologist. One of these plaintiffs, cross-appellant Howard Chin, further argues that the district court erred in denying the plaintiffs' motion for sanctions in the form of an adverse inference instruction due to the Port Authority's destruction of promotion records. Finding no abuse of discretion in the district court's determinations as to these matters, we affirm.

BACKGROUND

The Port Authority is a bi-state transportation agency whose facilities are policed by its Public Safety Department. The eleven plaintiffs-appellees in this case are Asian Americans who were employed by that department as police officers. Christian Eng was hired in 1977, David Lim in 1980, Richard Wong in 1983, Milton Fong in 1985, Howard Chin and Alan Lew in 1987, Stanley Chin in 1988, George Martinez and Nicholas Yum in 1993, and Michael Chung and Sanrit Booncome in 1999. All of the plaintiffs were members of the Port Authority Police Asian Jade Society of New York & New Jersey Inc. ("Asian Jade Society"), a nonprofit organization comprised of Port Authority police officers of Asian or Pacific Islander origin, whose stated goal is to "promot[e] understanding, friendship and cooperation among members of the Port Authority police department."

I. The Port Authority Police Department's Promotion Process

During the period relevant to this case, entry-level police officers in the Port Authority's police department could be promoted to the rank of Sergeant, the first level in a hierarchy of supervisory positions (followed by Lieutenant, Captain, Inspector, Chief, and finally Superintendent of Police). To become eligible for promotion to Sergeant, a police officer was required (among other requirements) to pass an examination, which would place him on an "eligibility list" for a period of time. When such a list expired, the officer would have to pass the examination again to be placed on the new list. Three lists were in effect during the period relevant to this case: the 1996 List, the 1999 List,

and the 2002 List.[1] These lists were "horizontal," which meant that the lists did not rank the officers, but merely established eligibility for promotion.

Each Port Authority facility's commanding officer (generally a Captain) was periodically asked to recommend eligible officers for promotion, at their discretion. The Port Authority did not dictate any criteria for recommendation. Moreover, commanding officers were free to make recommendation decisions themselves, solicit input from the police officers' direct supervisors (generally Sergeants and Lieutenants), or delegate the responsibility entirely to the direct supervisors. A promotion folder was prepared for each recommended officer, which included a performance evaluation by a supervisor, a photograph of the officer, and his record of absences, commendations, awards, and disciplinary history.

Officers recommended in this way were typically considered by the Chiefs' Board, in which the Chiefs would collectively decide which officers to recommend to the Superintendent. The Chiefs' Board did not operate under any written guidelines, and from 1996 through September 2001, took no

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[1] The 1996 List was in effect from August 1996 through August 1999, and included 178 officers, 7 of whom were Asian. Twenty-three officers were promoted from the 1996 List, none of whom was Asian. The 1999 List was in effect from August 1999 through August 2002, and included 220 officers, 10 of whom were Asian. Fifty-five officers were promoted from the 1999 List, 2 of whom were Asian (both of whom were promoted in December 2001). The 2002 List was in effect from August 2002 through the date the complaint was filed (April 15, 2005), and included 352 officers, 16 of whom were Asian. As of April 15, 2005, when the complaint in this case was filed, 45 officers had been promoted from the 2002 List, 1 of whom was Asian.

minutes or notes. Each Chief would vote regarding each recommended officer, and any officer who received a majority of votes from the Chiefs' Board would then be recommended to the Superintendent. This step in the process was not always necessary to promotion, however; for example, Acting Superintendent Joseph Morris did not use the Chiefs' Board at all during his tenure from September 2001 through April 2002.

The ultimate decision to promote an officer to Sergeant belonged solely to the Superintendent. In fact, the Superintendent occasionally promoted officers whom the Chiefs' Board had declined to recommend ahead of those recommended by the Board.

As of January 31, 2001, no Asian American had ever been promoted to Sergeant.

II. Procedural History

On January 31, 2001, the Asian Jade Society filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of its members, claiming that the Port Authority had denied Asian American police officers promotions because of their race. On August 29, 2003, the EEOC determined that there was reasonable cause to believe the Port Authority had violated Title VII, and on January 25, 2005, the Department of Justice issued a right-to-sue letter to the Asian Jade Society.[2] The eleven plaintiffs in this

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[2] Ordinarily, a "right to sue" letter must be issued by the EEOC. However, where the respondent to a Title VII discrimination charge is a governmental agency and the EEOC has not dismissed the charge, the Attorney General is

case filed suit on April 15, 2005, alleging that the Port Authority had discriminated against Asian Americans in making promotions to Sergeant.

During discovery, the plaintiffs learned that the Port Authority had not implemented a document retention policy and that, as a result, at least thirty-two promotion folders used to make promotion decisions between August 1999 and August 2002 had been destroyed. The plaintiffs moved for sanctions, seeking an adverse inference against the Port Authority for spoliation. The district court denied the motion, reasoning that the plaintiffs had ample alternative evidence regarding the relative qualifications of the plaintiffs and that the Port Authority's destruction of the documents was "negligent, but not grossly so." *Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc.* v. *Port Auth. of N.Y. & N.J.* (*Port Auth. I*), 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009).

On the eve of trial, the district court granted the Port Authority's motion to exclude testimony from one of the plaintiffs' expert witnesses: Dr. Kathleen Lundquist, an industrial psychologist who specializes in analyzing the reliability and validity of employee-selection procedures. Dr. Lundquist had prepared a report opining on the effectiveness of the Port Authority's promotion process, on whether it included safeguards to prevent bias and discrimination, and on the comparative qualifications of the plaintiffs relative to the qualifications of the officers who had been promoted.

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responsible for issuing the right-to-sue letter. *See* 29 C.F.R. § 1601.28(d).

Citing Rule 702 of the Federal Rules of Evidence,[3] the district court concluded that Dr. Lundquist's testimony "would not assist the trier of fact" and was therefore excluded.

The nine-day trial began on March 11, 2009, and included testimony from twenty-two fact witnesses and four expert witnesses. All eleven of the plaintiffs testified regarding their personal backgrounds, education, experiences as police officers, attendance and disciplinary records, awards and commendations, and performance evaluations. Six Chiefs, one former Superintendent, the Superintendent at the time of trial, and three other Port Authority managers testified regarding the Port Authority's promotion procedure. Each side also presented a statistical expert and a damages expert.

Most relevant to this appeal, the plaintiffs' statistical expert, Dr. Christopher Cavanagh, presented two analyses that, in his view, demonstrated a high probability that Asian Americans had been discriminated against in the Port Authority's promotion process. In his first

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[3] Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

study, Cavanagh compared the percentage of white police officers who held a supervisory position (out of all white police officers) with the percentage of Asian Americans who held a supervisory position (out of all Asian American police officers) from 1996 through 2004. For each year, he used a Fisher Exact Test to calculate the likelihood that the difference between Asian American and white representation at the supervisory level (as compared to the representation of these groups at the nonsupervisory level) was due to chance.[4] From 1996 through 2000, the likelihood that the disparities were due to chance was about two percent or less; from 2001 through 2004, the likelihoods that the disparities were due to chance were between about five and eleven percent.

Cavanagh's second analysis compared the promotion rate for whites who were on the eligible lists to the promotion rate for Asian Americans who were on the eligible lists over the period from August 1996 through January 31, 2001 (the date on which the EEOC charge was filed). Of the 259 white officers on the lists over this period, 36 were promoted; of the 12 Asian Americans on the lists, none were promoted. Using the Fisher Exact Test, Cavanagh calculated that the likelihood this disparity would occur due to chance was about thirteen percent.

The district court instructed the jury regarding three theories of discrimination: (1) disparate

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[4] The Fisher Exact Test is a statistical significance test named for its author, R.A. Fisher. *See generally* R.A. Fisher, *On the Interpretation of [Chi-Squared] from Contingency Tables, and the Calculation of P*, 85 J. Royal Stat. Soc'y 87 (1922).

impact; (2) pattern-or-practice disparate treatment; and (3) individual disparate treatment. After two-and-a-half days of deliberation, the jury returned a unanimous verdict, finding that seven of the eleven plaintiffs—Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and David Lim—had proven all three of their theories of liability, and awarding more than $1.6 million in total to those seven plaintiffs. The back pay awards corresponded precisely to certain hypothetical promotion dates suggested by the plaintiffs' damages expert.[5]

On the plaintiffs' motion, the district court also granted the seven prevailing plaintiffs equitable relief, including salary adjustments for pension purposes for Milton Fong, Stanley Chin, Alan Lew, George Martinez, Nicholas Yum, and David Lim, and retroactive promotions for Alan Lew, George Martinez, and Nicholas Yum. The hypothetical dates the district court used were October 31, 1999, for Fong, Chin, and Lew, and September 30, 2002, for

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[5] Four plaintiffs' back pay awards corresponded to hypothetical promotion dates of October 31, 1999: Christian Eng was awarded $35,445 in back pay and $250,000 in compensatory damages; Milton Fong was awarded $83,924 in back pay and $100,000 in compensatory damages; Alan Lew was awarded $189,859 in back pay and $75,000 in compensatory damages; and Stanley Chin was awarded $116,636 in back pay and $100,000 in compensatory damages. Three plaintiffs' back pay awards corresponded to hypothetical promotion dates of September 30, 2002: Nicholas Yum was awarded $141,663 in back pay and $15,000 in compensatory damages; George Martinez was awarded $145,861 in back pay and $15,000 in compensatory damages; and David Lim was awarded $119,234 in back pay and $250,000 in compensatory damages.

Martinez, Yum, and Lim—corresponding with the hypothetical dates the jury apparently used as a basis for computing back pay. The court also ordered the Port Authority to take certain specific actions to prevent future violations.

The Port Authority filed a motion pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure to set aside the jury's verdict or, alternatively, for a new trial and for remittitur. The Port Authority argued that: (1) the district court improperly admitted evidence pertaining to events prior to the onset of the statute of limitations period; (2) the jury was improperly instructed to consider events outside the limitations period for purposes of establishing liability; (3) there was insufficient evidence to find the Port Authority liable under any of the plaintiffs' three theories; (4) the jury instructions were erroneous and confusing with respect to the statute of limitations; and (5) the jury's damages included time-barred claims and were otherwise excessive.

The district court denied the Port Authority's motion in its entirety. *See Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc.* v. *Port Auth. of N.Y. & N.J.* (*Port Auth. II*), 681 F. Supp. 2d 456 (S.D.N.Y. 2010). As pertinent to this appeal, the district court first held that background evidence from beyond the statute of limitations is admissible in support of a timely claim. *See id.* at 462. Next, the court concluded that the plaintiffs' individual disparate treatment claims were premised on "discrete acts" and thus that the Port Authority could be liable only for those acts within the statute of limitations. *See id.* at 463. The court concluded that the plaintiffs'

disparate impact and pattern-or-practice disparate treatment theories of liability, however, were premised on the existence of an "ongoing discriminatory policy," and thus were subject to the "continuing violations" doctrine, so that the plaintiffs could recover for untimely discrete acts so long as they were the product of a discriminatory policy that continued into the statute-of-limitations period. *See id.* at 463–66. Third, the district court held that although Cavanagh's statistical evidence did not reach the conventional five-percent level of statistical significance, *see Smith* v. *Xerox Corp.*, 196 F.3d 358, 366 (2d Cir. 1999) (noting that statistical significance at the five-percent level is generally "sufficient to warrant an inference of discrimination"), the jury had before it other evidence of discrimination sufficient to find for the plaintiffs on each of the theories of liability. *See Port Auth. II*, 681 F. Supp. 2d at 468–69. Finally, the district court declined to remit the jury's compensatory damages awards because other judges had upheld similar awards and because the awards did not "shock the judicial conscience." *Id.* at 470.

The Port Authority appeals, and argues before this Court that it is entitled to a new trial with respect to the seven prevailing plaintiffs because: (1) evidence predating the onset of the limitations period should not have been admitted; (2) the evidence at trial was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) the damages and equitable relief are premised on time-barred claims and are otherwise excessive.

The four plaintiffs who did not prevail at trial—Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung—cross-appeal, and argue here that they are entitled to a new trial because the district court erred by excluding Lundquist's testimony. Howard Chin further argues that he is entitled to a new trial because the district court improperly denied the plaintiffs an adverse inference instruction despite the Port Authority's destruction of promotion records.

