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14  
15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA

17 BETTY DUKES, PATRICIA SURGESON, EDITH ARANA,  
18 DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO  
PAGE, and KAREN WILLIAMSON, on behalf of themselves  
19 and all others similarly situated,

20 Plaintiffs,

21 v.

22 WAL-MART STORES, INC.,

23 Defendant.

Case No. C-01-2252-CRB

PLAINTIFFS' MOTION TO  
EXTEND TOLLING OF THE  
STATUTE OF LIMITATIONS

Date: July 29, 2011

Time: 10:00 a.m.

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1 TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD IN THE  
2 ABOVE-CAPTIONED CASE AND IN ALL RELATED CASES:

3 PLEASE TAKE NOTICE that, on July 27, 2011, at 10:00 a.m. or as soon thereafter as  
4 may be heard before the Honorable Charles R. Breyer of the United States District Court, in  
5 Courtroom 6 of the United States District Court, Northern District of California, San Francisco  
6 Division, Plaintiffs will and hereby do move this Court to continue to toll the statute of  
7 limitations on the formerly certified class members' claims for an initial period of at least 120  
8 days from the issuance of the Supreme Court decision in this case or such additional time as the  
9 Court may need to address the orderly disposition of the claims covered by the former class.

10 On June 20, 2011, the Supreme Court reversed the class certification decision in this  
11 action. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. \_\_\_, 2011 WL 2437013 (June 20,  
12 2011). Upon decertification of a class action, former members of a class may move to intervene  
13 in the case, pursue a more narrowly defined class action, file separate cases, file charges with the  
14 Equal Employment Opportunity Commission, or pursue other legal action. In order to protect the  
15 rights of the members of the former class in this case to pursue their claims, Plaintiffs request  
16 continuation of the tolling period until at least October 18, 2011, on all claims covered by the  
17 former certified class, so that the members of the former class have an opportunity to learn of the  
18 Supreme Court's decision, obtain legal advice as necessary, and make an informed determination  
19 on how to best protect their legal interests.

20 This Motion is based upon this Notice of Motion and Motion, the attached Memorandum  
21 of Points and Authorities, the Declaration by Brad Seligman, the papers on file in this case, any  
22 oral argument that may be heard by the Court, and any other matters the Court deems appropriate.

23 Pursuant to Local Rule 7-11, Plaintiffs file concurrently with this motion a Motion for  
24 Administrative Relief requesting 1) relief from the limited stay in this case so that the instant  
25 motion may be briefed and so that the parties may submit Case Management Statements; and  
26 2) that a Case Management Conference be scheduled in this case.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On June 20, 2011, the Supreme Court reversed the class certification decision in this case.  
4 *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, 564 U.S. \_\_\_, 2011 WL 2437013 (June 20, 2011).  
5 This decision raises the immediate issue of when the statute of limitations will resume running on  
6 the claims of members of the former class. Under the tolling doctrine the Supreme Court first  
7 established in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the  
8 commencement of a class proceeding tolls the statute of limitations period for all purported  
9 members of the class and “remains tolled for all members of the putative class until class  
10 certification is denied.” *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). For over  
11 11 years, since the October 22, 1999 filing of the initial EEOC charge in this action, class  
12 members have been entitled to rely on this action to toll the statute of limitations on their  
13 individual claims. Order, Sept. 9, 2002 at 4, Dkt. 81. This tolling period extends retroactively to  
14 December 26, 1998, 300 days prior to the initial EEOC charge, which this Court set as the  
15 membership date for the class. *Id.*

16 Upon decertification of the class, former members of the class may intervene in the case,  
17 pursue a more narrowly defined class action, file separate cases, file charges with the Equal  
18 Employment Opportunity Commission (“EEOC”) or pursue other legal action. Because of the  
19 short limitations periods normally applicable to such actions once a class is decertified, courts  
20 have tolled the statute of limitations on class members’ claims for a limited period of time to  
21 afford them sufficient opportunity to evaluate their options, obtain counsel if necessary and  
22 pursue their claims.<sup>1</sup>

23 Plaintiffs respectfully request that the Court enter an order tolling the statute of limitations  
24 period on former class members’ claims for an initial period of at least 120 days from the  
25 issuance of the Supreme Court’s decision, from June 20, 2011 until at least October 18, 2011, or

26 \_\_\_\_\_  
27 <sup>1</sup> Plaintiffs believe that tolling ends, at the earliest, once the Supreme Court mandate  
28 issues to the lower court or when the stay in this action is lifted. Because there is uncertainty  
about when tolling recommences, *see* discussion *infra*. at 8-9, guidance from this Court will  
permit the consistent and orderly pursuit of claims by former class members.

