IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GEORGE MCREYNOLDS, et. al., Individually on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. 08 Civ. 6105
vs.	)	Judge Robert W. Gettleman
MERRILL LYNCH & CO., INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA CORPORATION,	)	Magistrate Judge Gilbert
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

In an effort to retain high-performing Financial Advisors ("FAs") following the acquisition of ML & Co. by Bank of America, Merrill Lynch adopted a merit/production based Transition Program under which FAs would be paid for remaining with the merged company. (Am. Compl. ¶ 7.) The amount of compensation depended on each FA's recent production levels. In this lawsuit, Plaintiffs allege that the Transition Program unlawfully discriminated against African American and female FAs by disproportionately advantaging white males. (*Id.* at ¶ 9.) At the same time, however, Plaintiffs admit that payments under the Transition Program were based on each FA's production. (*Id.* at ¶ 20.) ("Merrill Lynch decided to design the retention rewards based on annualized production credits through September 2008."). In other words, Plaintiffs acknowledge that the Transition Program measured all FAs, regardless of race or gender, by the same production metrics to determine eligibility for, and amount of, bonuses. This undisputed fact dooms Plaintiffs' claims. Indeed, it was on this basis that Judge Scheindlin recently dismissed a nearly identical claim brought by Plaintiffs' counsel here regarding the very same Transition Program. *Goodman v. Merrill Lynch*, 716 F. Supp. 2d 253 (S.D.N.Y. 2010) (attached as Ex. A). The same result is compelled here by Supreme Court and Seventh Circuit precedent.

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(h), expressly protects employers from discrimination claims arising from the application of a merit- or production-based pay system like the one at issue here. To overcome Section 703(h)'s protection, a plaintiff must demonstrate that the employer adopted the program for the express purpose of discriminating against a protected group. Plaintiffs' theory here is that Defendants had the requisite intent to discriminate against African American and female FAs because (1)

Defendants were aware when they adopted the Transition Program that it would have a disparate impact on African American and female FAs; and (2) the inputs that determine production are tainted by past and ongoing intentional discrimination in other employment practices. Taken separately or together, these allegations do not suffice to maintain a claim.

As to knowledge of the disparate impact, the Supreme Court and the Seventh Circuit have held that adopting a program with awareness of its disparate impact is not tantamount to intentional discrimination within the meaning of Section 703(h). As to tainted inputs, allegations of discrimination in connection with other employment practices that may affect payments under the Transition Program do not undo the protections afforded to a Section 703(h) pay system; instead, the Supreme Court and the Seventh Circuit have made it clear that Plaintiffs' remedy for any such discrimination is to challenge those separate practices, and if they are successful, to seek damages for receiving a lower Transition Program award than they otherwise would have been entitled to had they not been discriminated against.

The distinction between the program itself and the allegedly tainted inputs is important for defendants and courts, but irrelevant for plaintiffs. It is important for defendants and courts because if Plaintiffs are correct, then countless pay systems across the country that are based on gender neutral, rational factors, such as production, will need to be altered, and courts will find themselves in the business of redesigning compensation structures.

This distinction is irrelevant for plaintiffs, because they can recover for differences in pay by challenging the alleged underlying discrimination, as Plaintiffs do in *McReynolds v. Merrill Lynch*, No. 05 Civ. 6583 (N.D. Ill.) (Gettleman, J.) (the "*McReynolds I* Litigation").[1] Plaintiffs' disparate treatment and disparate impact challenges to other discriminatory practices, such as

[1] Plaintiffs in this case are all named plaintiffs in the *McReynolds I* Litigation. This Court has properly denied class certification in *McReynolds I*, but Plaintiffs' counsel has indicated that the individual Plaintiffs intend to pursue their claims against Merrill Lynch.

teaming, would provide them with adequate grounds for relief, and any losses allegedly suffered due to the application of the Transition Program would be an element of their damages.

