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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EARLY STRONG, Plaintiff and Appellant, v. BLUE CROSS OF CALIFORNIA, Defendant and Respondent.	B231512 (Los Angeles County Super. Ct. No. BC382405)

APPEALS from an order of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Knapp, Petersen & Clarke, Andre E. Jardini and Maria A. Grover; Law Offices of Michael S. Duberchin and Michael S. Duberchin; Law Offices of Alan R. Burman and Alan R. Burman, for Plaintiff and Appellant.

Seyfarth Shaw, Gilmore F. Diekmann, Jr., Jeffrey A. Wortman, Dennis Hyun, and Jill A. Porcaro, for Defendant and Respondent.

Early Strong appeals from an order denying certification of a statewide class of non-exempt African-American employees of respondent Blue Cross of California (Blue Cross), based on disparity in promotion and pay. We find no abuse of discretion and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

Strong, who is African-American, has worked at the Blue Cross Aranda Center in Woodland Hills, California, since 1998. Between 2003 and 2009, that center had more than 4,500 employees, over 650 of whom were African-American. There were over 600 departments and more than 1,000 job titles.

Two types of promotions are available at Blue Cross. A career progression advancement promotion occurs when a manager, sometimes in consultation with the Human Resources Department (HR), determines that an employee has the skill and experience to advance to a higher level within a job family. Strong received such promotions in 2000, when she advanced from a Customer Care Associate II to a Customer Care Associate III, and in 2001, when she advanced to Senior Customer Care Associate.

The second type of promotion occurs as a result of an application process that begins when a manager submits a requisition form to the HR's Talent Acquisition Department. Depending on the position, the requisition may be posted only internally or may also be made available to the general public. Job postings, which include a job description, minimum qualifications, and a prescreening questionnaire, are generated by talent consultants (otherwise known as recruiters), according to the managers' specifications. It is not unusual for a job requisition to be cancelled for budget or reorganization reasons, or because of a change in the need for a position.

The talent consultants screen the applications and, depending on the manager's preference, may forward to the managers all applications, only those meeting the minimum qualifications, or only those of the most qualified applicants. Depending on the job description, applicants may be interviewed by a hiring manager alone, a panel of

managers, the director of the department, a vice president of a department, or a clinical employee. A screening or follow-up interview may be delegated to a talent consultant or others within a department.

For the most part, managers make hiring decisions alone, but they may consider the input of colleagues who participated in the interview process. Before an offer is made, a talent consultant reviews the candidate evaluation form the manager completes, and sometimes the manager's interview notes, to assure that the manager has followed the company policy and procedure, and that the candidate meets the job requirements. Typically, a talent consultant checks whether the candidate the manager selected scored the highest on the evaluation form, and may discuss any discrepancy with the manager.

In 2003, Strong applied for, and was promoted to, the posted position of Lead Customer Care Associate. In 2005, she transferred to a lead position in the Provider Accounts Receivable unit. In 2006 and 2007, Strong unsuccessfully applied for various other jobs within the company. She was either rejected, or the job requisition was cancelled.

In December 2007, Strong sued Blue Cross for race discrimination under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) and for unlawful business practices under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) on behalf of herself and all African-American employees at Blue Cross since December 2003. In March 2010, the court granted the Blue Cross motion for a protective order to limit personnel data discovery to the Aranda Center. In October 2010, Blue Cross moved for an order denying class certification, and Strong moved for an order certifying a statewide class of about 800[1] non-exempt former or current African-American employees based on disparity in promotion and pay. In support of her motion, Strong offered anecdotal evidence from 13 other employees and statistical analysis by her expert, Dr. Mark R. Killingsworth, who concluded there was race-based disparity in promotion

[1] Strong's opposition to the Blue Cross motion represented the proposed class as composed of 4,500 employees. The court referenced this number in its order. On appeal, Strong refers to the class as consisting of approximately 800 employees.

and pay at the Aranda Center. Blue Cross submitted a competing analysis by its own expert, Dr. Daniel A. Biddle, as well as evidence of the decentralized nature of promotion decisions.

The trial court denied class certification on the ground that common issues did not predominate and a class action was not a superior method for resolving the litigation. This timely appeal followed.[2]

DISCUSSION

We review the trial court's decision on class certification for manifest abuse of discretion and do not disturb it '"unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*).) '"Any valid pertinent reason stated will be sufficient to uphold the order.' [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436.)