1 such additional time as the Court may need to address the disposition of the claims covered by the  
2 class. In addition to protecting the interests of class members, tolling is consistent with judicial  
3 economy. As set forth in the Plaintiffs' Motion for Administrative Relief under L.R. 7-11, filed  
4 concurrently with this motion, the Supreme Court's decision raises a number of complex issues  
5 the Court must address. Tolling the statute of limitations period on the claims of the class while  
6 the Court addresses these issues will protect the rights of the former class by affording them a  
7 reasonable time period to learn of the Supreme Court's decision, obtain legal advice, and make an  
8 informed determination on how best to protect their legal interests.

## 9 II. PROCEDURAL BACKGROUND

10 On October 22, 1999, former named plaintiff Stephanie Odle filed the first EEOC charge  
11 commencing this action, alleging that Walmart engaged in a pattern or practice of sex  
12 discrimination. Order Sept. 9, 2002 at 4, Dkt. 81. This charge tolled the statute of limitations for  
13 all class members beginning on December 26, 1998, which is 300 days prior to Ms. Odle's charge  
14 filing. See Order Sept. 9, 2002 at 4, Dkt. 81 ("A class representative's EEOC charge tolls the  
15 statute of limitations for all class members."); *American Pipe*, 414 U.S. at 554. On May 31,  
16 2001, the EEOC issued a right to sue on Ms. Odle's charge. On June 19, 2001, a class suit was  
17 filed. On June 21, 2004, the district court certified a nationwide class of female retail sales  
18 employees with pay or promotion claims arising on or after December 26, 1998. *Dukes v. Wal-*  
19 *Mart*, 222 F.R.D. 137 (N.D. Cal. 2004).

20 This action has been stayed pending interlocutory appellate review since September 27,  
21 2004. See Order Staying Disclosures and Discovery, Dkt. No. 665 (staying discovery until Ninth  
22 Circuit resolves appeal of class certification order).<sup>2</sup> Most recently, on December 23, 2010, upon  
23 consideration of the parties' joint stipulation and motion, the Court continued the stay of all  
24 proceedings in this case until 30 days after the Supreme Court's ruling on Walmart's appeal or  
25 August 26, 2011, whichever is earlier. Dkt. 728.

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27 <sup>2</sup> On Plaintiffs' request, the stay was partially lifted to allow the April 2, 2008, deposition  
28 of former Walmart vice chairman Thomas M. Coughlin, III, in advance of which Walmart  
produced additional documents, but the parties have not otherwise sought to modify the stay.

1 On Walmart’s appeal of the class certification order, a Ninth Circuit panel affirmed  
2 certification of the class in its initial decision issued February 6, 2007 and in a modified opinion  
3 of December 11, 2007. *Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007). Walmart then sought  
4 *en banc* review. The *en banc* court affirmed certification of the pay and promotion claims in  
5 significant part. *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir. 2010). On June 20, 2011, the  
6 Supreme Court reversed the certification decision. The Court held that a nationwide class did not  
7 satisfy 23(a) and that the backpay claims could not be certified under Rule 23(b)(2). *Wal-Mart*  
8 *Stores*, 564 U.S. \_\_\_, 2011 WL 2437013. The Supreme Court’s ruling did not address or limit the  
9 individual claims of the named plaintiffs that remain pending before this Court or the merits of  
10 this case.<sup>3</sup>

### 11 III. LEGAL ARGUMENT

12 As the Supreme Court has recognized, once a class is decertified, “class members may  
13 choose to file their own suits or to intervene as plaintiffs in the pending action.” *Crown, Cork*,  
14 462 U.S. at 354. In addition, class members may file charges with the EEOC, since the charge  
15 filing period has also been tolled by the pendency of this action. *See, e.g., Ruehl v. Viacom, Inc.*,  
16 500 F.3d 375, 389-90 (3d Cir. 2007) (tolling of EEOC charge filing period continues until  
17 decertification in ADEA collective action); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374,  
18 1392-93 (11th Cir. 1998)(EEOC administrative charge-filing period was tolled from the time the  
19 class action was filed until the court certified a class that did not include appellants); *Duplessie v.*  
20 *Zale Corp.*, No. 3:04-CV-2361-M, 2005 U.S. Dist. LEXIS 9446, at \*10 (N.D. Tex. May 18,  
21 2005) (statute of limitations for filing EEOC charge tolled during pendency of earlier class  
22 action). The denial of the national class also does not preclude pursuit of a narrower class or  
23 classes. *See infra* at 7-8.