DISCUSSION

The plaintiffs argue that they are entitled to damages for injuries that occurred before the onset of the statute of limitations period because the "continuing violations" doctrine applies to two of their three theories of liability—pattern-or-practice disparate treatment and disparate impact. We dispose of half of this argument at the outset of this opinion by holding that no such pattern-or-practice theory of liability is available to the private, non-class plaintiffs in this case. We next consider and affirm the district court's judgment with respect to the plaintiffs' two remaining theories of liability—individual disparate treatment and disparate impact—by holding that background evidence from outside the limitations period was admissible and that the evidence presented at trial was sufficient to sustain the jury's findings of liability on both theories. We then conclude, however, that the "continuing violations" doctrine does not apply to either theory in this case, and therefore vacate and remand for reconsideration of the damages and equitable relief granted by the district court to the prevailing plaintiffs whose awards correspond (or

may correspond) to hypothetical promotion dates preceding the onset of the limitations period. Finally, we consider the plaintiffs' cross-appeal, and hold that the district court did not abuse its discretion by excluding Lundquist's testimony or by denying the plaintiffs an adverse inference instruction. "A motion for a new trial should be granted when, in the opinion of the district court, 'the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.'" *Song* v. *Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (quoting and altering *Smith* v. *Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). "The district court's denial of a Rule 59 motion for a new trial is reviewed for abuse of discretion." *Manganiello* v. *City of New York*, 612 F.3d 149, 165 (2d Cir. 2010). "A district court has abused its discretion if it has (1) 'based its ruling on an erroneous view of the law,' (2) made 'a clearly erroneous assessment of the evidence,' or (3) 'rendered a decision that cannot be located within the range of permissible decisions.'" *Id.* (quoting *Sims* v. *Blot*, 534 F.3d 117, 132 (2d Cir. 2008)). We review the denial of a motion for judgment as a matter of law *de novo*. *Lore* v. *City of Syracuse*, 670 F.3d 127, 150 (2d Cir. 2012). "[W]hether conducting review *de novo* or under a less sweeping standard, we must disregard all errors and defects . . . . if there is no likelihood that the error or defect affected the outcome of the case." *Id.* (internal quotation marks omitted).

As a prerequisite to filing suit under Title VII, a private plaintiff must first file a timely charge with the EEOC. *See* 42 U.S.C. § 2000e-5(e)(1), (f)(1). Both parties agree that in this case, the plaintiffs' charge was due "within one hundred and eighty days after

the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Accordingly, because the EEOC charge in this case was filed on January 31, 2001, only an unlawful employment practice that "occurred" after August 2, 2000, may give rise to liability.[6]

I. The Pattern-or-Practice Method of Proof

As an initial matter, we address the question whether the method of proof described in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1997), and known as the "*Teamsters*" or "pattern-or-practice" method, was available to the nonclass private plaintiffs in this case.[7] We conclude that it was not and that the judgment as to pattern or practice must for this

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[6] Although the district court and the parties appear to agree that 180 days prior to January 31, 2001 is August 3, 2000, by this Court's calculation the correct date is August 4, 2000, which would mean that only an unlawful employment practice that occurred after August 3, 2000 may give rise to liability. But because the one-day difference is not material to this appeal, we refer to August 2, 2000, as the relevant date throughout this opinion. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

[7] The parties did not address this issue before the district court and do not raise it on appeal. Nonetheless, we are not bound by parties' effective stipulations on questions of law, *see U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446–48 (1993), and in this case we exercise our discretion to consider this issue in order to provide guidance in a complicated area.

reason be reversed. We emphasize, however, that evidence that the Port Authority engaged in a pattern or practice of discrimination—in the ordinary sense of those words, rather than in the technical sense describing a theory of liability for discrimination—remains relevant in assessing whether the plaintiffs proved discrimination using the individual disparate treatment and disparate impact methods of proof.

The phrase "pattern or practice" appears only once in Title VII—in a section that authorizes the government to pursue injunctive relief against an employer "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" the statute. 42 U.S.C. § 2000e-6. Notwithstanding the Supreme Court's recognition in *Teamsters* that this language "was not intended as a term of art, and the words reflect only their usual meaning," *Teamsters*, 431 U.S. at 336 n.16, the phrase is often used in a technical sense to refer either to this unique form of liability available in government actions under § 2000e-6, *see, e.g.*, *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 67–68 n.19, 70, 80 (1984), or to the burden-shifting framework set out in *Teamsters* and available both to the government in § 2000e-6 litigation and to class-action plaintiffs in private actions alleging discrimination, *see, e.g., Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2552 n.7 (2011).

We begin with § 2000e-6. The building blocks of liability pursuant to this provision—which provides for prospective injunctive relief where the government establishes that an employer is engaged in a "pattern or practice of resistance to the full

enjoyment" of rights secured by Title VII—differ from those that provide the foundation for typical, private-party Title VII litigation. To establish an employer's liability for discrimination in violation of Title VII, a private plaintiff ordinarily must show that an employer took an adverse employment action against him or her because of his or her race, or on account of another protected ground. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Aulicino* v. *N.Y. City Dep't of Homeless Servs.*, 580 F.3d 73, 80 (2d Cir. 2009). In § 2000e-6 litigation, by contrast, the government need not demonstrate specific losses to specific individuals to establish that injunctive relief is appropriate. The government must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts": it must prove that unlawful discrimination "was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336. Once established, however, "a court's finding of a pattern or practice justifies an award of prospective relief" even absent proof of losses to specific individuals. *Id.* at 361.

The parties here use the term "pattern or practice" to refer not to an element of a § 2000e-6 claim, but to the method of proof that the Supreme Court endorsed in *Teamsters* for the adjudication of such claims. This method of proof, however, originated in the class action context, in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). The Supreme Court in *Franks* determined that once the private plaintiffs in the class action there "carried their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the [employer] . . ., the burden [was] upon [the employer] to prove that individuals who reappl[ied] were not in

fact victims of previous hiring discrimination." *Id.* at 772. The Court in *Franks* used the phrase "pattern and practice" to refer to the common question of fact (whether the employer had engaged in a practice of discriminatory hiring) to be litigated by class plaintiffs, and apparently viewed its holding as no more than an application of *McDonnell Douglas'* burden-shifting framework in the class-action context. See *Franks*, 424 U.S. at 773 (citing *McDonnell Douglas*, 411 U.S. 792).

The *Teamsters* Court thereafter determined that the *Franks* burdenshifting framework for certain class actions should also apply to government "pattern or practice" suits brought under § 2000e-6:

> Although not all class actions will necessarily follow the *Franks* model, the nature of a [§ 2000e-6] pattern-or-practice suit brings it squarely within our holding in *Franks*. The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. . . .
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> When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the

> liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case. . . .
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> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Teamsters, 431 U.S. at 360–62 (internal citation and footnotes omitted). Since *Teamsters*, this burden-shifting framework has been known as the "*Teamsters* method of proof" or the "pattern-or-practice method." *See, e.g., Celestine* v. *Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001) ("A pattern or practice case is not a separate and free-standing cause of action . . . , but is really merely another method by which disparate treatment can be

shown." (internal quotation marks omitted)); *Lowery* v. *Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998) ("The courts of appeals have . . . permitted pattern or practice class action suits using the *Teamsters* method of proof."), *vacated on other grounds*, 527 U.S. 1031 (1999).[8] In sum, unlike in a typical individual disparate treatment suit, "a plaintiff's burden under the pattern-or-practice method requires the plaintiff to prove only the existence of a discriminatory policy rather than all elements of a prima facie case of discrimination"—but "under the pattern-or-practice method, only prospective relief [is] available, unless the plaintiffs offer additional proof." *Semsroth* v. *City of Wichita*, 304 F. App'x 707, 716 (10th Cir. 2008) (describing the reasoning in *Lowery*, 158 F.3d at 761).

Permitting private plaintiffs to use the pattern-or-practice method of proof outside the class action context would require us to extend this method beyond its current application. This we decline to do. Such an extension would allow nonclass private plaintiffs who have shown a pattern or practice of discrimination (but have not made out a disparate impact claim) to shift the burden to employers to prove that they did not discriminate against a particular individual. But this would conflict with the Supreme Court's oft-repeated holding in the

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[8] Although the *Teamsters* framework is not a freestanding cause of action, courts—including the Supreme Court—sometimes loosely refer to the Teamsters method of proof as a "pattern-or-practice claim." *See, e.g., Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 n.9 (2002) ("We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here.").

context of disparate-treatment, private nonclass litigation that "[t]he ultimate burden of pursuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). To be sure, proof that an employer engaged in a pattern or practice of discrimination may be of substantial help in demonstrating an employer's liability in the individual case. But such proof cannot relieve the plaintiff of the need to establish each element of his or her claim.

We note that the district court in this case did not instruct the jury that a finding of a pattern or practice of discrimination shifted the burden of persuasion. Rather, the verdict sheet instructed the jury that each individual plaintiff was required to prove by a preponderance of the evidence that he was discriminated against as part of the pattern or practice. This instruction only underscores, however, why there was no need for the jury to make a specific finding regarding a pattern or practice of discrimination in this private, nonclass suit, as opposed to determining directly whether each individual plaintiff had been intentionally discriminated against. Where, as here, there are only individual, nonclass disparate-treatment claims, a district court need not and should not instruct the jury that a common pattern of discrimination is an element of liability.

For these reasons, all of our sister circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs. *See Semsroth* v. *City of Wichita*,

304 F. App'x 707, 715 (10th Cir. 2008); *Davis* v. *Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967–69 (11th Cir. 2008); *Bacon* v. *Honda of Am. Mfg.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine* v. *Petroleos de Venezuella SA*, 266 F.3d 343, 355–56 (5th Cir. 2001); *Gilty* v. *Vill. of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990); *Lowery* v. *Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *see also Schuler* v. *PricewaterhouseCoopers, LLP*, 739 F. Supp. 2d 1, 6 n.2 (D.D.C. 2010) ("Courts in every other Circuit that has touched on this issue have indicated that an individual plaintiff cannot maintain a pattern and practice claim.") (collecting cases); 1 Lex Larson et al., *Employment Discrimination* § 8.01[3], at 8-13 (2d ed. 2011) ("[C]ourts have refused to permit individuals to use the pattern or practice proof structure for claims of individual discrimination . . . ."). We have suggested as much, albeit in dicta. *See Brown* v. *Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998).

For the foregoing reasons, we now hold that the pattern-or-practice method of proof is not available to nonclass, private plaintiffs in cases such as the one before us. Evidence of an employer's general practice of discrimination may be highly relevant to an individual disparate treatment or to a disparate impact claim. Outside the class context, however, private plaintiffs may not invoke the *Teamsters* method of proof as an independent and distinct method of establishing liability. The district court erred in submitting this method of proof to the jury as a basis on which it could hold the Port Authority liable.

II. Admissibility and Sufficiency of Evidence

A. Admissibility of Evidence from Outside the Limitations Period

Turning to the plaintiffs' individual disparate treatment and disparate impact claims, the Port Authority argues that the district court improperly admitted evidence of events prior to August 2, 2000, for purposes of liability and damages. It is well established, however, that so long as at least "one alleged adverse employment action . . . occurred within the applicable filing period[,] . . . evidence of an earlier alleged retaliatory act may constitute relevant 'background evidence in support of [that] timely claim.'" *Jute* v. *Hamilton Sundstrand Corp.*, 420 F.3d 166, 176 (2d Cir. 2005) (quoting and altering *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002)). Such background evidence "may be considered to assess liability on the timely alleged act." *Id.* at 177; see also *Petrosino* v. *Bell Atl.*, 385 F.3d 210, 220 (2d Cir. 2004) (applying this rule in the failure-to-promote context). In particular, we have noted that statistical studies may include data from outside the statute of limitations to prove timely discriminatory acts. *See Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 n.5 (2d Cir. 1986).[9] Title VII's statute of limitations therefore did not prohibit admission of the plaintiffs' evidence of discrimination before August 2, 2000.

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[9] To be clear, the district court retains discretion to determine whether evidence predating the onset of the statute of limitations period should be admitted under any applicable rule of evidence. *See Jute*, 420 F.3d at 177 n.7; *Malarkey* v. *Texaco, Inc.*, 983 F.2d 1204, 1211 (2d Cir. 1993).

B. Sufficiency of the Evidence

The Port Authority next argues that the plaintiffs' evidence of individual disparate treatment and disparate impact was insufficient as a matter of law, and that the district court therefore abused its discretion in declining to set aside the verdict. "In reviewing the sufficiency of the evidence in support of a jury's verdict, we examine the evidence in the light most favorable to the party in whose favor the jury decided, drawing all reasonable inferences in the winning party's favor." *Gronowski* v. *Spencer*, 424 F.3d 285, 291 (2d Cir. 2005). We will overturn the verdict here "only if there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the [Port Authority] that reasonable and fair minded men could not arrive at a verdict against [the Port Authority].'" *Id.* at 292 (quoting *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 429 (2d Cir. 1995)) (some internal quotation marks omitted).