A class action may be allowed in a case where "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code Civ. Proc., § 382.) The requirements for class certification are based on this statutory provision and federal precedent. (*Brinker, supra*, 53 Cal.4th at p. 1021.) The class action proponent "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.]" (*Ibid*.)

I

For purposes of class certification, a community of interest exists when there are "'"(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately

[2] The subsequent summary judgment in favor of Blue Cross and against Strong is the subject of a separate appeal, case No. B232708.

represent the class."' [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1021.) Strong challenges the court's finding that common issues in this case did not predominate.

On the issue of predominance, courts are allowed to consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333 (*Sav-On*).) Since predominance is a factual issue, the trial court's finding on this issue generally is reviewed for substantial evidence. (*Brinker, supra*, 53 Cal.4th at p. 1022.)

A. The Wal-Mart Case

In *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S.___, 131 S.Ct. 2541 (*Wal-Mart*), the United States Supreme Court recently considered what evidence is sufficient for class certification under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2. In that case, female employees of Wal-Mart sought to certify a nation-wide class of 1.5 million members, based on alleged sex-based disparities in pay and promotion. (*Id*. at p. 2548.) The court held the plaintiffs had failed to identify a company-wide policy or practice of sex discrimination, and their statistical and anecdotal evidence was insufficient to justify class certification in the absence of such a policy or practice. (*Id*. at pp. 2555–2556.)

Blue Cross argues that *Wal-Mart* is dispositive. In reply, Strong attempts to distinguish the case and to limit its holding to its particular facts. The size of the proposed class in *Wal-Mart* (a nation-wide class of 1.5 million members) obviously was much larger than the statewide class of 800 members proposed in this case. But while the court repeatedly noted the enormity of Wal-Mart's nation-wide operations and the size of the proposed class, these facts were not determinative of its reasoning or holding. (*Id.* at pp. 2546, 2552; see *Bolden v. Walsh Const. Co.* (7th Cir. 2012) 688 F.3d 893, 897 [*Wal-Mart*'s class size relevant to manageability rather than commonality].)

More importantly, like *Wal-Mart*, this is a "pattern-or-practice" case. The plaintiff in such a case must "establish by a preponderance of the evidence that . . . discrimination

was the company's standard operating procedure[,] the regular rather than the unusual practice." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2552 & fn. 7, quoting *Teamsters v. United States* (1977) 431 U.S. 324, 358 (*Teamsters*).) The *Wal-Mart* case provides important guidance for class certification in pattern-or-practice cases, and is directly on point in promotion cases, such as this one, where the challenged decisions are made by lower-level managers.

We begin with a review of the *Wal-Mart* court's reasoning and holding, and then discuss the evidence in this case.

The court began with the general proposition that in order to establish commonality, the class proponent must show the claims of all class members depend on a common contention "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2551.) The court reasoned: "Without some glue holding the alleged *reasons* for all [promotion] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." (*Id*. at p. 2552.)

Wal-Mart's corporate policy was of nondiscrimination, but it allowed local supervisors to exercise discretion over employment matters. (*Wal-Mart*, *supra*, 131 S.Ct. at p. 2554.) The court explained that this type of policy "'should itself raise no inference of discriminatory conduct[.]'" (*Ibid*., quoting *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 990.) While it may have a disparate effect "in appropriate cases," not all employees will have a disparate effect claim in common. In a company that has a policy of nondiscrimination, most managers will rely on nondiscriminatory criteria that produce no disparate effect. (*Ibid*.) Others may rely on facially neutral criteria, such as test scores or educational level, that disproportionately affect a particular group. (*Ibid*., citing *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431–432.) And still others may misuse their discretion to intentionally discriminate. Thus, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."

(*Ibid*.) The court held, therefore, that in order to establish commonality in a case based on subjective decisionmaking, the plaintiffs must present '"[s]ignificant proof that an employer operated under a general policy of discrimination . . . ."' (*Id.* at p. 2553, quoting *General Telephone Co. of the Southwest v. Falcon* (1982) 457 U.S. 147, 159, fn. 15.)