The retention bonus system at issue here serves an obvious and important business purpose. When it was being acquired by Bank of America, Merrill Lynch targeted its most productive FAs to receive retention bonuses that would encourage them to remain at the firm. (*See* Am Compl. ¶¶ 7, 20.) The more successful the FA, the greater the bonus. (*See id*.) No other system would have made any sense in the business environment in which Merrill Lynch operates, and the Transition Program is consistent with what other firms in the industry reportedly had done in similar circumstances.[2] In this context, it is simply not plausible that Defendants adopted this program with the intent to discriminate against African American and female FAs.

Defendants previously moved to dismiss Plaintiffs' Complaint, arguing that Section 703(h) precluded Plaintiffs' claims. Judge Kennelly denied Defendants' motion in January 2009, prior to the case being transferred to this Court. Nevertheless, the Court should consider Defendants' motion. Judge Kennelly's decision came before the Supreme Court's ruling in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and thus he applied the wrong standard in evaluating Defendants' motion. Judge Scheindlin's dismissal in *Goodman* of a nearly identical claim regarding the Transition Program on Section 703(h) grounds—a decision rendered after Judge Kennelly's ruling—confirms the need to revisit this issue.

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[2] *See, e.g., http://registeredrep.com/news/ubs-mcdonald-retention/; http://www.researchmag.com/News/2009/2/Pages/Morgan-Stanley-Smith-Barney-ShareRetention-Program-with-FAs.aspx; http://registeredrep.com/advisorland/Wachovia AGEdwards Retention Package/; http://www.onwallstreet.com/news/Morgan Stanley Smith Barney Retention Bonuses TARP2661079-1.html; http://www.investmentnews.com/apps/pbcs.dlllarticle?AID=/20070618/FREE/70618008/1/INlssueAlert04&ht=; http://www2.insurancenewsnet.com/article.asp?a=ma&id=62104.*

The discovery burden on Defendants is likely to be significant, particularly in terms of depositions of senior executives, to defend claims that, on their face, are contrary to binding precedent. Accordingly, Defendants' Rule 12(b)(6) motion to dismiss should be granted.

II. LEGAL STANDARD

To avoid dismissal under Rule 12(b)(6), a plaintiff must provide "more than labels and conclusions," and "a formulaic recitation of the elements of the cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). A complaint must allege facts that show "plausibility of entitlement to relief," and factual allegations "that are merely consistent with a defendant's liability" fall short of that standard. *Iqbal*, 129 S. Ct. at 1949 (internal quotations omitted). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. It requires a plaintiff to "plea[d] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Pleading facts that "do not permit the court to infer more than the mere possibility of misconduct" fails to show "that the pleader is entitled to relief," as required by Rule 8(a). *Id*. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). A claim requiring proof of intentional discrimination should be dismissed if the complaint "does not contain any factual allegation sufficient to plausibly suggest [defendant's] discriminatory state of mind." *Id.* at 1952.

Applying *Twombly* and *Iqbal*, the Seventh Circuit requires that a complaint "suggest that the party has more than a 'speculative' right to relief." *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). "[I]t is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief by providing allegations that raise a right to relief above the speculative level." *Id.* at 777 (citations and quotation marks removed); *see also Reger Development, LLC v. National City Bank*, 592

F.3d 759, 764 (7th Cir. 2010); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). Plaintiffs "must give enough details about the subject matter of the case to present a story that holds together." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).[3]

The plausibility standard must be applied with particular rigor where, as here, "discovery is likely to be more than usually costly." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (citing *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 804 (7th Cir. 2008)).

III. ARGUMENT

A. Law of the Case Doctrine Does Not Preclude Granting Defendants' Motion to Dismiss the Amended Complaint

Prior rulings should be revisited where there is a change in the law or manifest error. *See Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006); *Starcon Int'l, Inc. v. N.L.R.B.*, 450 F.3d 276, 278 (7th Cir. 2006); *Best v. Shell Oil Co.*, 107 F.3d 544, 546 (7th Cir. 1997). The law of the case doctrine does not limit a court's power to reconsider earlier rulings in a case, rather, the doctrine is a "self-imposed prudential limitation" that should not be considered an "immutable rule." *Evans v. City of Chicago*, 873 F.2d 1007, 1014 (7th Cir. 1989).