With respect to a Title VII individual disparate treatment claim, "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148–49 (2000). A plaintiff establishes a prima facie case by showing "(1) that he belonged to a protected class;

(2) that he was qualified for the position he held; (3) that he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." *Feingold* v. *New York*, 366 F.3d 138, 152 (2d Cir. 2004). An employer may then rebut this prima facie case by offering a legitimate, nondiscriminatory business reason for its conduct. *See id.* A plaintiff ultimately prevails if he proves that the defendant's employment decision was based in whole or in part on intentional discrimination. *See id.*

To prevail under the disparate impact theory of liability, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). This requires a plaintiff to (1) "identify a specific employment practice" or policy, *Malave* v. *Potter*, 320 F.3d 321, 326 (2d Cir. 2003); "(2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two." *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160 (2d Cir. 2001). "The statistics must reveal that the disparity is substantial or significant," and "must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity." *Id.* (internal quotation marks omitted). To rebut a plaintiff's statistics, a defendant may introduce evidence showing that "either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity." *Id.* at 161.

If the trier of fact determines that the plaintiffs have established a disparate impact violation of Title VII, each person seeking individual relief such as back pay and compensatory damages "need only show that he or she suffered an adverse employment decision 'and therefore was a potential victim of the proved discrimination.'" *Id.* at 159 (quoting *Teamsters*, 431 U.S. at 362) (alteration omitted); *see id.* at 161–62. After such a showing, the employer bears the burden of persuading the trier of fact that its decision was made for lawful reasons; otherwise, the employee is entitled to individualized relief, which may include back pay, front pay, and compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, [or] other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3); *see Robinson*, 267 F.3d at 159–60.

The Port Authority challenges three aspects of the plaintiffs' evidence. First, the Port Authority argues that the plaintiffs' statistical evidence was fatally flawed and that without it the plaintiffs lack sufficient evidence to prove a disparate impact. Second, the Port Authority contends that the plaintiffs did not show that the multiple-step promotion process was "not capable of separation for analysis," 42 U.S.C. § 2000e-2(k)(1)(B)(i), and therefore the plaintiffs were required but failed to identify the specific promotion practice that caused a disparate impact. Third, the Port Authority contends that the plaintiffs' anecdotal evidence of intentional discrimination consists of nothing more than personal affronts outside of the promotion context, and therefore that the plaintiffs' individual

disparate treatment claims must fail for lack of evidence that any discrimination was intentional.

We disagree with all three of the Port Authority's arguments and hold that the plaintiffs introduced sufficient evidence to support the jury's verdict as to plaintiffs' disparate impact and individual disparate treatment claims.

1. Statistical Evidence

The Port Authority argues first that the statistical evidence presented by Dr. Cavanagh, the plaintiffs' expert witness, was insufficient to prove their disparate impact claim because Dr. Cavanagh's analyses impermissibly (1) relied on data predating the onset of the statute of limitations, (2) did not focus on the relevant pool of candidates eligible for promotion, and (3) failed to establish statistical significance. We address each of these contentions in turn.

First, the Port Authority is incorrect in asserting that Dr. Cavanagh's statistics were flawed because they relied in part on data predating the onset of the statute of limitations period. In *Bazemore* v. *Friday*, 478 U.S. 385 (1986), the Supreme Court stated that evidence predating the 1972 enactment of Title VII was not only admissible but, "to the extent that proof is required to establish discrimination with respect to salary disparities created after 1972, evidence of pre-Act discrimination is quite probative." *Id.* at 402 n.13 (internal citation omitted). Moreover, we have made clear that a district court errs by "downgrading" statistical studies on the ground that they "relied in part on pre-statute of limitations data." *Rossini*, 798 F.2d at 604 n.5.

The Port Authority next argues that Dr. Cavanagh's year-end demographic statistics were not sufficient to show a disparate impact because they simply compared the percentage of Asian Americans in supervisory positions with the percentage of Asian American officers, rather than looking to the relevant pool for promotion (*i.e.*, the percentage of Asian Americans on the eligible lists). On this point, we agree.

As we have said, "plaintiffs must identify the correct population for analysis. In the typical disparate impact case the proper population for analysis is the applicant pool or the *eligible* labor pool." *Smith* v. *Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999) (emphasis added), *overruled on other grounds by Meacham* v. *Knolls Atomic Power Lab.*, 461 F.3d 134, 140 (2d Cir. 2006). "In the context of promotions, we have held that the appropriate comparison is customarily between the [racial] composition of candidates *seeking to be promoted* and the [racial] composition of those actually promoted," at least so long as the relevant data are available. *Malave*, 320 F.3d at 326 (emphasis added). The plaintiffs in this case did not allege that the eligibility test was discriminatory; rather, they alleged that discrimination entered the process at the discretionary stage after the eligible lists had already been drawn up. The relevant population for analysis, then, includes only those officers on the eligible lists. Dr. Cavanagh's year-end demographic analyses include *all* officers, and therefore do not meet the statistical standards prescribed by law.

Putting aside these demographic analyses, then, we are left with Dr. Cavanagh's statistical analysis

comparing the percentage of Asian Americans on the eligibility lists with the percentage of Asian Americans promoted from 1996 to January 31, 2001 (the date that the EEOC complaint was filed). None of the 12 Asians on the eligible lists were promoted during this period, in contrast to 36 out of 259 whites; according to Dr. Cavanagh's calculations, this difference would occur due to chance "a bit under 13 percent" of the time. The Port Authority argues that a due-to-chance figure of 13 percent is not statistically significant because "it is generally accepted that statistical significance is at a 5% level or less."

It is true that "we have . . . looked to whether the plaintiff can show a statistically significant disparity of two standard deviations," which (in a normal distribution) requires statistical significance at approximately the 5-percent level. *Xerox*, 196 F.3d at 365. However, we have also said that "[t]here is no minimum statistical threshold requiring a mandatory finding that a plaintiff has demonstrated a violation of Title VII. Courts should take a 'case-by-case approach' in judging the significance or substantiality of disparities, one that considers not only statistics but also all the surrounding facts and circumstances." *Waisome* v. *Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (quoting *Ottaviani* v. *State Univ. of N.Y. at New Paltz*, 875 F.2d 365, 372–73 (2d Cir. 1991)); *see also Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) ("[W]e have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. . . ."); *accord Xerox*, 196 F.3d at 366.

In many (perhaps most) cases, if there is a 13-percent likelihood that a disparity resulted from chance, it will not qualify as statistically significant. In this case, the plaintiffs offered other evidence that reasonable jurors could have relied upon to find that an 87-percent likelihood that the disparity was not due to chance qualified as significant. First, *no* Asian Americans were promoted during the relevant period; requiring a statistical showing of 95-percent confidence would make it mathematically impossible to rely upon statistics in a case like this one, in which the relevant population included so few Asian Americans. *See Waisome*, 948 F.2d at 1379 ("[T]he lack of statistical significance in the ultimate promotion reflects only the small sample size."). Second, as the Port Authority acknowledges, the plaintiffs presented a substantial amount of evidence that reasonable jurors could have relied on to conclude that the plaintiffs were more qualified than some of the white officers who were promoted, including comparing length of service, attendance records, and disciplinary histories. In the context of this case, it would not be unreasonable for a juror to find Dr. Cavanagh's statistics significant despite only being significant at the 13-percent level.

Finally, despite the Port Authority's argument to the contrary, Dr. Cavanagh's choice to limit his time frame to the period from 1996 through January 2001 (rather than, as defendant's expert did, extending the analysis into 2005) was not unreasonable. The plaintiffs' theory was that the Port Authority's failures to promote them caused a disparate impact through 2001, when the EEOC charge in this case was filed. Dr. Cavanagh's selected time frame was directly relevant to answering this question.

2. Specific Employment Practice

The Port Authority next argues that there was insufficient evidence to support the plaintiffs' disparate impact claim on the ground that plaintiffs either failed to identify a *specific* promotion practice resulting in a disparate impact on Asian Americans or failed to show that the Port Authority's promotion process could not be separated into component parts for analysis. According to the Port Authority, the promotion process involved three separate steps—recommendation by a commanding officer, approval by the Chiefs' Board, and selection by the Superintendent—and these steps were wholly capable of being separated from each other for the purpose of statistical analysis. For the following reasons, we disagree.

To make out a disparate impact claim (or, more generally, to rely on statistical evidence), a plaintiff must identify a specific discriminatory employment practice. *See Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2555–56 (2011) ("[R]espondents have identified no 'specific employment practice' . . . . Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."); *Watson*, 487 U.S. at 994 ("Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). Title VII, however, expressly provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable

of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i). Whether a particular decisionmaking process is capable of separation for analysis largely turns on the details of the specific process and its implementation in a given case. *See McClain* v. *Lufkin Indus.*, 519 F.3d 264, 278 (5th Cir. 2008); *cf. Meachem* v. *Knolls Atomic Power Lab.*, 381 F.3d 56, 74 (2d Cir. 2004), *vacated on other grounds*, 544 U.S. 957 (2005).

Here, the evidence amply demonstrated that recommendation by the Chief's Board could not be separated from the rest of the promotion process for the purpose of statistical analysis. Such recommendation was neither necessary nor sufficient for promotion, and the weight it carried in the process was both unclear and variable. For example, two candidates who were not recommended by the Chiefs' Board in January 2003 were nonetheless promoted by the Superintendent later that month, even as others who received unanimous recommendations from the Chiefs were not promoted for a year, or two years. Another Superintendent did not bother to use the Chiefs' Board at all. Recommendation by the Chiefs' Board was therefore not capable of separation from the rest of the promotion process.

The commanding officers' recommendations were similarly inseparable from the Superintendent's ultimate decisions regarding promotions because they played an indeterminate role in the integrated promotion process. For example, former Chief Thomas Farrell testified that he occasionally would ask for performance evaluations of everyone on the

eligible list—not just those who were recommended by commanding officers—while other testimony indicated that commanding officers' recommendations were often important in the promotion process. We therefore agree with the district court that these "steps" in the promotion process were not capable of separation for analysis. *See Port Auth. II,* 681 F. Supp. 2d at 464. Accordingly, the decisionmaking process involved in promotions to Sergeant was properly analyzed as one employment practice.

3. Proof of Intent

The Port Authority next argues that it was entitled to judgment as a matter of law on the plaintiffs' individual disparate treatment claims because many of the plaintiffs' anecdotes of intentional discrimination were merely "situations involving personal affront as opposed to examples of overt racism," and moreover, that "[n]one of the specific instances relied upon by plaintiffs took place in the context of promotion." Appellants' Reply Br. at 17. Even if we were to accept the Port Authority's characterization of these accounts of discrimination, however, the plaintiffs also provided evidence that they were better qualified for promotion than several white officers who were promoted instead. In conjunction with the plaintiffs' statistical evidence, we conclude that this anecdotal evidence of intent was sufficient for a reasonable jury to conclude that the Port Authority intentionally discriminated against the plaintiffs by failing to promote them.

III. Damages and the Statute of Limitations

The Port Authority argues, finally, that it was improperly assessed back pay and compensatory

damages for harms that were suffered by the plaintiffs prior to August 2, 2000. The district court disagreed because it believed that the "continuing violation" doctrine applied in the context of plaintiffs' disparate impact allegations so that damages could properly be awarded for failures to promote that occurred outside the limitations period.[10] We agree with the Port Authority and hold that the continuing violation doctrine does not apply to plaintiffs' disparate impact proof. As a result, we further conclude: (1) that the back pay awards to Eng, Lew, Stanley Chin, and Fong must be vacated, as well as the retroactive promotion of Lew and the salary and pension adjustments for Lew, Stanley Chin, and Fong; and (2) that the jury's compensatory damage awards with regard to all seven prevailing plaintiffs must also be vacated. We remand to the district court for a new trial on damages and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitations period.

A. The Continuing Violation Doctrine

It has been the law of this Circuit that "[u]nder the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone." *Lambert* v. *Genesse*

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[10] The district court reached a similar conclusion with regard to plaintiffs' pattern-or-practice allegations but, for the reasons already stated, *see supra* Part I, we have concluded that this theory of liability was not properly submitted to the jury.

Hosp., 10 F.3d 46, 53 (2d Cir. 1993), *abrogated on other grounds by Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1329–30 (2011); *see also Patterson* v. *Cnty. of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004); *Fitzgerald* v. *Henderson*, 251 F.3d 345, 359 (2d Cir. 2001); *Van Zant* v. *KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996); *Cornwall* v. *Robinson*, 23 F.3d 694, 703–04 (2d Cir. 1994). Applying this principle, the district court in this case concluded that the Port Authority could be liable, and assessed damages, for discriminatory failures to promote outside the statute of limitations because, pursuant to the plaintiffs' disparate impact theory, those failures to promote were the product of an ongoing discriminatory policy that continued after August 2, 2000, thus triggering the continuing-violation doctrine. *See Port Auth. II*, 681 F. Supp. 2d at 463.