In the absence of a company-wide policy controlling the exercise of discretion, the court concluded that the plaintiffs' statistical analysis of sex-based disparity in promotion and pay was insufficient to establish commonality. In other words, merely proving that a system of discretionary decisionmaking has produced a prohibited disparity is not a substitute for identifying the specific employment practice that is challenged. (*Wal-Mart, supra,* 131 S.Ct. at p. 2554.) The court concluded the plaintiffs' anecdotal evidence suffered from the same defects, in addition to being too weak to support an inference of company-wide discrimination since it was too sparse and unevenly distributed (one anecdote for every 12,500 class members, in 235 out of 3,400 stores, concentrated in a few states). (*Id*. at p. 2556.) The court contrasted this evidence to that found sufficient in *Teamsters*, *supra*, 431 U.S. 324: 40 anecdotes from individuals spread throughout the company, which represented roughly one account for every eight members of the class. (*Wal-Mart*, at p. 2556.)

As the Seventh Circuit has noted, *Wal-Mart* helps "to show on which side of the line that separates a company-wide practice from the exercise of discretion by local managers [a] case falls." (*McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. 2012) 672 F.3d 482, 490 (*McReynolds*).) In *McReynolds*, Merrill Lynch was accused of discriminating against 700 African-American brokers out of a work force of 15,000 in 600 branch offices. (*Id*. at p. 488.) The plaintiffs challenged two company-wide policies: allowing brokers to form teams of their own choosing and transferring accounts of brokers leaving the company to the remaining brokers based on their past success. (*Id*. at p. 489.) The court held that, while facially neutral, these policies could have a disparate class-wide impact that supported class certification. (*Id*. at p. 490.)

Here, the trial court found that "there was no centralized body or policy for making promotional decisions. . . . Each department had its own manager who made the hiring decisions. . . . And every job had its own requirements which were probably evaluated differently depending on the manager overseeing the hiring." On appeal, Strong does not argue that there is a company-wide promotion policy that is discriminatory in either its intent or impact. Instead, she argues the evidence establishes that Blue Cross has a centralized promotion system, which coupled with statistical and anecdotal evidence of discrimination, is sufficient for class certification.

We examine these arguments next.

B. The Evidence

As a general rule, when issues of class certification overlap with the merits of the case, a court should consider the merits as necessary. (*Brinker*, *supra*, 53 Cal.4th at pp. 1023–1024.) Here, the issue of commonality overlaps with Strong's claim that Blue Cross engages in a pattern or practice of discrimination.

1. Blue Cross's Promotion System

A company-wide pattern or practice may be established by evidence that promotion decisions, based on common criteria, are either the result of a centralized policy, or are made or influenced by upper management. (See, e.g., *Ellis v. Costco Wholesale Corp.* (9th Cir. 2011) 657 F.3d 970, 983; *Ellis v. Costco Wholesale Corp.* (N.D.Cal. 2012) 285 F.R.D. 492, 511-516; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421 (*Stephens*).) In *Stephens*, for example, candidates for promotion were subject to a company-wide performance appraisal system, and every appraisal was based on the same criteria for the same job throughout the company. (*Ibid*.) Pay rates were set at the company's headquarters and administered at the district, rather than individual store, level. (*Ibid*.)

Strong contends the trial court incorrectly concluded that Blue Cross's promotion system is decentralized. Her contention is based on evidence that 45 to 50 talent consultants are involved in the promotion process by posting positions, screening applicants, and reviewing applications for diversity purposes. But the evidence does not

support Strong's representation that the talent consultants are a centralized body that controls the promotion process.

The talent consultants are essentially recruiters. As Strong recognizes, not all of them are even located in California. Some, located as far as Missouri and New York, generally support the entire WellPoint family of companies, including Blue Cross. Their involvement in the promotion process is ministerial as they must comply with the hiring managers' wishes about what information is to be included in a job posting and which applications are to be forwarded to the managers. While a manager may delegate some interviewing responsibility to a recruiter, the final decision of whom to hire is made by the manager, not by the recruiter. The recruiters review the notes and evaluation forms the managers submit in support of the promotion decisions, but there is no evidence that they have the power to override the managers' decisions. The recruiters, thus, cannot be said to control the promotion process.

Strong also argues that all jobs at Blue Cross are essentially office jobs that require a person "to sit at a desk, enter data, and research in some way." Even were this an accurate description of all Blue Cross positions, it does not establish that the hiring managers use the same promotion criteria for all positions, nor does Strong identify any such criteria. On the contrary, one of her theories is that some job postings were cancelled only to be reposted with more stringent requirements that she no longer met. She also argues that she was rejected for positions for which she was more qualified than the successful applicants. Assuming she could prove these theories, they do not establish that all promotion decisions were based on the same criteria.

The trial court correctly concluded the Blue Cross evidence shows a decentralized promotion process, and Strong has not identified a class-wide promotion policy or practice. Additionally, although the proposed class also is based on an alleged disparity in pay, Strong does not separately argue that pay rates are controlled by recruiters or are otherwise centralized.