On January 12, 2009, Judge Kennelly, prior to the case being transferred to this Court, entered an order denying Defendants' Motion to Dismiss Plaintiffs' Complaint. *See* Order, dated Jan. 12, 2009 (Docket No. 27). Similar to the instant motion, Defendants moved to dismiss the complaint based on Section 703(h). This Court should exercise its discretion to reexamine the

[3] At issue in *Swanson* was a limited face-to-face interaction between the plaintiff and the particular persons who allegedly discriminated against her when she applied for a home equity loan. *Swanson* draws a sharp distinction between "straightforward cases," like *Swanson* and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and "more complex cases," which will require more pleading detail. 614 F.3d at 404-05. The issues in this case are clearly more complex than the questions presented by either *Swanson* or *Swierkiewicz*, and are at least as complex, if not more complex, than the questions presented in *Iqbal*.

issue presented in this motion, because new case law relevant to the issues has been decided subsequent to Judge Kennelly's decision, namely *Iqbal* and *Goodman*.

To be sure, the Seventh Circuit has held that neither *Iqbal* nor *Twombly* changed the fundamentals of pleading. *See Bissessur v. Ind. Univ. Bd. of Trustees*, 581 F.3d 599 (7th Cir. 2009). But it also has recognized that the Supreme Court did intend *Twombly* and *Iqbal* to set a higher pleading bar. *See Swanson*, 614 F.3d at 403.

Judge Kennelly failed to test Plaintiffs' complaint against that higher bar. Without the benefit of *Iqbal*, Judge Kennelly denied Defendants' motion to dismiss without relying on or citing to the "plausibility standard," which had not been articulated in *Twombly*. As a result, the court applied the wrong standard when it credited Plaintiffs' bare statements that Defendants "'intentionally chose to employ retention bonuses that intentionally discriminated against African Americans and women' because they 'intended to retain white men while not retaining African Americans and women.'" (Order, at p. 2). Judge Kennelly should not have credited these conclusory allegations under the plausibility standard, because Plaintiffs did not offer any facts sufficient to raise the allegations beyond mere speculation, nor do they offer such facts in the Amended Complaint. Indeed, Plaintiffs plead facts that are inconsistent with liability.

The allegations in *Iqbal* that the Supreme Court found insufficient show clearly that Plaintiffs' allegations here also are inadequate to satisfy the plausibility standard. In *Iqbal*, the Court held that a plaintiff's allegations that defendants "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" were "bare assertions" which amount to nothing more "than a formulaic recitation of the elements of a constitutional discrimination claim." *Iqbal*, 129 S. Ct. at 1951. The Court

rejected these allegations as "conclusory and not entitled to be assumed as true." *Id*. Plaintiff also alleged that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men...as part of its investigation of the events of September 11" and the FBI and Defendants Ashcroft and Mueller approved the policy that these detainees be held in highly restrictive areas until cleared. *Id*. Significantly, the Court held the complaint should be dismissed despite these allegations because the complaint "does not contain any factual allegations sufficient to plausibly suggest petitioners' discriminatory state of mind." *Id*. at 1952.

The allegations here relating to the Transition Program are even barer and more conclusory than those found inadequate in *Iqbal*. Under the *Iqbal* standard, Plaintiffs clearly failed to allege facts sufficient to plausibly suggest that the Transition Program was designed with the intent to discriminate against African American or female FAs.

Equally important, Judge Scheindlin's decision in *Goodman* provides persuasive intervening authority that demonstrates the necessity of applying the *Iqbal* plausibility standard to the Amended Complaint. *See* 716 F. Supp. 2d 253. The *Goodman* decision addressed a sex discrimination claim against the Transition Program. Defendants moved for a partial ruling on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure as to all of the plaintiff's claims relating to the Transition Program, which were virtually identical to the claims alleged in the instant action, albeit alleging discrimination solely on the basis of sex.[4] Judge Scheindlin granted Defendants' motion, holding that the Transition Program qualified as a "bona fide" production-based compensation system for purposes of Section 703(h), and that while other discrimination may have affected the plaintiff's overall production credits, the Transition Program itself is protected under Section 703(h). *Id*. at 260-62. Judge Scheindlin had it exactly

[4] Goodman was represented by the same attorneys as Plaintiffs here, and the allegations in her complaint are nearly identical to the allegations in the Amended Complaint here.

right when she ruled that although "Goodman clearly alleges that defendants adopted the [Transition Program] in order to under-compensate and otherwise discriminate against their female FA's, mere conclusory statements and recitations of the elements of a cause of action will not satisfy the plausibility standard." *Id*. at 261.