* * *

The Port Authority argues that the continuing-violation doctrine does not apply in this case because (1) the plaintiffs did not identify a specific, ongoing discriminatory policy or custom; and (2) under the Supreme Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), failures to promote are "discrete acts" of discrimination and thus do not implicate the continuing-violation doctrine. Because we agree with the Port Authority's second argument, we do not address the first.

In *Morgan*, the Supreme Court unanimously rejected the Ninth Circuit's view that a series or pattern of "related discrete acts" could constitute one continuous "unlawful employment practice" for

purposes of the statute of limitations. *Id.* at 111. Rather, the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* at 113. By a divided vote, however, the *Morgan* Court distinguished such discrete acts from an allegedly hostile work environment, which it held could be a continuing violation because its "very nature involves repeated conduct." *Id.* at 115. "Such claims are based on the cumulative effect of individual acts," the Court wrote, noting that "a single act of harassment may not be actionable on its own." *Id.*

The plaintiffs argue that *Morgan's* analysis of "discrete acts" cannot apply to disparate impact claims because such claims—like hostile work environment claims—are "necessarily based on the cumulative effect of a particular practice over time." Appellees' Br. at 28. It is true that *Morgan* involved only an individual disparate treatment claim premised on a series of related discrete acts, and therefore did not directly address whether the continuing-violation doctrine applies where an ongoing discriminatory policy results in discrete discriminatory acts both before and after the limitation date. *See Morgan*, 536 U.S. at 107 (noting in passing that in the Ninth Circuit, pre-*Morgan*, another type of continuing violation could be established by showing "a systematic policy or practice of discrimination that operated, in part, within the limitations period," but neither endorsing nor repudiating that category of continuing violations); *id.* at 115 n.9 ("We have no occasion here to consider the timely filing question with respect to

'pattern-or-practice' claims brought by private litigants as none are at issue here."). *Morgan*'s reasoning, however, demonstrates that a plaintiff may recover for a failure to promote—regardless whether it was caused by an ongoing discriminatory policy—only if he files an EEOC charge within 180 or 300 days of that decision.[11]

Morgan established that an employer's failure to promote is by its very nature a discrete act. "Discrete acts such as termination, *failure to promote*, denial of transfer, or refusal to hire are easy to identify," the Court wrote. *Id.* at 114 (emphasis added); *see also Forsyth* v. *Fed'n Emp't & Guidance Serv.*, 409 F.3d 565, 572 (2d Cir. 2005), *abrogated on other grounds by Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). Moreover, each discrete act necessarily "constitutes a separate actionable 'unlawful employment practice,'" *Morgan*, 536 U.S. at 114—unlike the incidents that comprise a hostile work environment claim, which may not be individually actionable, *id.* at 115. Both the employer and the aggrieved party may therefore rely on the clear and predictable statute of limitations when contemplating prospective litigation regarding failures to promote or other discrete acts. As Justice Ginsburg has explained:

> A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And

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[11] As *Morgan* notes, the 300-day limitations period, inapplicable here, applies in those states that have "an entity with the authority to grant or seek relief with respect to the alleged unlawful practice" and where an employee initially files a grievance with that entity. 536 U.S. at 109.

> promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext.

Ledbetter, 550 U.S. at 649 (Ginsburg, J., dissenting). Accordingly, under *Morgan*, every failure to promote is a discrete act that potentially gives rise to a freestanding Title VII claim with its own filing deadline.

Discrete acts of this sort, which fall outside the limitations period, cannot be brought within it, even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period. This is the conclusion of every circuit to consider the question after *Morgan*. Each of our sister circuits has held that an allegation of an ongoing discriminatory policy does not extend the statute of limitations where the individual effects of the policy that give rise to the claim are merely discrete acts. *See, e.g., Williams* v. *Giant Food Inc.*, 370 F.3d 423, 429 (4th Cir. 2004) ("Nor does [the plaintiff's] allegation of a 20-year 'pattern or practice' of discrimination extend the applicable limitations periods."); *Davidson* v. *Am. Online, Inc.*, 337 F.3d 1179, 1185–86 (10th Cir. 2003) (holding that claims cannot be premised on an untimely discrete act "even if the discrete act was part of a company-wide or systemic policy"); *cf. Tademe* v. *St. Cloud State Univ.*, 328 F.3d 982, 988 (8th Cir. 2003) ("Although [the plaintiff] argues that the district court failed to consider that he was asserting a pattern-or-practice

of discrimination, *Morgan* makes clear that the failure to promote, refusal to hire, and termination are generally considered separate violations."); *Lyons* v. *England*, 307 F.3d 1092, 1107 & n.8 (9th Cir. 2002) (holding that an individual plaintiff's "assertion that this series of discrete acts flows from a company-wide, or systemic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations period," but distinguishing and declining to address class-wide pattern-or-practice claims).

This conclusion is not altered by the fact that the plaintiffs employ the disparate impact method of proof. To prevail on a disparate impact claim, a plaintiff must "demonstrate[] that a respondent *uses a particular employment practice that causes a disparate impact*." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). In *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2197–99 (2010), the Supreme Court interpreted this language to mean that every "use" of an employment practice that causes a disparate impact is a separate actionable violation of Title VII with its own 180- or 300-day statute-of-limitations clock. *See id.* at 2197–99. Accordingly, under *Lewis* and *Morgan*, each time the Port Authority failed to promote one of the plaintiffs, that plaintiff had 180 days to challenge the decision.

In an attempt to distinguish *Morgan*, the plaintiffs argue that they "challenge *the process* by which the Port Authority made promotion decisions, rather than any specific promotion decision." Appellees' Br. at 29. But this argument hurts rather than helps them. In *Lewis*, the Supreme Court considered the case of an allegedly discriminatory

examination used by the City of Chicago to make hiring decisions. The examination's scores and the City's plan to hire based on certain cutoff scores were announced outside the limitations period, but the actual hiring occurred within the limitations period. *See Lewis*, 130 S. Ct. at 2195–96. The Supreme Court explained that although "[i]t may be true that the City's . . . decision to adopt the cutoff score (and to create a list of the applicants above it) gave rise to a freestanding disparate-impact claim[,] [i]f that is so, the City is correct that since no timely charge was filed attacking it, the City is now entitled to treat that past act as lawful." *Id.* at 2198–99 (citation and internal quotation marks omitted). If the process by which the Port Authority promoted police officers from its eligibility lists did not materially change within the limitations period, as the plaintiffs claim, then the Port Authority is entitled to treat the process as lawful. *See id.* at 2199. The process itself therefore cannot be challenged; rather, only specific failures to promote that occurred within the limitations period are actionable.

B. Damages & Equitable Relief

The district court properly instructed the jury regarding the statute of limitations for plaintiffs' individual disparate treatment claims, and the jury indicated on the verdict sheet its express findings that the Port Authority made discriminatory decisions not to promote Eng, Fong, Lew, Stanley Chin, Yum, Martinez, and Lim "after August 2, 2000." Pursuant to the district court's conclusion that the continuing violation doctrine was applicable to plaintiffs' disparate impact proof, however, the jury was permitted to assess damages for failures to

promote occurring outside the limitations period.[12] With this in mind, we turn to the Port Authority's claim that the damages and equitable awards here were premised on time-barred claims and were otherwise excessive.

1. Back Pay

The jury's back-pay awards correspond precisely to certain calculations of the plaintiffs' damages expert, such that both parties and the district court agreed below that the jury found that four of the prevailing plaintiffs (Eng, Lew, Stanley Chin, and Fong) would have been promoted on October 31,

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[12] We note that the jury was not properly instructed regarding the statute of limitations as it applied to the plaintiffs' disparate impact proof. "To find disparate impact," the district court instructed the jury, "you are not required to consider whether the Port Authority intended to discriminate, but whether the Port Authority's promotion practices were the cause of a disparity, if any, after August 2, 2000." When the jury asked for clarification regarding the timing, the district court told them simply, "There has to be an effect after August 2, 2000." This phrasing suggests that the jury could find disparate impact liability where the Port Authority used an employment practice only outside the limitations period that resulted in a disparate effect that then *passively persisted* into the limitations period. *Lewis*, however, makes clear that a disparate impact claim requires plaintiffs to plead and prove that defendants, within the limitations period, *used* an employment practice that had a disparate impact. 130 S. Ct. at 2197–99. In other words, the *cause*—not merely the effect—must occur within the limitations period. The district court's instruction was therefore erroneous. The Port Authority, however, does not challenge the jury's liability finding on this basis, but simply the award of damages and equitable relief for harms occurring before August 2, 2000. Accordingly, we deem the error waived. *See Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

1999, and the other three (Yum, Lim, and Martinez) would have been promoted on September 30, 2002.

The Port Authority argues first that the jury could not award back pay to multiple plaintiffs dating back to the same date when fewer than that number of plaintiffs were actually promoted on that date. It points out that there were only three promotions on October 31, 1999, but the jury awarded back pay to four plaintiffs corresponding to a failure to promote on that date. Likewise, there were only two promotions on September 30, 2002, but the jury awarded back pay to three plaintiffs extending back to that date. The Port Authority urges that the back pay awards for this reason "suffer from a fundamental error of law" and must be vacated. Appellants' Br. at 46.

We disagree. Although in many circumstances an employer may have only a fixed, limited number of possible promotion slots such that relief would be limited accordingly, *see Dougherty* v. *Barry*, 869 F.2d 605, 614–15 (D.C. Cir. 1989) (R.B. Ginsburg, J.), that is not the case here. The plaintiffs presented evidence that the Port Authority could and did create new Sergeant-level vacancies. For example, during cross-examination, Chief Farrell conceded that the Superintendent occasionally would not specify the number of new Sergeants he was looking for, and that from time to time the Port Authority created new Sergeant-level vacancies based on staffing needs. A reasonable jury could therefore have concluded that the Port Authority could have promoted three officers rather than two on September 30, 2002, and four officers rather than three on October 31, 1999.

Nevertheless, the back pay awards to Christian Eng, Alan Lew, Stanley Chin, and Milton Fong were improper because they were premised on a hypothetical promotion date outside the statute of limitations. As explained earlier, *see supra* section III.A, the district court should have instructed the jury that the Port Authority could be liable only for discriminatory failures to promote after August 2, 2000, and that individual remedies were limited accordingly. We therefore vacate the back pay awards to these four plaintiffs and remand to the district court for determination of their proper back-pay awards.

2. Compensatory Damages

The Port Authority next argues that the jury's compensatory damages awards were based on discriminatory acts that predated the onset of the statute of limitations period. The plaintiffs do not contest this allegation, but rather embrace it, and defend the awards solely on the basis of the continuing violation theory. *See* Appellees' Br. at 48 ("The compensatory damages awards correlate to each Plaintiff's seniority on the job—and thus, the duration of each Plaintiff's distress—awarding $250,000 to the two Plaintiffs who each had more than twenty-nine years on the job, $100,000 and $75,000 to the three Plaintiffs who had between twenty and twenty-five years on the job, and $15,000 to the two Plaintiffs who had sixteen years on the job."). "When '[i]t is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable' to claims that were time-barred, the damages awards must be vacated" and remanded for a new trial on damages. *Annis* v. *Cnty.*

of Westchester, 136 F.3d 239, 248 (2d Cir. 1998) (quoting *Rush* v. *Scott Specialty Gases, Inc.*, 113 F.3d 476, 485 (3d Cir. 1997)). Because the jury may have included time-barred claims with respect to each of the plaintiffs, we vacate all seven prevailing plaintiffs' compensatory damages awards and remand for a new trial on damages. On remand, the district court should instruct the jury to award damages only for injuries stemming from a discriminatory failure to promote after August 2, 2000.

3. Equitable Relief

The Port Authority next argues that the district court's equitable relief of retroactive promotions and salary and pension adjustments should have been granted only *pro rata* under the theory that only a limited number of promotions were available on each day. *See Dougherty*, 869 F.2d at 614–15. But this argument fails with respect to equitable relief for the same reason it fails regarding back pay, *see supra* section III.B.1; on the evidence presented, a reasonable jury could have concluded that the Port Authority could promote more officers on a given date than it chose to.