2. Statistical Evidence

Strong argues she can make her prima facie case of company-wide discrimination based on statistical evidence alone. While statistical evidence of company-wide discrimination may be sufficient in appropriate cases (see e.g. *Teamsters*, *supra*, 431 U.S. 324, 337), the statistical evidence in this case is limited to the Aranda Center. Strong contends the trial court should not have held this limitation against her since the court itself had imposed it.

In March 2010, the court granted a Blue Cross motion to limit Strong's discovery of personnel (or so-called PeopleSoft) data, on which the statistical analysis was based, to the Aranda Center. In its motion, Blue Cross argued Strong was not entitled to statewide discovery of such data since she worked only at the Aranda Center and had not shown a statewide policy or practice of discrimination. In opposition, Strong supplied a declaration stating only that she had applied to several positions at other branch offices; she did not state that she was challenging the promotion decisions regarding those positions as discriminatory.

On appeal, Strong does not argue the trial court abused its discretion in limiting discovery to the Aranda Center. (Cf. *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334 [on appeal from order denying class certification appellant also challenged earlier order denying motion to compel discovery].) She argues instead that, in the order denying class certification, the court improperly faulted her for presenting limited statistical evidence. Had Strong identified a company-wide policy or a centralized decisionmaking process, we would agree that the trial court abused its discretion in rejecting her limited statistical data without allowing her to conduct additional discovery. But since she did not, the court's ruling on class certification was in line with its earlier discovery order, which Strong does not challenge.

Strong argues that statistics limited to the Aranda Center may be imputed to the entire company since, unlike the proposed nation-wide class action in *Wal-Mart*, her proposed class is only statewide, and there is not much regional variety in California.

Because she offers no legal or factual support for this argument, we need not consider it. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.)

The parties represent that there are 39 Blue Cross offices in California and a total of 58,000 employees. We have been cited to no evidence regarding the locations of these offices or their demographics. Strong claims there is no evidence that the Aranda Center is acting in a "rogue capacity." Yet, in her declaration, she states that the company's ombudswoman made an onsite visit in 2006 because of an alleged "serious problem in the Aranda Center with promotion opportunities for African-Americans." There is no evidence the ombudswoman visited any other Blue Cross office.

Strong selectively quotes from a 2009 e-mail by the Blue Cross President and CEO to argue that he has acknowledged the existence of company-wide racial inequality. The relevant portion of the e-mail states that one of the goals for 2009 was to "[i]mprove/maintain enterprise-wide racial and gender diversity at the Staff VP and above level as compared to 2008 results." This statement cannot fairly be read as an acknowledgment of inequality. Since the stated goal was to at least maintain the previous year's diversity results, those results must have shown there was racial and gender diversity at the referenced levels within the company. Nor does the statement speak to any lack of diversity at lower level salaried positions, such as those to which Strong applied. It cannot be read as an acknowledgment of a general company-wide racial inequality for positions it does not mention. Imputing Strong's limited statistical data to the entire company under the circumstances would be speculative.

The parties dispute at length the validity of the regression analysis performed by Dr. Killingsworth, which indicates a statistically significant racial disparity in promotion and pay at the Aranda Center. Specifically, Dr. Killingsworth found such disparity in the rate at which hourly employees are promoted to salaried positions, when controlling for variables such as sex, age, years of service, education, and annual pay. He also found a statistically significant disparity when using Blue Cross's own definition of promotions and controlling for the same variables. The same was true for the disparity in pay.

Blue Cross argues that Dr. Killingsworth's analysis of promotions from hourly to salaried positions is invalid because he relied on a personnel data field that contained a coding error, and did not reflect actual promotions. Strong responds that neither a coding error nor the codes for hourly and salaried employees were disclosed by Blue Cross during discovery. Blue Cross argues the error was self-evident since, when it was corrected in 2005, it resulted in an unusually high rate of transition from hourly to salaried positions. Blue Cross also takes issue with Dr. Killinsworth's analysis of the "probability" of promotions, but Strong retorts that these probabilities were derived from an analysis of actual promotions. The parties disagree as well on what variables should be used to control the analysis. For example, Blue Cross argues that job title should be a controlling variable, while Strong argues that higher paid jobs already are tainted by discrimination.