Accordingly, because Judge Kennelly did not have the benefit of *Iqbal* in deciding Merrill Lynch's motion to dismiss, and because the more recent decision by Judge Scheindlin in *Goodman v. Merrill Lynch* shows the critical importance of Judge Kennelly's failure to apply the correct standard in assessing Plaintiffs' Complaint, the law of the case doctrine should not bar a reexamination of the issues presented in this motion.

B. Section 703(h) Protects the Transition Program as a Merit- or Production-Based Pay System

Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, **it shall not be an unlawful employment practice** . . . **to apply different standards of compensation, or different terms**, conditions, or **privileges of employment pursuant to a bona fide** seniority or **merit system, or a system which measures earnings by quantity of quality of production** [when] such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(h) (emphasis added).

The reasons for this statutory provision are clear from the legislative history. Congress anticipated that legitimate "seniority, merit, or other incentive system[s]" might result in less pay to a substantial number of persons of a particular protected class (*i.e*., those of a particular race, sex, or national origin). *See* 110 Cong. Rec. 12723 (1964). Rather than prohibit such pay systems, Congress adopted Section 703(h) to protect these employment practices "unless it is shown that the employer was intending to discriminate for or against one of the [protected]

groups." [5] *Id.* As a result, seniority-, merit- or production-based systems cannot be held unlawful "absent a discriminatory purpose . . . *even if the system has some discriminatory consequences*." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (emphasis added). Unlike its counterpart in the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), Section 703(h) does not operate as an affirmative defense. *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908-09 (1989). Instead, a plaintiff must establish that an employer's practice falls outside the scope of Section 703(h), and "actual intent to discriminate *must be proved*." *Id.* (emphasis in original) (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65 (1982)).

C. Plaintiffs' Own Allegations Establish that the Transition Program is a Production- Or Merit-Based System Protected by Section 703(h)

As alleged in the Amended Complaint, the Transition Program falls squarely within Section 703(h)'s statutory protection for production- or merit-based systems. The Amended Complaint states that the "retention bonuses would be based on a FA's 'production credits,' in essence, commissions earned on client assets managed by the FA." (Am. Compl. ¶ 7.) Thus, as described by Plaintiffs, the retention bonuses are calculated methodically and without discretion under a facially neutral, objective formula based on production, placing them within the protection of Section 703(h). [6] *See EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980); *Goodman*, 716 F. Supp. 2d at 261.[7]

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[5] The legislative history for the Equal Pay Act provision on which Section 703(h) was modeled confirms that Congress intended to protect such systems even though it was known that they might not yield equal pay for all employees. "[M]easuring either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same type of work." S. Rep. No. 88-176, at 4 (1963); *Aetna*, 616 at 725 (4th Cir. 1980). "[O]bviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements." S. Rep. No. 88-176, at 4.

[6] Section 703(h) applies equally to claims under 42 U.S.C. § 1981. *NAACP v. Detroit Police Officers Ass'n*, 900 F.2d 903, 912-14 (6th Cir. 1990) (citing cases). An employment practice that passes scrutiny under the substantive requirements of Title VII and §703(h) "is not violative of 42 U.S.C. §1981."

D. Plaintiffs' Theory of Discrimination Is Not Sufficient Under Section 703(h)

The Transition Program loses its Section 703(h) protection only if Plaintiffs adequately allege that the program was adopted with the intent to discriminate. "To state a claim," Plaintiffs "must plead sufficient factual matter to show that [defendant] adopted and implemented the … policies at issue not for a neutral … reason but for the purpose of discriminating on account of race." *Iqbal*, 129 S. Ct. at 1948-49. Plaintiffs' theory of intent focuses on two flawed propositions: (1) Defendants were aware of the disparate impact of the Transition Program, and (2) the bonuses awarded to African American and female FAs pursuant to the program were lower because of discrimination in other employment practices. The Supreme Court and the Seventh Circuit have held that neither one of these theories is sufficient to sustain a claim under Section 703(h).