The equitable relief should not, however, have extended retroactive promotions or salary or pension adjustments beyond the limitations period. The district court's award of salary and pension adjustments for Milton Fong, Stanley Chin, and Alan Lew, as well as the retroactive promotion of Alan Lew, must be vacated and remanded for reconsideration because the award of such equitable relief was premised on a hypothetical promotion date of October 31, 1999. On remand, the district court

should determine the date, after August 2, 2000, that each of these three plaintiffs would have been promoted absent discrimination and may grant appropriate equitable relief accordingly.

IV. Exclusion of Lundquist's Expert Testimony

We now turn to the cross-appeal. The four cross-appealing plaintiffs argue that the district court erred in excluding the expert testimony of Dr. Lundquist, who would have testified that the Port Authority's promotion procedure was so unstructured and subjective that it fell below professional standards, and who would have compared the qualifications of the plaintiffs with those of the officers who were actually promoted. Expert testimony is admissible if it "(a) will help the trier of fact to understand the evidence or to determine a fact in issue," so long as "(b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. A district court's exclusion of expert testimony is reviewed for abuse of discretion, and "[a] decision to admit or exclude expert scientific testimony is not an abuse of discretion unless it is 'manifestly erroneous.'" *Amorgianos* v. *Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (quoting *McCullock* v. *H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995)). "Further, an erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore* v. *City of Syracuse*, 670

F.3d 127, 155 (2d Cir. 2012) (quoting *Arlio* v. *Lively*, 474 F.3d 46, 51 (2d Cir. 2007)).

The district court did not abuse its discretion in concluding that it lacked evidence that Dr. Lundquist's testimony was based on established principles and methods and that, in any event, her testimony would not have provided assistance to the trier of fact beyond that afforded by the arguments of counsel, as required by Rule 702. On appeal, the plaintiffs argue that the district court failed to acknowledge the portion of Dr. Lundquist's testimony that compared the qualifications of the plaintiffs with those of the white officers who were promoted instead. But Dr. Lundquist's analysis as to the comparative qualifications of the plaintiffs was both brief and simple, relying mostly on various officers' years of experience, commendations, discipline, and absences. For each of the four plaintiffs who did not prevail, Dr. Lundquist merely summed up their qualifications in a few sentences and then compared each of them to two officers who were promoted instead but whose record suggested that they may have been less qualified. For example, she compared both Michael Chung and Sanrit Booncome to a promoted officer named Gary Griffith, whom she described only as having "sixty-seven absences in 2000 alone."

The district court did not abuse its discretion in concluding that expert analysis was not required to help the jury understand such evidence. Indeed, the plaintiffs' attorneys made the same points in argument that were made in Dr. Lundquist's report. Chung and Booncome's qualifications were established in detail while they were on the stand,

and their attorney brought out Gary Griffith's relative lack of experience and his significant number of absences through questioning of a former Superintendent. The plaintiffs' attorneys, moreover, emphasized throughout the trial the relative qualifications of the plaintiffs when compared with officers who were promoted. At the trial's conclusion, the plaintiffs' summation detailed the qualifications of each of the plaintiffs in almost exactly the same way as Dr. Lundquist's testimony would have, including occasionally comparing a plaintiff with someone who had been promoted. The district court therefore did not abuse its discretion in determining that Dr. Lundquist's testimony was not relevant expert testimony that would help the jury understand the facts at issue.

V. Sanctions for Spoliation

Finally, cross-appealing plaintiff Howard Chin argues that the district court erred in denying the plaintiffs' motion requesting an adverse inference instruction due to the Port Authority's destruction of the promotion folders used to make promotions off of the 1999 eligible list.[13] *See Port Auth. I*, 601 F. Supp. 2d 566 (S.D.N.Y. 2009). The Port Authority does not dispute that, upon receiving notice of the filing of plaintiffs' EEOC charge in February 2001, it had an obligation to preserve the promotion folders yet failed to do so. It argues, however, that the district court did not abuse its discretion in denying an adverse inference instruction. We agree.

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[13] Howard Chin is the only one of the four cross-appealing plaintiffs who claims to have lost relevant evidence due to the Port Authority's destruction of the promotion folders.

"[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Residential Funding Corp.* v. *DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (internal quotation marks omitted). If these elements are established, a district court may, at its discretion, grant an adverse inference jury instruction insofar as such a sanction would "serve[] [the] threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation." *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 107 (2d Cir. 2001). Our review of a district court's decision on a motion for discovery sanctions is limited to abuse of discretion, which includes errors of law and clearly erroneous assessments of evidence. *See Residential Funding Corp.*, 306 F.3d at 107. "[A]bsent a showing of prejudice, the jury's verdict should not be disturbed." *Id.* at 112.

Howard Chin argues that the Port Authority's failure even to issue a litigation hold regarding the promotion folders at any point between 2001 and 2007 amounted to gross, rather than simple, negligence. We reject the notion that a failure to institute a "litigation hold" constitutes gross

negligence *per se*. *Contra Pension Comm. of Univ. of Montreal Pension Plan* v. *Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010). Rather, we agree that "the better approach is to consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue. *Orbit Comm'ns, Inc.* v. *Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.N.Y. 2010). Moreover, as the district court recognized, *see Port Auth. I*, 601 F. Supp. 2d at 570, a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction. *See Residential Funding Corp.*, 306 F.3d at 109; *Byrnie*, 243 F.3d at 108. Even if we assume *arguendo* both that the Port Authority was grossly negligent and that the documents here were "relevant," we have repeatedly held that a "case-by-case approach to the failure to produce relevant evidence," at the discretion of the district court, is appropriate. *Residential Funding Corp.*, 306 F.3d at 108 (quoting *Reilly* v. *Natwest Mkts. Grp.*, 181 F.3d 253, 267 (2d Cir. 1999)). In this case, the district court concluded that an adverse inference instruction was inappropriate in light of the limited role of the destroyed folders in the promotion process and the plaintiffs' ample evidence regarding their relative qualifications when compared with the officers who were actually promoted. *See Port Auth. I*, 601 F. Supp. 2d at 570–71. At trial, Howard Chin was able to establish his service record and honors, and Chief Charles Torres testified that Howard Chin was very smart and a good employee. Under these circumstances, the district court did not abuse its discretion in concluding that an adverse inference instruction was inappropriate.

CONCLUSION

For the foregoing reasons, we affirm the district court's conclusion that the Port Authority is liable to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong under both the individual disparate treatment and disparate impact theories. We also affirm the denial of individual relief to Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung. Because the district court erred in applying the continuing–violation exception to the plaintiffs' claims, however, we: (1) vacate the jury's back pay awards with respect to Christian Eng, Alan Lew, Stanley Chin, and Milton Fong; (2) vacate the jury's compensatory damage awards with respect to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong; (3) vacate the retroactive promotion of Alan Lew; and (4) vacate the salary and pension adjustments for Alan Lew, Stanley Chin, and Milton Fong. We remand all of these remedies issues to the district court for a new trial solely on damages and for the reconsideration of equitable relief. On remand, individual relief should be awarded only insofar as it corresponds to discriminatory failures to promote committed after August 2, 2000.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, HOWARD CHIN, DAVID LIM, GEORGE MARTINEZ, STANLEY CHIN, MILTON FONG, RICHARD WONG, SANRIT BOONCOME AND MICHAEL CHUNG, Plaintiffs, VS. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Defendant.	OPINION 05 CIV. 3835 (MGC)

Cedarbaum, J.

Plaintiffs sue the Port Authority of New York and New Jersey ("Port Authority") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, for discriminating against Asian-American officers in making promotions to Sergeant. The jury trial began on March 11, 2009, and the jury returned its verdict on March 26, 2009. The Port Authority now moves for judgment as a matter of law, or in the alternative, for a new trial or for a remittitur of the jury's compensatory damages award. For the following reasons, the Port Authority's motion is denied in its entirety.

BACKGROUND

I. The Parties

The Port Authority is a bi-state agency created by compact between the States of New York and New Jersey to develop transportation facilities in the New York metropolitan area. The Port Authority's thirteen facilities are policed by the Port Authority's Public Safety Department.

The plaintiffs are eleven Asian-American members of the Port Authority Public Safety Department. All of the plaintiffs began their careers with the Department as Officers. Christian Eng was hired in 1977, David Lim in 1980, Richard Wong in 1983, Milton Fong in 1985, Howard Chin and Alan Lew in 1987, and Stanley Chin in 1988. George Martinez and Nicholas Yum joined in 1993, and both Michael Chung and Sanrit Booncome in 1999.

The Port Authority Police Asian Jade Society of New York and New Jersey ("Asian Jade Society") is a fraternal organization of Port Authority Police

officers of Asian or Pacific Islander descent. Each plaintiff is a member of the Asian Jade Society.

II. The Port Authority's Promotion Process

The entry-level rank in the Public Safety Department is Officer. To be eligible for promotion to Sergeant, a police officer must have served two years as an officer or detective as of the date of the Sergeant's Examination, meet certain attendance requirements, and pass the examination. Beginning in 1996, all officers who passed were equally eligible for promotion without regard to their score. Once the exam was scored, a list of officers eligible for promotion was circulated.

The commanding officers of the various facilities were charged with recommending eligible officers for promotion. Some commanding officers made the recommendations themselves, while others delegated full authority to the officers' direct supervisors. Still others made the recommendations themselves after receiving advice from the direct supervisors.

The Public Safety Department had no set criteria or protocol for recommendation for promotion. The factors relevant to promotion and the weight assigned to those factors varied among the commanding officers. An officer's supervisor or commanding officer completed a "Performance Appraisal Form" only after selecting that officer to be recommended for promotion. The form required the supervisor to rate the officer on a scale from "unacceptable (clearly below standard)" to "outstanding (among the very best)."

From 1996 to 2001, the next step in the promotion process was the so-called Chiefs' Board, at

which the chiefs and deputy chiefs would review the promotion folders of the officers recommended for promotion. During Superintendent Morrone's tenure, no minutes or notes were taken of meetings of the Chiefs' Board. Chief Farrell testified that during that time, the chiefs of each command advocated for the candidates put forth from that command. (Trial Tr. 194, March 13, 2009.) The Chiefs' Board then decided which officers to recommend to the Superintendent, who made the final decision.

Chief Morris assumed the role of Acting Superintendent shortly after Superintendent Morrone was killed on September 11, 2001. Instead of using a Chiefs' Board, he solicited recommendations for promotions from deputy chiefs, who in turn asked the assistant chiefs to collect recommendations from the commanding officers of each facility. Once the recommendations were made, the assistant chiefs decided among themselves which officers to recommend to the deputy chiefs. The deputy chiefs then reviewed those and made recommendations to Chief Morris for promotion.

Charles DeRienzo became the Superintendent of Police in April 2002. He reinstituted a Chiefs' Board comprised of all chiefs and the Acting Superintendent, but excluded himself and Chief Morris. At these meetings, the chiefs voted after every candidate was discussed. Officers receiving a majority in favor of promotion were recommended to the Superintendent. A memorandum listed the officers recommended for promotion and those not recommended with the reason why they were not

recommended, and, on occasion, the tally of votes for and against each officer.

Superintendent Plumeri again changed the process when he succeeded Superintendent DiRienzo in 2004. He did away with the Chiefs' Board and made promotion decisions without formal input from the chiefs.

III. Procedural History

Before 2001, no Asian-American officer had ever been promoted to Sergeant. On January 31, 2001 the Asian Jade Society, on behalf of its members, filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). The Asian Jade Society received a Right to Sue letter on January 25, 2005. On April 15, 2005, the Asian Jade Society and the individual plaintiffs filed the Complaint in this case. The Complaint alleges that the Port Authority intentionally discriminated against Asian-Americans in making promotions to Sergeant, that the Port Authority had a pattern or practice of intentionally discriminating against Asian-Americans in making promotions to Sergeant, and that the Port Authority's practices for promotion to Sergeant had a disparate impact on Asian-American officers.

After hearing all the evidence, the jury found that the Port Authority's promotion practices for Sergeant had a disparate impact upon Asian-American police officers. The jury also found that the Port Authority had a pattern or practice of intentional discrimination against Asian-American police officers, and that plaintiffs Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and David Lim had been

discriminated against as a part of this pattern or practice. In addition, the jury found that the Port Authority's decision not to promote those officers was motivated by their ethnicity.

The jury returned a verdict that Howard Chin, Richard Wong, Michael Chung, and Sanrit Booncome had not proven that they were discriminated against either as part of the Port Authority's pattern or practice of discrimination or individually. The jury awarded back pay and compensatory damages only to Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and David Lim.

The Port Authority now moves for judgment as a matter of law overturning the jury's verdict for the successful plaintiffs. It also moves in the alternative for a new trial, or a remittitur.

