UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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GULINO, ET AL.,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendant.
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96 Civ. 8414 (KMW)
ORDER

WOOD, U.S.D.J.:

The Court previously certified a remedy-phase class in this case, pursuant to Federal Rule of Civil Procedure 23(b)(3) ("Rule 23(b)(3)"). *See Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 96 Civ. 8414, 2013 WL 4647190, at *12 (S.D.N.Y. Aug. 29, 2013) (Wood, J.). Plaintiffs and Defendant the Board of Education of the City School District of the City of New York ("Defendant") now jointly move to expand the definition of the remedy-phase class, pursuant to Federal Rule of Civil Procedure 23(c)(1)(C) ("Rule 23(c)(1)(C)"). [Dkt. No. 416].

The class is currently defined as:

> All African–American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on LAST–1 before the end of the 2001/2002 school year, and as a result either lost or were denied a permanent teaching appointment.

Gulino, 2013 WL 4647190, at *12.

The parties seek to include within the class definition individuals employed as New York City public school teachers who failed the Liberal Arts and Sciences Test (the "LAST-1") from June 1, 2002, through February 13, 2004. The Court previously limited

the class size to teachers who failed the LAST-1 before the end of the 2001/2002 school year, because "Judge Motley's ruling that LAST–1 had a disparate impact, and this Court's ruling that the Board violated Title VII by using LAST–1, was based on data from approximately 1993 through the end of the 2001/2002 school year." *Id.* at *5.

Three facts support the parties' joint motion:

1. The LAST-1 was used through February 13, 2004; it was replaced by a new version of the LAST that was first administered on February 14, 2004. (Foley Decl. ¶¶ 5–6 [Dkt. No. 418]). The parties state that they "are not aware of information that the LAST administered from June 1, 2002, through February 13, 2004, was materially different from the LAST administered before June 2002 and which was the subject of the trial in this case." (Foley Decl. ¶ 3); (Mem. of Law 1 [Dkt. No. 417]).
2. The LAST-1 administered from June 1, 2002, through February 13, 2004, "had a comparable disparate impact on African-American and Latino test takers as the administrations of the LAST currently included in the class definition," according to data produced by the New York State Education Department ("SED") and analyzed by Plaintiffs' expert, Dr. Thomas DiPrete. (Folely Decl. ¶ 3); (Sohn Decl. (attaching Dr. DiPrete's report) [Dkt. No. 419]); (Mem. of Law 1).
3. No additional evidence exists concerning the job relatedness of the LAST-1 administered from June 1, 2002, through February 13, 2004, other than what was presented at trial. (Foley Decl. ¶¶ 3, 9); (Mem. of Law 1).

The Court agrees that these facts justify an expansion of the class definition. As stated below, the Court finds that the expanded class satisfies Rule 23's requirements. Accordingly, the Court GRANTS the joint motion to amend the definition of the Rule 23(b)(3) class.

I. Applicable Law

Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001) (noting the district court's ability "to alter or modify the class … whenever warranted");

Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999) ("[U]nder Rule 23(c)(1), courts are required to reassess their class rulings as the case develops." (internal quotation omitted)).

Because the parties' motion seeks to bind additional absent class members, it must comply with Rule 23's requirements for class certification. *Cf. In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 237–38 (2d Cir. 2012) ("The party seeking 'class certification must affirmatively demonstrate … compliance with [Rule 23],' and a district court may only certify a class if it 'is satisfied, after a rigorous analysis,' that the requirements of Rule 23 are met." (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011))); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (noting that the Due Process Clause "requires that the named plaintiff at all times adequately represent the interests of the absent class members").

As the Court explained in its Opinion and Order certifying the remedy-phase class:

> Class actions must first satisfy the four elements of Rule 23(a), which requires that a proposed class action "(1) be sufficiently numerous, (2) involve questions of law or fact common to the class, (3) involve class plaintiffs whose claims are typical of those of the class, and (4) involve a class representative or representatives who adequately represent the interests of the class." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010). In addition, Plaintiffs must satisfy Rule 23(b)(3), which requires that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "class treatment would be superior to individual litigation." *Id.* (quoting Fed. R. Civ. P. 23(b)(3)). Rule 23 "does not set forth a mere pleading standard." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Wal–Mart*, 131 S. Ct. at 2551–52). Rather, parties seeking class certification must "satisfy through evidentiary proof" that there are "*in fact* sufficiently numerous parties, common questions of law or

> fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Id.* Courts must apply the same "rigorous analysis" to ensure the two requirements of Rule 23(b)(3) are met, and are cautioned that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997)). "[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc* , 546 F.3d 196, 202 (2d Cir. 2008).

Gulino, 2013 WL 4647190, at *3.

II. Discussion

The Court finds that the requested expansion to the Rule 23(b)(3) class meets Rule 23's requirements.

A. Rule 23(a) Requirements

The expanded class satisfies the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation.

The Court finds that numerosity is met. Courts in the Second Circuit presume numerosity when the proposed class is greater than forty individuals, *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), and the parties have identified more than 1,500 likely members of the expanded class, (*see* Foley Decl. ¶ 8); *cf Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement.").[1]

[1] The likely class members are individuals who (i) failed the LAST-1 for the first time between June 1, 2002, and February 13, 2004; (ii) worked for Defendant as a public school teacher or as a per diem substitute; and (iii) on the LAST-1, either identified themselves as African-American or Latino, or did not designate a race. (Foley Decl. ¶ 8); (Mem. of Law 7).