#### 24 A. Tolling the Statute of Limitations Will Protect the Rights of Class Members

25 An order confirming that the tolling period will continue for at least 120 days from the  
26

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27 <sup>3</sup> There are seven named plaintiffs, six of whom were certified as class representatives.  
28 In addition to class claims, three named plaintiffs have alleged individual retaliation and race  
discrimination claims.

1 Supreme Court's decision is vital because without such an order, class members may lose  
2 valuable claims before they have the opportunity to learn of the decision, obtain legal advice,  
3 retain counsel, if necessary, and act to preserve these claims. Without additional tolling, class  
4 members face one of two looming deadlines: a deadline to intervene into this action or file a  
5 separate suit or a deadline to file a charge of discrimination with the EEOC.

6 Title VII requires a plaintiff to commence an action within 90 days after notice of a right  
7 to sue letter issued. 42 U.S.C. § 2000e-5(f)(1). For most class members, this means they will  
8 have 90 days to file suit once the Supreme Court mandate issues to the lower court. For some  
9 class members, however, the time period is arguably even shorter, particularly if they had filed an  
10 EEOC charge and received a notice of right to sue during the pendency of this action or prior to  
11 Ms. Odle filing her charge of discrimination.<sup>4</sup> Class members may also timely move to intervene  
12 in this action. Fed. R. Civ. P. 24; *Winbush v. State of Iowa By Glenwood State Hosp.*, 66 F.3d  
13 1471, 1478 (8th Cir. 1995).

14 Separate from the right to file an individual action or intervene in this action, class  
15 members who have not previously filed an EEOC charge alleging class claims retain the right to  
16 file an individual charge. The time period for filing this charge has been tolled during the  
17 pendency of the class action. *See Ruehl*, 500 F.3d at 389-90. Class member now have 180 days  
18 in some states and 300 day in deferral states to file such charges. 42 U.S.C. § 2000e-5(e). These  
19 time limits may be even shorter for those individuals whose claims accrued before October 22,  
20 1999, when Ms. Odle filed her EEOC charge.

21 Members of this nationwide class are geographically dispersed, and the former class was  
22 estimated to include over 1.5 million women at the time of certification. *Dukes v. Wal-Mart*  
23 *Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal. June 21, 2004). The class is undoubtedly larger now  
24 because Walmart has hired many women since the class certification order was entered seven  
25

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26 <sup>4</sup> We do not concede that a lesser time period applies. Rather, we make this point  
27 because the rights and obligations of class members in such a situation is ambiguous. *See*  
28 *Armstrong*, 138 F.3d at 1392-93 (finding action barred by the administrative statute of limitations  
where former class members had only 54 to 64 days after the entry of order denying certification  
to file charges with the EEOC and these periods had elapsed).

1 years ago.

2 During the time this case has been pending, class counsel has been contacted by over  
3 12,000 women concerning this case and their claims of sex discrimination. Seligman Decl. ¶ 4.  
4 In the months leading up to the Supreme Court decision, class counsel has worked diligently to  
5 reach as many of these women as possible in order to be prepared to inform them of the Supreme  
6 Court's decision upon its issuance and to remind them that they may be required to take action  
7 promptly to protect their legal rights. *Id.* In the wake of the decision, class counsel has redoubled  
8 their efforts and updated the case website to inform former class members of the ramifications of  
9 the Supreme Court decision, as well as steps women may take to pursue their rights, including  
10 consulting an attorney of their choice, filing a charge of discrimination with the EEOC or  
11 pursuing a case in court. *Id.* at ¶ 5; Ex. 1 to Seligman Declaration attaching information on  
12 homepage of website <http://walmartclass.com>.

13 As a result of the Supreme Court's decision, class counsel no longer represents most  
14 former members of the class. Class counsel has established an intake process where former class  
15 members may provide information concerning their individual claims. Seligman Decl. ¶ 5, Ex. 1.  
16 Counsel is engaged in a careful review of this information and will inform former class members  
17 whether they can offer to represent them individually or as part of one or more reformulated  
18 classes. Seligman Decl. ¶ 6. This requires reviewing information submitted by the class member,  
19 reviewing documents produced by them or obtained in discovery (if any), preparing  
20 correspondence and conducting telephonic interviews. For those former class members whom  
21 counsel can represent, they must conduct further investigation of the claim and draft and file  
22 either a court complaint or an EEOC charge. Where counsel determines they cannot offer  
23 representation, they will refer those women to other organizations and firms who will face the  
24 same daunting challenges of evaluating the claims expeditiously.