DISCUSSION

IV. The Port Authority's Motions for Judgment as a Matter of Law or a New Trial

A. Standard of Review

1. Rule 50(b) Motion for Judgment as a Matter of Law

The Port Authority renews its motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). Rule 50(b) permits the jury verdict to be set aside when the jury "would not have a legally sufficient evidentiary basis to find for the [non-moving] party on that issue." Fed. R. Civ. P. 50(a)(1). To grant such a motion, there must be "such a complete absence of evidence supporting the verdict that the jury's findings could only have been

the result of sheer surmise and conjecture" or "such an overwhelming amount of evidence in favor of the movant that [a] reasonable and fair minded" jury could not have returned a verdict in favor of the non-moving party. *Fidelity & Guaranty Insurance Underwriters, Inc.* v. *Jasam Realty Corp.*, 540 F.3d 133, 142 (2d Cir. 2008) (*quoting Song* v. *Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992)). When considering a Rule 50(b) motion, all reasonable inferences are drawn in favor of the non-moving party, evidence may not be weighed or assessed for credibility. *Reeves* v. *Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

2. Rule 59 Motion for a New Trial

In the alternative, the Port Authority moves for a new trial under Rule 59(a)(1)(A). A new trial may be granted when "the jury has reached a seriously erroneous result" or when the verdict "is a miscarriage of justice," that is, when the jury verdict is against the weight of the evidence. *DLC Mgmt.* v. *Town of New Hyde Park*, 163 F.3d 124, 133-34 (2d Cir. 1998) (*citing Song*, 957 F.2d at 1047 and *Metromedia* v. *Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992)). Although evidence may be weighed and need not be viewed in the light most favorable to the non-moving party, I should only grant a new trial if I conclude the jury verdict is "egregious." *DLC Mgmt.*, 163 F.3d at 134 (*citing Song*, 957 F.2d at 1047)).

B. Analysis

1. Statute of Limitations

At trial, the jury was permitted to consider events prior to August 2, 2000 (180 days prior to the filing of the EEOC charge) for two distinct purposes. First,

those events could be considered as evidence bearing on whether the Port Authority made a discriminatory decision not to promote a particular plaintiff after August 2, 2000. Second, under the "continuing violations" doctrine, the jury was permitted to consider whether events that occurred before August 2, 2000 could give rise to liability if they were part of an "ongoing policy of discrimination" that persisted into the limitations period, that is, after August 2, 2000.

(a) Introduction of Evidence that Arose Before August 2, 2000.

The Port Authority first argues that the use of events prior to August 2, 2000 as background evidence for indisputably timely claims was error that requires a new trial. At the outset, this argument confuses the limitations period on a claim with the admissibility of evidence relating to that claim. Otherwise admissible evidence does not become inadmissible if the statute of limitations would have run on a claim that arose on that date. As the Supreme Court commented in *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002), the statute of limitations does not "bar an employee from using . . . prior acts as background evidence in support of a timely claim." Moreover, it is reversible error to preclude otherwise admissible evidence solely because it dated to a time when a claim would have been time-barred. *Jute* v. *Hamilton Sundstrand*, 420 F.3d 166, 175 (2d Cir. 2005). Evidence from a truly remote period may be precluded under Fed. R. Evid. 403 but only because its probative value is attenuated by the passage of time. The Port Authority's argument that I erred by

permitting the jury to consider events that occurred before August 2, 2000 as background evidence for timely claims is therefore without merit.

(b) Substantive Claims

The Port Authority's second argument is that the verdict cannot stand because the jury was permitted to consider liability for events before August 2, 2000 for the plaintiffs' pattern and practice and disparate impact claims.

(i) The Limitations Period for Title VII Claims

Title VII prohibits certain "employment practices." 42 U.S.C. §§ 2000e-2(a). To preserve a claim, a plaintiff must file an EEOC charge within 180 or 300 days after the complained-of practice "occurred." 42 U.S.C. § 2000e-5(c). In determining the timeliness of a Title VII claim two interrelated questions must be considered: "what [is the] 'unlawful employment practice'" at issue, and "when has that practice 'occurred.'" *Morgan*, 536 U.S. at 110. As the Supreme Court noted in *Morgan*, the timeliness of any claim "varies with the practice." *Id.*

At one end of the spectrum, certain practices are "discrete acts" that occur at a particular moment in time. *Id.*, at 114. Almost by definition, an untimely claim based upon them cannot become timely simply because that claim is related to a timely claim based on another discrete act. *Id.* at 113.

On the other end, certain practices are "continuing violations." These claims are based on an "ongoing policy of discrimination," that is, a single unlawful employment practice comprised of events extended over time. Because such a claim

encompasses the entire unlawful employment practice, events outside the statutory period may give rise to liability. *Id.* at 118.

The plaintiffs' individual disparate treatment claims are examples of "discrete act[s]." Each claim is based on a particular, isolated decision (or decisions) not to promote a plaintiff motivated by ethnicity. Thus, the jury was instructed that it could only find the Port Authority liable if the decision (or decisions) in question had been made after August 2, 2000. (Trial Tr. 1307, March 24, 2009; Verdict Form, Part Three, pp. 5-7.)[14]

The Port Authority proffers two – largely interrelated – reasons why the plaintiffs' disparate impact and pattern or practice disparate treatment claims are not continuing violations. First, it contends the "continuing violations" doctrine is inapplicable because the plaintiffs failed to identify a discriminatory policy. Second, it asserts that *Morgan* limits the "continuing violations" doctrine to hostile work environment claims, and requires discriminatory policies to be analyzed as "discrete acts."

(ii) The plaintiffs' disparate impact and pattern or practice claims properly challenged a discriminatory policy.

The plaintiffs' disparate impact and pattern or practice claims each charged that the Port

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[14] The jury's verdict that plaintiffs Eng, Fong, Stanley Chin, Lew, Martinez, Yum, and Lim were each discriminated against after August 2, 2000 was by itself sufficient for the jury to award each of them back pay and compensatory damages.

Authority's practices for promotion to Sergeant discriminated against Asian-American police officers. Because the unlawful employment practice at issue was an "ongoing discriminatory policy," each claim is a "continuing violation," not a discrete act.

A disparate impact claim challenges an employment practice that causes an imbalance in opportunities among protected groups. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (to make out a prima facie case, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact"); *Gulino* v. *New York State Dept. of Ed.*, 460 F.3d 361, 382 (2d Cir. 2006) (*quoting New York City Tran. Auth.* v. *Beazer*, 440 U.S. 568, 584 (1979) (defining "disparate impact" as when "an employment practice has the effect of denying the members of one race equal access to employment opportunities.")) To press a disparate impact claim, the plaintiffs must identify a particular employment practice. In this case, the plaintiffs identified the Port Authority's practices for promotion to sergeant. Although the Port Authority's practices were occasionally altered during the relevant period, the overall policy was continuously maintained from 1996 until at least August 2, 2000.

The Port Authority makes the subsidiary argument that the plaintiffs failed to identify which element of the Port Authority's promotion practices caused a discriminatory impact. While § 2000e-2(k)(b)(i) provides that a plaintiff must demonstrate that each challenged practice causes a disparate impact, that subsection goes on to provide that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking

process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." *Id.* See also *Malave* v. *Potter*, 320 F.3d 321, 327 (2d Cir. 2003) (*quoting* § 2000e-2(k)(b)(i)).

The Port Authority's process for making promotions from the list of eligible officers was comprised of several steps. But these steps cannot be separately analyzed both because records do not exist for every step and because the causal role of each step is called into doubt by the records that do exist. For example, Superintendent DeRienzo testified that he could not recall ever having promoted someone not recommended by the Chiefs' Board. (Trial Tr. 261-62, March 13, 2009.) At a Chiefs' Board in 2003 during his tenure, Plaintiff Nicholas Yum received a unanimous vote in favor of promotion. (Pls.' Ex. 18.) At another Chiefs' Board on January 7, 2003, Peter Hernandez was given a "No" recommendation, with five votes against, three for, and the notation "Sick History Record." (Pls.' Ex. 17.) Steven Grossi's vote stalemated at the January 7, 2003 Chiefs' Board. (*Id.*) Grossi and Hernandez were promoted on January 24, 2003; Nicholas Yum was not promoted until October 2005. (Pls.' Ex. 28.) In sum, for many of the plaintiffs, all that could be shown is whether they were recommended and that they were ultimately not promoted.

Because the role of each step cannot be determined, the steps cannot be examined separately to discover whether a particular step causes a disparate impact. The jury was instructed to consider whether the decision making process as a

whole caused a disparate impact if the steps of the process could not be separated for analysis. (Trial Tr. 1304, March 24, 2009.) Therefore, the Port Authority's practices for promotion to Sergeant are properly analyzed as a continuously maintained discriminatory policy that caused a disparate impact on Asian-American police officers.

A pattern or practice claim is a means of challenging a persistent "unlawful employment practice," that is, an enduring policy or custom of intentional discrimination. *See Robinson*, 267 F.3d at 160 (*citing Int'l. Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977)). Pattern or practice claims are defined in opposition to "discrete acts"; a pattern or practice can only be found when the practice is of such a "routine, or of a generalized nature" that it is the defendant's "standard operating procedure." Int'l Bhd. of Teamsters, 431 U.S. at 336, n. 16; *Robinson*, 267 F.3d at 160. The Port Authority now argues that the plaintiffs failed to identify a specific discriminatory policy or general practice of discrimination. This is incorrect. The plaintiffs consistently argued that intentional discrimination was so pervasive in the Port Authority's practices for promotion to sergeant that it amounted to a discriminatory policy or custom. This is a sufficient identification to proceed on a pattern or practice theory. *Cf.*, *Hazelwood School Dist.* v. *U.S.*, 433 U.S. 299, 303 (1977) (attorney general's "pattern or practice" suit identified "standardless and highly subjective" hiring practices); *Robinson*, 267 F.3d at 154 (company-wide policy of delegating discipline and promotion procedures to supervisors allegedly resulted in a pattern or practice of intentional discrimination.) Thus, the plaintiffs' pattern or

practice claim properly challenged a discriminatory policy or custom.

(iii) Title VII claims that challenge a discriminatory policy are analyzed as "continuing violations."

Next, the Port Authority argues that *Morgan* limits the "continuing violations" doctrine to claims involving a hostile work environment and therefore, both the plaintiffs' disparate impact and "pattern or practice" claims must be analyzed as "discrete acts."

The Second Circuit developed the "continuing violations" doctrine to address the problem of longstanding discriminatory policies and customs. In a series of cases, the Court of Appeals rejected the argument that only plaintiffs to whom the policy was applied within the limitations period could sue. Instead, the Court of Appeals held that "a continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an instance of that policy" and "all plaintiffs injured by . . . adherence to that policy are therefore entitled to relief." *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *The Guardians Association of the New York City Police Department et al.* v. *Civil Service Commission* (*Guardians III*), 633 F.2d 232, 251 (2d Cir 1980) (*citing Acha*, 570 F.2d at 65)). *See also Association Against Discrimination* v. *Bridgeport*, 647 F.2d at 274; *Lambert* v. *Genesee Hospital*, 10 F.3d 46, 53 (2d Cir. 1993) (*citing Association Against Discrimination* v. *Bridgeport*, 647 F.2d at 274)).

The Port Authority argues that the Supreme Court's holding in *Morgan* restricts the Second Circuit's continuing violations doctrine to cases

involving a hostile work environment. In support, the Port Authority points to the Supreme Court's statement in *Morgan* that "discrete acts such as termination, failure to promote, denial of transfer . . . are easy to identify" and that Title VII "precludes recovery for discrete acts . . . that occur outside the statutory time period." *Morgan*, 536 U.S. at 105, 114. From this, the Port Authority concludes that any unlawful employment practice touching on one of these acts (e.g., promotion) is a "discrete act."

But that is not the holding of *Morgan*. *Morgan* did not involve a "pattern-or-practice" claim, or any claim, other than that of a hostile work environment, which would be a proper "continuing violation" under the Second Circuit's doctrine. The "continuing violation" at issue in *Morgan* was analyzed under the Ninth Circuit's "serial violation" theory, which permits a series of "related acts" to be treated as a single "continuing violation." *Morgan*, 536 U.S. at 107. The Supreme Court held that a series of related but ultimately discrete acts could not be treated as a single unlawful employment practice. *Id.* at 114. This is in keeping with the Second Circuit's pre-*Morgan* precedent. *Compare Lambert* v. *Genesee Hospital*, 10 F.3d 46, 53 (2d Cir. 1993) (multiple similar instances of discrimination cannot form a continuing violation unless they stem from a discriminatory policy or mechanism) *with Morgan* v. *National Railroad Passenger Corporation*, 232 F.3d 1008, 1015 (9th Cir. 2000) (a continuing violation may be shown by a "series of related acts").