The commonality requirement is satisfied. Commonality "requires the existence of both at least one *question* common to the class, and also that a class action 'has the capacity … to generate common *answers* apt to drive the resolution of the litigation.'" *Gulino*, 2013 WL 4647190, at *6 (internal citation omitted) (quoting *Wal-Mart*, 131 S. Ct. at 2551). The Court agrees with the parties that the questions of law or fact that the Court previously found common to the class are similarly common to the proposed expanded class. The question of Title VII liability, for instance, can be a sufficient common question in the remedy phase of a case. *See id.* ("[C]ommon questions of liability under Title VII are enough to satisfy the commonality question."). The Court's previous conclusions regarding the validity of the LAST-1, *see Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 907 F. Supp. 2d 492, 516 (S.D.N.Y. 2012), *aff'd*, 2014 WL 402286 (2d Cir. Feb. 4, 2014), are equally applicable to the expanded class, (*see* Foley Decl. ¶¶ 9–10). In addition, the common "questions (and answers) relating to the calculation of appropriate remedies" that the Court previously found, *Gulino*, 2013 WL 4647190, at *6–8, are similarly shared by members of the expanded class.

The class representative's claims are typical of the claims of the expanded class. Typicality "'is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Brown v. Kelly*, 609 F.3d 467, 475 (2d Cir. 2010) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)). The Court previously found class representative Peter Wilds's claims typical of the class, *Gulino*, 2013 WL 4647190, at *8–9, and the Court agrees with the parties that his claims are likewise typical of the prospective expanded class members, who bring suit based on the same conduct and seek

the same remedies as existing class members. The prospective class members are distinguished from existing class members merely by the date that they failed the LAST-1, which the parties have demonstrated is a distinction without a difference.

Adequacy is also satisfied. "[A]dequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Mr. Wilds has reaffirmed his ability to represent the expanded class and his commitment to achieving a favorable outcome. (*See* Wilds Decl. ¶¶ 5–9 [Dkt. No. 420]). Defendant does not allege any conflicts between Mr. Wilds and the class. (Mem. of Law 10). There is also no dispute about the ability of Plaintiffs' counsel to adequately represent the class. (*Id.* at 10–11).

B. Rule 23(b)(3) Requirements

As stated above, to maintain a class action under Rule 23(b)(3), the Court must find (1) that "questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The expanded class satisfies these requirements.

Common issues in the expanded class predominate over individual issues. "'Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *Gulino*, 2013 WL 4647190, at *10 (quoting

Myers, 624 F.3d at 547). The Court previously found that common issues predominated for the existing class, *see id.* at *10–11, and the same conclusion is compelled for the expanded class. The expanded class will have the same common issues in the relief phase as the existing class. *See id.* As the Court explained, although individualized determinations may be necessary for certain issues, they are outweighed by common issues, for which classwide resolution will "'achieve economies of time, effort and expense, and promote uniformity of decision.'" *Id.* at *11 (quoting *Myers*, 624 F.3d at 547).

A class action is the superior method of adjudicating the expanded class's claims. Courts assessing superiority consider four nonexclusive factors: "(1) the interest of the class members in maintaining separate actions; (2) 'the extent and nature of any litigation concerning the controversy already commenced by or against members of the class'; (3) 'the desirability or undesirability of concentrating the litigation of the claims in the particular forum'; and (4) 'the difficulties likely to be encountered in the management of a class action.'" *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (quoting Fed. R. Civ. P. 23(b)(3)). These factors all indicate the superiority of classwide adjudication here. Class members will benefit from class counsel's experience in this case and the efficiencies of class resolution of common issues. Moreover, the parties state that the Rule 23(b)(2) class certified by Judge Motley did not specify an end date to the class period, so those who failed the LAST-1 from June 1, 2002, through February 13, 2004, have presumptively been represented in this case for at least ten years. (*See* Mem. of Law 12). Having the prospective class initiate separate actions at this stage would be "unfair." *Gulino*, 2013 WL 4647190, at *12. Aggregate litigation in this forum

is beneficial; "[t]his Court and class counsel are already familiar with the evidence regarding liability and damages, which will make argument and resolution of common issues easier in this forum than any other." *Id.* Finally, the difficulties of aggregate litigation of the expanded class's claims "are far less daunting than the difficulties involved in litigating over a hundred separately captioned actions." *Id.* (internal quotation omitted) (explaining that case-by-case adjudication "would sacrifice the efficiencies that could be obtained by resolving common issues together and using those determinations to streamline individual proceedings").

III. Conclusion

For the reasons stated, the Court GRANTS the joint motion to amend the definition of the Rule 23(b)(3) remedy-phase class. The class is amended to include:

> All African-American and Latino individuals employed as New York City public school teachers by Defendant, on or after June 29, 1995, who failed to achieve a qualifying score on an administration of the LAST-1 given on or before February 13, 2004, and as a result either lost or were denied a permanent teaching appointment.

Notice under Rule 23(c)(2)(B) shall include the additional members of the now-expanded class. This Order resolves docket entry number 416.

SO ORDERED.

DATED: New York, New York
June 17, 2014

Kimba M. Wood

KIMBA M. WOOD
United States District Judge