25 The long pendency of this action exacerbates this process, as some former class members  
26 have moved or otherwise changed their contact information. Despite counsel's repeated attempts  
27 to remain in contact with the class, nearly one fifth of our recent communications were returned  
28 as undeliverable. Seligman Decl. ¶ 4. In addition, we have continued to receive inquiries from

1 additional former class members since the Supreme Court decision.

2 This is an extremely time intensive undertaking. As such, a serious risk exists that absent  
3 extension of tolling for a reasonable period, former class members may compromise their ability  
4 to pursue claims before they learn of the decertification decision and can take action to protect  
5 their rights.

6 **B. Tolling Will Protect Class Members From Prejudice to Their Claims Due to Disputes**  
7 **Over the Restarting of the Limitations Period**

8 Effect Of Subsequent Class Certification. In addition to filing individual litigation or  
9 EEOC charges, members of the former class may also elect to pursue their claims collectively  
10 through narrower classes that comply with the certification standards set forth in the Supreme  
11 Court decision. Thus, classes that challenge a specific national policy or that are limited  
12 geographically to the appropriate decision-makers (store, district or regional) may be pursued. A  
13 tolling order will provide important protection to class members by providing clear guidance on  
14 when the statute of limitations period begins to run on their claims. The statute of limitations  
15 period recommences once it is no longer reasonable for class members to rely on the class to  
16 protect their rights. *See In re Initial Public Offering Sec. Litig.*, 617 F. Supp. 2d 195, 199  
17 (S.D.N.Y. 2007); *see also Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985)  
18 (plaintiff could rely on tolling in a related class action until she opted-out). Where, as here, the  
19 reversal of class certification does not foreclose the possibility of certifying a narrower class,  
20 Plaintiffs may seek to certify a more modest or different class. *See Smith v. Bayer Corp.*, \_\_\_ U.S.  
21 \_\_\_, No. 09-1205, 2011 WL 2369357, at \*6 (June 16, 2011) (holding that denial of class  
22 certification in one case did not preclude the filing of a subsequent class action). Under these  
23 circumstances, courts have concluded that class members may reasonably rely on the pendency of  
24 the case to continue to toll the statute of limitations on claims of the former class unless and until  
25 the court definitively forecloses pursuit of class certification.

26 For example, in *Gardner v. Shell Oil Co.*, No. 09-05876 CW, 2010 WL 1576457 (N.D.  
27 Cal. Apr. 19, 2010), the court found that an earlier multi-facility class that was later decertified  
28 tolled the statute of limitations in a second class action seeking to certify a narrower class at one

1 facility. The court permitted tolling because plaintiffs did not attempt to relitigate the same issues  
2 addressed in the denial of class certification in the earlier action, which focused on whether to  
3 certify a broad class of employees of two companies at several different locations. *Id.* Similarly,  
4 in *In re Initial Public Offering*, 483 F.3d 70 (2d Cir. 2007), the Second Circuit, at IPO’s request,  
5 clarified that its earlier order decertifying six discrete classes in a large consolidated litigation did  
6 not foreclose the district court from reconsidering different or narrower class actions, explaining:  
7 “District courts have ample discretion to consider (or to decline to consider) a revised class  
8 certification motion after an initial denial.” *Id.* at 73. The district court subsequently issued an  
9 order confirming that the statute of limitations was tolled on all cases as the Second Circuit’s  
10 decision reversing certification left open the possibility of certification of a more modest class. *In*  
11 *re IPO*, 617 F. Supp. 2d at 200.

12 Whether such a class or classes may be pursued will no doubt be subject to motion and  
13 discovery practice. Plaintiffs have requested a status conference to discuss this issue as well as  
14 other matters relevant to the statute of limitations on the claims of the class. Additional tolling  
15 ensures that sufficient time is provided to resolve these issues.