The contrast *Morgan* drew was between "discrete acts" on the one hand and ongoing unlawful employment practices, which includes a hostile work

environment, on the other. A hostile work environment, the *Morgan* court noted, "cannot be said to occur on any particular day" and is based on the "cumulative effect of individual acts." *Id.* at 116. Each act that contributed to that environment "encompas[ses] a single unlawful employment practice." Thus, a hostile work environment claim is timely as long as it is filed within 180 or 300 days of an act that was part of that hostile work environment. *Id.* at 118. The continuing violations at issue in this case demand an analysis analogous to *Morgan*'s treatment of a hostile work environment. Every act that was part of those discriminatory policies was part of a single, ongoing unlawful employment practice that did "not occur on any particular day." In a recent § 1983 case, the Second Circuit relied on *Morgan* for the proposition that the "continuing violation doctrine can be applied when the plaintiff seeks redress for injuries resulting from 'a series of separate acts that collectively constitute one 'unlawful act . . .'" *Shomo* v. *City of New York*, No. 07-1208- cv, 2009 U.S. App. LEXIS 23076 (2d Cir. August 13, 2009). Because the plaintiffs' disparate impact and pattern or practice claims each challenged a single, ongoing unlawful employment practice, the jury was properly permitted to consider acts 180 days or more before the filing of the EEOC charge under the "continuing violations" doctrine.

2. Dr. Cavanaugh's Testimony

The plaintiffs offered the testimony of Dr. Cavanaugh, a statistical expert. The Port Authority now argues that his testimony was inadmissible and a new trial is required to correct this error. At the outset, I note that the Port

Authority did not move *in limine* to preclude Dr. Cavanaugh's testimony, and that the trial transcript reveals no clear objection to his testimony under Rule 702. Failure to make an objection either *in limine* or at trial ordinarily constitutes waiver. *See United States* v. *Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995); *see also* Fed. R. Evid. 103.

In any event, the Port Authority's argument addresses the weight of Dr. Cavanaugh's testimony, not its admissibility. Under Rule 702, as interpreted by the Supreme Court in *Daubert* v. *Merrell Dow Pharma.*, 509 U.S. 579 (1993), and its progeny, expert testimony that will assist the jury in understanding the facts at issue is admissible if the expert uses reliable methods and properly applies them to the facts in the case at hand. The Port Authority's principal objection to Dr. Cavanaugh's testimony is that his analyses did not consistently show statistical significance at the 5% level.[15] It is correct that statistical significance at the 5% level is generally "sufficient to warrant an inference of discrimination." *Smith* v. *Xerox Corp.*, 196 F.3d 358, 366 (2d Cir. 1999). But evidence is not inadmissible because it does not itself make out a prima facie case for its proponent. Dr. Cavanaugh presented the results of his analyses to the jury and then explained why, in his opinion, they were significant given the sample size at issue. The Port Authority had a full opportunity to cross-examine Dr. Cavanaugh. Its own expert, Dr. Zellner, disagreed with Dr. Cavanaugh's choice of groups for comparison, but

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[15] Put otherwise, some of Dr. Cavanaugh's analyses showed that the observed distribution would occur by chance more than 5% of the time.

did not "have any concerns" about his choice of statistical methods or his application of those methods to that data set. (Trial Tr. 986, March 19, 2009). My role is to act as a gatekeeper, and permit evidence that uses accepted statistical methods properly applied to the facts of the case. It is the jury's role to decide between competing conclusions based on the data and analysis. Therefore, the admission of Dr. Cavanaugh's testimony does not warrant a new trial.

3. The Jury Verdict and the Verdict Form

(a) The Jury Verdict

As noted above, the jury returned a verdict in favor of the Port Authority on the "pattern or practice" claims of plaintiffs Howard Chin, Wong, Chung, and Booncome, and awarded those plaintiffs no damages. The Port Authority asserts that the jury verdict is inconsistent and thus merits a new trial. A jury verdict may be set aside for inconsistency only if it is "ineluctably inconsistent," that is, when there is no rational means of harmonizing the jury's answers. *Munafo* v. *Metropolitan Transportation Authority*, 381 F.3d 99, 105 (2d Cir. 2004).

The first alleged inconsistency is that the jury's finding that the Port Authority's promotion practices for Sergeant had a disparate impact upon Asian-American police officers is inconsistent with the jury's decision not to award any back pay to Howard Chin. The jury was free to conclude that Howard Chin would not have been promoted even absent the disparate impact and therefore was not entitled to back pay. *See EEOC* v. *Joint Apprenticeship Committee*, 186 F.3d 110, 122-23 (2d Cir. 1998). The

Port Authority also attempts to cast the jury's "pattern or practice" verdict as inconsistent because the jury did not return a verdict for every plaintiff on that claim. This is not inconsistent. Each of the eleven plaintiffs was required to prove, by a preponderance of the credible evidence, that he was discriminated against as part of that pattern or practice. The fact that the jury found that several plaintiffs had not met that burden does not render the verdict inconsistent. Because the jury verdict can be harmonized rationally, it cannot be overturned as inconsistent.

(b) Verdict Form

The Port Authority argues that a new trial is required because the jury failed to understand the verdict sheet and was "confused as to whether this was a class action." (Def.'s Mem. at 28.) There is simply no reason to believe that the jury was confused about whether the action was a class action. The jury answered separate questions and evaluated damages separately for each plaintiff. Second, it is understandable that the jury would seek further guidance about the meaning of the complex questions this case presented. The fact the jury asked for clarification does not suggest that the jury failed to understand the verdict sheet. Finally, my instruction that the jury was required to find disparate impact after August 2, 2000 in order to return a verdict for the plaintiffs on that claim accurately states the law and did not "direct a verdict against the Port Authority."

(c) The Jury's Back Pay Award

The Port Authority maintains that the jury's back pay award must be vacated because it awarded back

pay beginning as early as October 31, 1999. 42 U.S.C. § 2000e-5(g)(1) provides that back pay cannot be awarded from a date earlier than two years prior to the filing of a charge with the EEOC. The plaintiffs' EEOC charge was filed on January 31, 2001. Two years prior to that date is January 31, 1999. The jury's back pay award for three plaintiffs exactly matches the back pay plaintiffs' expert calculated would be due had those plaintiffs been promoted on October 31, 1999. October 31, 1999 is within the two-year statutory period. The Port Authority's argument that back pay cannot be awarded from a time more than 180 days before the filing of the EEOC charge in effect reargues the statute of limitations issue that I addressed above.

4. Sufficiency and Weight of the Evidence

The Port Authority also moves for judgment as a matter of law on the ground that the jury lacked a legally sufficient evidentiary basis to return its verdict on the plaintiffs' disparate impact and pattern or practice claims, or for a new trial on those claims on the ground that the verdict is against the weight of the evidence.

The main thrust of the Port Authority's argument is that the statistical evidence presented by plaintiffs' expert, Dr. Cavanaugh, was insufficient to support the jury's findings of disparate impact and a pattern or practice of intentional discrimination. As the Port Authority points out, statistical significance at the 5% level is generally "sufficient to warrant an inference of discrimination." *Smith*, 196 F.3d at 366; *see also Ottaviani* v. *State University of New York at New Paltz*, 875 F.2d 365, 371 (2d Cir. 1989) (significance at 5% level supports an inference of

discrimination); *Waisome* v. *Port Authority*, 948 F.2d 1370, 1376 (statistical disparity of "two or three standard deviations . . . is generally highly probative of discriminatory treatment"). That said, the Court of Appeals has cautioned that "where statistics are based on a relatively small number of occurrences, the presence or absence of statistical significance is not a reliable indicator of disparate impact." *Waisome*, 948 F.2d at 1379. In such an instance, "other indicia raising an inference of discrimination must be examined." *Id.* *See also International Brotherhood of Teamsters* v. *T.I.M.E., Inc.*, 431 U.S. 324, 340 (1977) (warning that "[the usefulness of] statistics depends on all of the surrounding facts and circumstances").

At trial, Dr. Cavanaugh presented an analysis comparing the promotion rates of eligible Asian-American officers with that of eligible White officers. Dr. Cavanaugh used the Fisher Exact Test to calculate the likelihood of observing the promotion rates between the two groups under the hypothesis that the observed distribution is due to chance.[16] Dr. Cavanaugh determined that between August 1996 and January 31, 2001, the Fisher Exact Test returned a p-value of 13%. (Trial Tr. p. 729, March 17, 2009.) According to Dr. Cavanaugh, this means that there is an approximately 13% likelihood of observing by chance the given distribution of Asian-American officers promoted (zero out of twelve) and White officers promoted (36 of 259). (*Id.*) On cross-examination, Dr. Cavanaugh stated that

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[16] *See generally*, R.M. Fisher, *On The Interpretation of [Chi-Squared] from Contingency Tables, and the Calculation of P*, 85 J. Royal Stat. Soc'y 87 (1922).

although his results were not significant at the 5% level, he believed that those results were significant because the small sample size made it impossible to provide statistical evidence at the 5% level "even with perfect discrimination." (Trial Tr. at 754-55, March 18, 2009.)[17]

The Port Authority's statistical expert, Dr. Zellner, also used the Fisher Exact Test, but instead compared the number of Asian-American officers promoted from all Asian-American officers on eligible lists between August 9, 1996 and April 15, 2005, with the number of all other officers promoted from all other eligible officers during that time period. She concluded that the Fisher Exact Test returned a p-value of 38.5% for that data set, suggesting an over one-in-three-chance that the given distribution would be observed due to chance. (Trial Tr. 954-960, March 19, 2009).

The statistical evidence was not sufficient to either prove or disprove the plaintiffs' claim, and so the jury considered other evidence of discrimination. *See Waisome*, 948 F.3d at 1379. Each plaintiff testified about his qualifications, service record, awards, commendations, and achievements, and the Port Authority had an opportunity to cross-examine each plaintiff.

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[17] The Port Authority argues that Dr. Cavanaugh "did not take into account the small number of Asian police officers in the entire force." The factual basis of this argument is unclear given Dr. Cavanaugh's testimony and the fact that the Fisher Exact Test uses number of officers in each category to calculate the p-value, reflecting the small number of Asian-American officers eligible for promotion.

The plaintiffs presented evidence that the Port Authority's promotion process lacked clear standards and guidelines, and that non-Asian-American officers who may have been less-qualified were promoted, sometimes even after one of the plaintiffs had been recommended for promotion by the Chiefs' Board. The jury deliberated for several days and made a number of requests to review the evidence presented at trial. The jury verdict reflects careful attention to whether each plaintiff had proven his individual claim. Ultimately, I cannot conclude that the verdict could "only have been a result of sheer surmise and conjecture" or that the evidence was so overwhelmingly in favor of the Port Authority that a "reasonable and fair minded" jury could not have returned its verdict. *Fid. & Guar. Ins. Underwriters*, 540 F.3d at 142.

Although I may weigh evidence and draw inferences against the plaintiffs when considering the Port Authority's motion for a new trial, I am satisfied that the jury's verdict is not so erroneous or so contrary to the evidence as to constitute a "miscarriage of justice." *DLC Mgmt.*, 163 F.3d 133-34.

II. Remittitur

The Port Authority asks that I remit the jury's compensatory damages award to plaintiffs Christian Eng and David Lim from $250,000 to $50,000; from $100,000 to $25,000 for plaintiffs Milton Fong and Stanley Chin; and for plaintiff Alan Lew from $75,000 to $20,000. Remittitur permits me to put the plaintiffs to a choice between accepting a reduction in the damages awarded or a new trial. *Earl* v. *Bouchard Transp.*, 917 F.2d 1320, 1328 (2d

Cir. 1990). When federal law provides the cause of action, remittitur is appropriate when the jury award includes an identifiable error of a quantifiable amount or is so high as to "shock the conscience." *Kirsh* v. *Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998) (quoting *O'Neill* v. *Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988)). In the Second Circuit, the preferred method of calculating a remittitur is to reduce an excessive award to the maximum amount that I would sustain as not excessive. *Martinez* v. *Port Authority*, 445 F.3d 158, 160 (2d Cir. 2006) (*citing Earl*, 917 F.2d at 1330)). Comparison to similar cases can help illuminate whether an award is unconscionably high, but the award in a particular case must be seen in light of the facts and circumstances of that case. As a result, it is difficult to discern a consistent practice, notwithstanding the formula that "garden variety" emotional distress claims merit an award between $30,000 and $100,000. *See*, *e.g*, *Lynch* v. *Town of Southampton*, 492 F. Supp. 2d 197, 207 (E.D.N.Y. 2007) (quoting *Watson* v. *E.S. Sutton, Inc.*, 02 CV 2739, 2005 U.S. Dist. LEXIS 31578 (S.D.N.Y. Sept. 6, 2005)).