The trial court did not resolve these disputes, and neither do we, since they go to the weight of Dr. Killingsworth's statistical analysis rather than to the issue of commonality. (See *Wal-Mart, supra,* 131 S.Ct. at p. 2555 [even taken at face value, regression analyses did not establish class-wide discrimination].) Even assuming that Dr. Killingsworth's statistical analysis is valid, it is limited to the Aranda Center. In the absence of other evidence of company-wide discriminatory policy or practice, it is insufficient to establish commonality. (See *id*. at p. 2556.)

3. Anecdotal Evidence

Strong's anecdotal evidence consists of her own and 13 additional declarations by Blue Cross employees. None of the 13 declarants identified the office at which he or she worked, but Blue Cross represented they all worked at the Aranda Center, and the trial court adopted this representation in its order. Strong does not dispute it on appeal. Since there is no evidence that the declarants are spread throughout the company, the declarations do not support statewide class certification. (See *Wal-Mart, supra,* 131 S.Ct. at p. 2556.)

The anecdotal evidence is weak for the additional reason that, while all but one declarant state they are African-American, their complaints are so varied in kind that they

might not even support an inference that African-Americans were discriminated throughout the Aranda Center during the class period. Some complained-of incidents are either undated or predate the class period. Declarants complain about specific supervisors in only a few departments, and two declarants complain about the same supervisors in relation to the same position. Not all declarants state they applied for and were denied positions in the company. Not all state that the complained-of treatment was disparate or racially motivated. Only three declarants mention hearing racist or race-related comments by a co-worker or a supervisor. A couple claim they received unequal pay at hiring based on statements by co-workers; a few others claim they did not receive certain pay increases, but do not state this amounted to disparate treatment.

Thus, even if all these anecdotes are true, not all can be fairly characterized as evidence of race discrimination at the Aranda Center. And even if they could be characterized as such, on their own they are insufficient to establish a company-wide pattern or practice of discrimination.

In the absence of evidence of a company-wide pattern or practice of race discrimination, the trial court did not abuse its discretion in denying class certification for lack of commonality.

II

Strong also challenges the trial court's determination that a class action is not the superior method of resolving this case.

A class action is proper where it "'"'provides small claimants with a method of obtaining redress . . .'" [citation]" and "'when numerous parties suffer injury of insufficient size to warrant individual action . . . .' [Citations.]" (*Linder*, *supra*, 23 Cal.4th at p. 435.) The determination whether a class action would be superior to individual lawsuits is usually based on such factors as each class member's interest in controlling his or her own case, the desirability and manageability of a single class action, and any pending litigation by individual class members on the same controversy. (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 121.)

The trial court determined that a class action would not be "the most efficient way" of resolving this controversy because the Blue Cross hiring decisions are decentralized, and the circumstances of the class members are too individualized to be grouped into a single action. The court concluded that consolidating all claims may be disadvantageous to class members who may have stronger individual cases. The trial court's determination on the issue of superiority was largely based on its earlier determination that individual factual issues predominate.

Strong relies on the propositions that "[i]ndividual issues do not render class certification inappropriate so long as such issues may effectively be managed . . . [citations]" and '"the trial court has an obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class' [citations]." (*Sav-On, supra,* 34 Cal.4th at pp. 334, 339.) But she presented no "innovative procedural tools," and no management plan. Instead, she argued in conclusory terms that "the class will establish liability and a fair method of determining the wages owed to each individual," and the case will not present "unique circumstances which would pose a difficulty in management."

In her reply brief on appeal, Strong relies on Justice Werdegar's concurring opinion in *Brinker*, which identified employer records, representative testimony, surveys, and statistical evidence as tools available to render manageable the determination of damages in class action cases. (*Brinker, supra*, 53 Cal.4th at p. 1054.) Justice Werdeger rejected the respondent's claim that a particular subclass in a wage and hour lawsuit was "categorically unmanageable." (*Id*. at p. 1055.) She left it to the trial court "to decide on remand, in the fullness of its discretion, whether in this case methods exist sufficient to render class treatment manageable." (*Ibid*.) Her opinion does not stand for the proposition that statistical and anecdotal evidence render a class action categorically manageable.

"It is not sufficient . . . simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question . . . ." (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432.) Here,

there is no explanation how Strong's statistical and anecdotal evidence, limited as it is to the Aranda Center, can be used to effectively manage a company-wide class action.

Under the circumstances, the trial court did not abuse its discretion in denying class certification for lack of superiority.

DISPOSITION

The order is affirmed. Blue Cross is entitled to its costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.