16 Supreme Court Issuance of Mandate. Moreover, there may be additional uncertainty over  
17 when the statute of limitations recommences. Typically, the statute of limitations will resume  
18 once the decertification decision becomes final, upon the issuance of the mandate to the lower  
19 court. *See In re IPO*, 617 F. Supp. 2d at 197-98, 199 (statute of limitations in a class action suit  
20 does not start running until the date upon which the Circuit Court issues its mandate to the lower  
21 court reversing decertification). Under Supreme Court Rules 45.2 and 45.3, the mandate issues  
22 upon passage of 25 days after the judgment is entered. Once the Supreme Court’s judgment is  
23 sent to the Ninth Circuit, that court must issue a mandate to the district court reversing its order  
24 certifying the class. *See, e.g., Katz v. United States*, 262 F.3d 897, 897 (9th Cir. 2001) (issuing a  
25 mandate to the district court reversing its prior judgment due to the Supreme Court’s ruling). As  
26 such, the statute of limitations on claims of the former class should, at the earliest, begin to run  
27 after the Supreme Court issues its mandate to the Ninth Circuit and the Court of Appeals issues its  
28 mandate to this Court.

1 Other courts, however, have held that tolling ends when a court decertifies the class and  
2 not when the mandate issues. *See, e.g., Kelly v. Capital One, N.A.*, 717 F. Supp. 2d 805, 808  
3 (E.D. Wis. 2010) (finding the tolling of the statute of limitations ended when the Circuit  
4 decertified class rather than when mandate issued as this is a formality)(citing other authority).<sup>5</sup>  
5 Ordering a reasonable tolling period will resolve the uncertainty on these complex limitations  
6 issues in order to protect the interests of the former class members.

7 Stay. Finally, there is a stay in effect in this case for 30 days after the Supreme Court  
8 decision. It is not clear whether tolling ends with the Supreme Court decision, or the stay on  
9 proceedings in this case.

10 **C. This Court Has Authority to Grant Tolling after Decertification to Protect the**  
11 **Interests of Former Class Members**

12 Courts have repeatedly recognized that they bear ultimate responsibility to protect the  
13 rights of class members, a responsibility that continues after decertification or dismissal of the  
14 class. *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (Rule 23 imposes a  
15 nondelegable duty on the district judge as a fiduciary of the class); *Roper v. Conserve, Inc.*, 578  
16 F.2d 1106, 1110 (5th Cir. 1978) (“The court itself has special responsibilities to ensure that the  
17 dismissal does not prejudice putative members.”).

18 Thus, even after decertification of a class, the court “must nevertheless still be assured that  
19 the rights of the absent class members to prosecute their individual claims will not be prejudiced.”  
20 *Gilford v. Wilson Indus., Inc.*, No. H-77-279, 1980 WL 204, at \*3 (S.D. Tex. July 21, 1980)  
21 (providing absent class members 180 days to file new EEOC charges after decertification of Title  
22 VII class). As courts have recognized, “[b]ecause it is infeasible for a class member to file his or  
23 her own suit or motion to intervene contemporaneously with the issuance of a court’s decision to

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24 <sup>5</sup> Even there, however, the court recognized that: “[w]hether it is reasonable for a class  
25 member to continue to rely on a class action after decertification may depend on the reason for  
26 decertification. Where a court decertifies a class action on narrow grounds such as, for example,  
27 that the class is too broad but indicates that with a narrower class the action could proceed, it may  
28 be reasonable for a putative member of the narrower class to continue to rely on the class action.”  
*Id.* at n.2 (citing *In re IPO*, 617 F. Supp. 2d at 200). There, the court held that it would have been  
unreasonable for any class member to continue to rely on the class action after the Seventh  
Circuit’s decertification decision because it absolutely precluded rescission class actions under  
the statute at issue. *Id.*

1 deny certification, courts typically deny certification and toll the statute of limitations for an  
2 additional, brief period of time to afford a former class member the opportunity to pursue his or  
3 her individual claims.” *Burch v. Qwest*, No. 06-3523 (MJD/AJB), 2010 WL 529427, at \*4 (D.  
4 Minn. Feb. 4, 2010) (ordering tolling of 60 days on putative class members in Rule 23 class  
5 action and Fair Labor Standards Act collective action); *see In re Teflon Products Liability*  
6 *Litigation*, 254 F.R.D. 354, 371 (S.D. Iowa 2008), the court held that “all statutes of limitations  
7 periods are tolled for ninety (90) days from the date of this Order to enable individuals . . .  
8 meeting the criteria set forth in plaintiffs’ proposed class definitions to file separate complaints in  
9 the appropriate federal or state district court;” *Reed v. County of Orange*, 266 FRD 446, 464  
10 (C.D. Cal. 2010) (ordering tolling of 60 days on putative class members in Fair Labor Standards  
11 Act collective action).