In certain cases, other judges of this District and of the Eastern District have upheld compensatory damage awards in excess of the $250,000 award to Christian Eng and David Lim, or remitted larger awards to a still substantial amount. *See, e.g.*, *Osorio* v. *Source Enter's.*, No. 05 Civ. 10029 (JSR), 2007 U.S. Dist. LEXIS 18725 (S.D.N.Y. March 5, 2007) (upholding a $4 million compensatory damages award in a Title VII and state-law retaliation case); *Marchisotto* v. *City of New York*, No. 05 Civ. 2699 (RLE), 2007 U.S. Dist. LEXIS 27046, at *37-38 (S.D.N.Y. April 11, 2007) (upholding $300,000

compensatory damages award for retaliation); *Quinn* v. *Nassau County Police Dep't.*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) ($250,000 compensatory damages award for protracted harassment did not shock the conscience); *Quinby* v. *WestLB AG*, No. 04 Civ. 7406 (WHP), 2008 U.S. Dist. LEXIS 62366 (S.D.N.Y. August 15, 2008) (remitting a compensatory damages award of $500,000 for "garden variety emotional distress" to $300,000.)

The Port Authority cites *Patrolmen's Benevolent Ass'n* v. *City of New York*, 315 F.3d 43, 55 (2d Cir. 2002) for the proposition that an award for emotional damages must be supported by "competent evidence" in addition to the plaintiffs' testimony. As that case goes on to hold, "competent evidence" is not limited to medical evidence; the award should be considered in light of the "circumstances of the violation itself." *Id.* The compensatory damages awarded to Christian Eng and David Lim are extremely large. But, I do not conclude that they "shock the judicial conscience."

CONCLUSION

For the foregoing reasons, the Port Authority's motion is denied in its entirety.

SO ORDERED.

Date: New York, New York
January 13, 2010

S/_____
MIRIAM GOLDMAN
CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, HOWARD CHIN, DAVID LIM, GEORGE MARTINEZ, STANLEY CHIN, MILTON FONG, RICHARD WONG, SANRIT BOONCOME AND MICHAEL CHUNG,

Plaintiffs,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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05 **CIVIL** 3835 (MGC)

JUDGMENT

#10,0620

A Jury Trial before the Honorable Miriam Goldman Cedarbaum, United States District Judge, having begun on March 11, 2009, and at the conclusion of the trial, on March 26, 2009, the jury having rendered a verdict in favor of seven of the eleven plaintiffs in the amount of $1,637,622 in back pay and compensatory damages, more specifically, in favor of Christian Eng in the amount of $285,445, in

favor of Milton Fong in the amount of $183,924, in favor of Alan Lew in the amount of $264,859, in favor of Stanley Chin in the amount of $216,636, in favor of Nicholas Yum in the amount of $156,663, in favor of George Martinez in the amount of $160,861, and in favor of David Lim in the amount of $369,234; On January 13, 2010, the Court having denied the motion of the Port Authority of New York and New Jersey ("Port Authority") to grant judgment as a matter of law, a new trial, or a remittitur; Plaintiffs having moved for an award of fees and costs totaling $2,357,658.63, and the matter having come before this Court, and the Court on April 14, 2010, having issued its Memorandum Opinion and Order granting the motion in part, awarding Cravath, Swaine & Moore LLP ("Cravath") the amount of $576,705 for fees and $152,571.36 for costs, awarding Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss") the amount of $613,703 for fees and $221,258.74 for costs, and directing the Clerk of the Court to enter judgment in accordance with the Jury Verdict of March 26, 2009, the Order Granting Equitable Relief dated January 13, 2010, and the Memorandum Opinion and Order dated April 14, 2010, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to the Jury Verdict dated March 26, 2009, Order dated January 13, 2010, and Memorandum Opinion and Order dated April 14, 2010, judgment is entered as follows: in favor of Christian Eng in the amount of $285,445, in favor of Milton Fong in the amount of $183,924, in favor of Alan Lew in the amount of $264,859, in favor of Stanley Chin in the amount of $216,636, in favor of Nicholas Yum in the amount of $156,663, in favor of George Martinez in the amount of $160,861, and in favor of David Lim in

the amount of $369,234; the motion of Port Authority to grant judgment as a matter of law, a new trial, or a remittitur is denied; Plaintiffs motion for an award of fees and costs is granted in part; Cravath is awarded $576,705 for fees and $152,571.36 for costs; and Paul Weiss is awarded $613,703 for fees and $221,258.74 for costs.

DATED: New York, New York
April 19, 2010

So Ordered: **J. MICHAEL McMAHON**

_____ /s/
U.S.D.J.

_____
Clerk of Court

By:

/s/
_____
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

Extract of Minutes

United States District Court
Southern District of New York

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THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY, et al.,

05 Civ. 3835 (MGC)
Docket #

V.

Cedarbaum
Judge

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

---------- X

(full title of case required, use other side if necessary)

Appearances:

Plaintiff: Karen King, Esq. – Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, NY, NY 10019 (212) 373-3553

Defendant: Kathleen Miller, Esq. – The Port Authority of NY and NJ, 225 Park Avenue South, 14th Floor, New York, NY 10003 (212) 435-3434

TRIAL (JURY) BEGUN: 3/11/09 jurors empaneled and sworn. Trial continued 3/12/09, 3/13/09, 3/16/09 through 3/20/09 and 3/24/09 through 3/26/09. On 3/26/09 jury reaches verdict. (See attached verdict sheet)

CLERK /s/ A. Daniels

COURT REPORTER /s/ Anne Harston

The Port Authority Police Asian Jade Society of New York & New Jersey, Inc., Christian Eng, Nicholas Yum, Alan Lew, Howard Chin, David Lim, George Martinez, Stanley Chin, Milton Fong, Richard Wong, Sanrit Booncome, and Michael Chung v. The Port Authority of New York and New Jersey

05 Civ. 3835 (MGC) **March 24, 2009**

VERDICT FORM

Part One – Disparate Impact

Question 1:

Have the plaintiffs proven, by a preponderance of the credible evidence, that the Port Authority's promotion practices for Sergeant had a disparate impact upon Asian-American police officers?

Yes **X** No_____

If your answer to Question 1 is NO, skip Question 2, Question 3, and Question 4, and proceed to Part Two, Question 5.

Proceed to answer Question 2 only if your answer to Question 1 is YES.

Question 2:

Has the Port Authority proven, by a preponderance of the credible evidence, that its promotion practices for Sergeant were job-related and consistent with business necessity?

Yes _____ No **X**

If your answer to Question 2 is NO, skip Question 3, and proceed to Question 4.

Proceed to answer Question 3 only if your answer to Question 2 is YES.

Question 3:

Have the Plaintiffs proven, by a preponderance of the credible evidence, that there was an alternative practice for promotion to Sergeant that the Port Authority could have used which would also have satisfied its business necessity, but would do so without having a disparate impact on Asian-American police officers?

Yes _____ No_____

If your answer to Question 3 is NO, skip Question 4 and proceed to Part Two, Question 5.

Proceed to Question 4 only if your answer to Questions 1 is YES, and your answer to Question 3 is YES or your answer to Question 2 is NO.

Question 4:

Did the Port Authority's promotion practices for Sergeant have a disparate impact upon Asian-American police officers after August 2, 2000?

Yes __X__ No_____

Proceed to Part Two, Question 5.

Part Two – Pattern or Practice of Discrimination

Question 5:

Have the plaintiffs proven, by a preponderance of the credible evidence, that the Port Authority had a pattern or practice of intentional discrimination against Asian-American police officers for promotion to Sergeant?

Yes __X__ No_____

If your answer to Question 5 is NO, skip Questions 6, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), and 7(k), and proceed to Part Three, Question 8.

Proceed to answer Questions 6, 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), and 7(k) only if your answer to Question 5 is YES.

Question 6

Did that pattern or practice of intentional discrimination against Asian-American police officers affect any plaintiff after August 2, 2000?

Yes __X__ No_____

Question 7(a) :

Has Christian Eng proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes __X__ No_____

Question 7(b):

Has Milton Fong proven, by a preponderance of credible the evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes X No_____

Question 7(c) :

Has Alan Lew proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes X No_____

Question 7(d):

Has Stanley Chin proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes X No_____

Question 7(e):

Has Nicholas turn proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes X No_____

Question 7(f) :

Has George Martinez proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes X No_____

Question 7(g):

Has Howard Chin proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes _____ No X

Question 7(h):

Has Richard Wong proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes _____ No X

Question 7(i) :

Has Michael Chung proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes _____ No X

Question 7(j):

Has Sanrit Booncome proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes _____ No__X__

Question 7(k) :

Has David Lim proven, by a preponderance of the credible evidence that he was discriminated against for promotion to Sergeant as a part of this pattern or practice of discrimination?

Yes __X__ No_____

Proceed to Part Three, Question 8

Part Three – Individual Disparate Treatment

Question 8:

Has Christian Eng proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 9:

Has Milton Fong proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 10:

Has Alan Lew proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 11:

Has Stanley Chin proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 12:

Has Nicholas Yum proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 13:

Has George Martinez proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes X No_____

Question 14:

Has Howard Chin proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes _____ No X

Question 15:

Has Richard Wong proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes _____ No X

Question 16:

Has Michael Chung proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes _____ No __X__

Question 17:

Has Sanrit Booncome proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes _____ No __X__

Question 18:

Has David Lim proven, by a preponderance of the credible evidence, (1) that he was qualified for promotion to Sergeant, (2) that his ethnicity was a motivating factor in the Port Authority's decision not to promote him to Sergeant, and (3) that the Port Authority made that discriminatory decision after August 2, 2000?

Yes _____ No __X__

Proceed to Part Four, Question 19

Part Four – Back Pay

Answer this question for all plaintiffs if and only if:

- Your answer to Question 1 is Yes and your answer to Question 2 is No and your answer to Question 4 is Yes; or
- Your answer to Question 1 is Yes and your answer to Question 3 is Yes and your answer to Question 4 is Yes.

Answer Question 19 only for a plaintiff, if any, for whom your answer to Question 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), or 7(k) is Yes.

Answer Question 19 only for a plaintiff, if any, for whom your answer to Question 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 or 18 is Yes.

Question 19:

Back pay (lost pay and benefits):

Christian Eng:	$ 35,445
Milton Fong:	$ 83,924
Alan Lew:	$ 189,859
Stanley Chin:	$ 116,636
Nicholas Yum:	$ 141,663
George Martinez:	$ 145,861
Howard Chin:	$ ———
Richard Wong:	$ ———

Michael Chung:	$ ———
Sanrit Booncome:	$ ———
David Lim:	$ 119,234

Please Proceed to Part Five, Question 18

Part Five – Compensatory Damages

Answer Question 20 only for a plaintiff, if any, for whom your answer to Question 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), or 7(k) is Yes.

Answer Question 20 only for a plaintiff, if any, for whom your answer to Question 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 or 18 is Yes.

Question 20:

Compensatory damages (excluding back pay):

Christian Eng:	$ 250,000
Milton Fong:	$ 100,000
Alan Lew:	$ 75,000
Stanley Chin:	$ 100,000
Nicholas Yum:	$ 15,000
George Martinez:	$ 15,000
Howard Chin:	$ ———
Richard Wong:	$ ———
Michael Chung:	$ ———
Sanrit Booncome:	$ ———
David Lim:	$ 250,000

Please have the foreperson sign and date below:

/s/
FOREPERSON
DATED: March 26, 2009 5:05pm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 10-1904 (Lead)
No. 10-2031 (XAP)

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 25th day of September, two thousand twelve,

HOWARD CHIN, RICHARD WONG, SANRIT BOONCOME, MICHAEL CHUNG,
Plaintiffs -Appellees-Cross-Appellants,

THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, DAVID LIM, GEORGE MARTINEZ, STANLEY CHIN, MILTON FONG,
Plaintiffs - Appellees,

versus

The Port Authority of New York & New Jersey,
Defendant - Appellant-Cross-Appellee.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(September 25, 2012)

BEFORE:

PER CURIAM:

Appellee Stanley Chin, Christian Eng, Alan Lew, David Lim, George Martinez and Nicholas Yum and Appellee-Cross-Appellant Milton Fong, filed a petition for panel rehearing, or, in the alternative, for hearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

It is hereby ordered that the petition is DENIED.

ENTERED FOR THE COURT:
UNITED STATES COURT OF APPEALS

Catherine O'Hagan Wolfe,
Clerk

United States Court of
Appeals for the Second
Circuit