12         The Supreme Court has held that under Title VII, a court may equitably toll the statute of  
13 limitations for both EEOC charge filing and suit commencement. *See, e.g., American Pipe*, 414  
14 U.S. at 558 (noting “judicial power to toll statutes of limitations in federal courts”); *Zipes v.*  
15 *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that “filing a timely charge of  
16 discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a  
17 requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable  
18 tolling”). As the Supreme Court recognized in its recent decision, *Smith v. Bayer Corporation*,  
19 absent class members who were not party to a prior class suit may receive the benefits of tolling.  
20 *Smith v. Bayer*, \_\_\_ U.S. \_\_\_; 2011 WL 2369357, at \*9, n.10. The Court explained, “a person not a  
21 party to a class suit may receive certain benefits (such as the tolling of a limitations period)  
22 related to that proceeding. . . . That result is consistent with a commonplace of preclusion law --  
23 that non-parties sometimes may benefit from, even though they cannot be bound by, former  
24 litigation.” *Id.* Accordingly, after decertification of a class, a court may provide putative  
25 plaintiffs with benefits from this litigation, such as tolling of their statute of limitations. An order  
26 providing equitable tolling would provide absent class members with a reasonable opportunity to  
27 evaluate their options and take any appropriate action they wish.

28         In a related context, the Ninth Circuit has recognized the importance of providing

1 equitable tolling to individuals who sought to join a collective action where failing to do so would  
2 deprive individuals of an opportunity to exercise their rights. *See Partlow v. Jewish Orphans’*  
3 *Home of Southern California, Inc.*, 645 F.2d 757, 760 (9th Cir. 1981) (equitably tolling statute of  
4 limitations for 45 days on all class members’ FLSA claims where consents to join had been  
5 rendered ineffective), *abrogated on other grounds by Hoffmann-La Roche Inc. v. Sperling*, 493  
6 U.S. 165 (1989). Additionally, the Ninth Circuit noted that because defendants were sufficiently  
7 on notice of the claims, the court had a greater duty to prevent the potential prejudice to the  
8 putative plaintiffs than to prevent potential prejudice to defendants. *Id.* at 761.

9 Continuing the tolling period for at least 120 days will further the goals of *American Pipe*  
10 tolling, which seeks to protect the rights of absent class members by assuring that, in the event the  
11 pending class action ends, their individual claims are not prejudiced by their reliance on the class  
12 action mechanism. *See American Pipe*, 414 U.S. at 554; *Crown, Cork*, 462 U.S. at 350. Here,  
13 where a class has been certified for over seven years, a decision that was affirmed by the Ninth  
14 Circuit three times, class members may place even greater reliance on the class status than in the  
15 circumstance in *American Pipe* and *Crown, Cork* where a class had never been certified. In light  
16 of the size and geographic scope of the class, and the complexity of the sex discrimination claims  
17 at issue, the need for tolling is particularly acute. The members of the former class should be  
18 entitled to a reasonable opportunity to learn of the Supreme Court’s decision, consult with  
19 counsel of their choice, and take action to protect their rights. Without this tolling period, absent  
20 class members may be foreclosed from pursuing significant claims before they have time to fully  
21 evaluate their legal rights.

22 Finally, an extension of tolling for a reasonable period after decertification is consistent  
23 with the goals behind the statutes of limitations. Walmart has long been on notice of the claims  
24 advanced by the class, at least since the filing of the first EEOC charge in 1999 and through the  
25 subsequent litigation. As the Court recognized in *Crown, Cork*, a class complaint “notifies the  
26 defendants not only of the substantive claims being brought against them, but also of the number  
27 and generic identities of the potential plaintiffs who may participate in the judgment.” *Crown,*  
28 *Cork*, 462 U.S. at 353 (citations omitted). “The defendant will be aware of the need to preserve

1 evidence and witnesses respecting the claims of all the members of the class. Tolling the statute  
2 of limitations thus creates no potential for unfair surprise, regardless of the method class members  
3 choose to enforce their rights upon denial of class certification.” *Id.* Likewise, in the over 11  
4 years since the initial EEOC charge was filed, Walmart has had the opportunity to preserve its  
5 own evidence and thoroughly investigate Plaintiffs’ claims. Indeed, it has been subject to a  
6 document preservation Stipulation and Order since 2001. Continuing this tolling period for a brief  
7 additional period will provide important protection to former class members while inflicting no  
8 prejudice on Walmart.

### 9 CONCLUSION

10 For the above reasons, this Court should continue to toll all statutes of limitations on the  
11 claims encompassed within the previously certified class effective from June 20, 2011 until at  
12 least October 18, 2011.

13 Dated: June 24, 2011

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