1. Allegations of Knowledge of a Disparate Impact Are Insufficient to Overcome Section 703(h) Protection

Plaintiffs seek to infer intent from Defendants' alleged awareness of the disparate impact the Transition Program would have on African American and female FAs. (Am. Compl. ¶ 22.) But the argument that awareness of disparate results is tantamount to intentional discrimination has been squarely rejected by the Supreme Court and the Seventh Circuit (pursuant to Rule 12 motions to dismiss and otherwise). *See Iqbal*, 129 S. Ct. at 1948 ("purposeful discrimination requires more than … 'awareness of consequences.'"); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979) (rejecting plaintiffs' argument that a veterans-preference program, which

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Waters v. Wis. Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 n.4 (7th Cir. 1974); *accord Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 475 (4th Cir. 1978).

[7] S*ee also, Scott v. Dallas County Hosp. Dist.*, No. 3:01-CV-2659-K, 2003 WL 21500426, at *2-3 (N.D. Tex. Apr. 21, 2003) (holding that a mathematical matrix for awarding compensation was a "merit system"); *Gerbush v. Hunt Real Estate Corp.*, 79 F. Supp. 2d 260, 264 (W.D.N.Y. 1999) (holding that tying salaries to branch revenues and awarding bonuses for exceeding predicted revenue levels was a "merit system").

bestowed 97% of its benefits on men, was discriminatory because knowledge that a program disfavors women is not akin to an intent to disfavor women, and stating that "intent" means doing something because of, rather than in spite of or with indifference to, the prohibited characteristic); *Council 31, Am. Fed'n of State, County and Mun. Employees, AFL-CIO v. Doherty*, 169 F.3d 1068, 1073 (7th Cir. 1999) (affirming summary judgment on intentional discrimination claim where defendant prepared an adverse impact analysis and knew that a disproportionate number of African American employees would be affected by a reduction in force); *Cannon v. Univ. of Chi.*, 648 F.2d 1104, 1109-10 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981) (affirming dismissal of complaint where plaintiff's allegation of disparate impact was not sufficient to satisfy Title IX's requirement of intentional discrimination because the "claim of disparate impact, even when coupled with the allegations made in appellant's brief to this court that the defendants knew of this impact while enforcing their age policies, [was] insufficient to establish a violation of Title IX").[8]

The Seventh Circuit has explained that "intent as awareness of consequences" cannot suffice; discriminatory purpose requires more. *Am. Nurses' Ass'n v. Ill.*, 783 F.2d 716, 722 (7th Cir. 1986) (internal quotes and citation omitted). Instead, the "***particular course of action" must have been "selected or reaffirmed***. . .at least in part ***because of, not merely in spite of, its adverse effects on an identifiable group.***" *Id.* (emphasis added) (internal quotation marks

[8] *Accord Detroit Police Officers*, 900 F.2d at 909 (holding that an employer who "knew that enforcement of the seniority plan would have a discriminatory impact on newly hired black officers" could not be liable under Title VII because application of the seniority plan was "congressionally immunized by §703(h) and by the decisions of the Supreme Court."); *African Am. Legal Defense Fund, Inc. v. N.Y. State Dep't. of Educ.*, 8 F. Supp. 2d 330, 337 (S.D.N.Y. 1998) (even assuming the disparate impact of defendant's funding scheme on minority students was both known and foreseeable, awareness of disparate consequences was insufficient and plaintiff's complaint could not be read to include an allegation of discriminatory intent); *Shelford v. N.Y. State Teachers Ret. Sys.*, 889 F. Supp. 81, 88 n.2 (E.D.N.Y. 1993) ("The only factual allegations offered by plaintiffs in their complaint deal with the system's purported disparate impact on women which, of course, is not sufficient to foreclose recourse to the protection afforded to facially neutral seniority systems afforded under § 703(h).").

omitted); *see Day v. Patapsco & Back Rivers R.R. Co.*, 504 F. Supp. 1301, 1310 (D. Md. 1981) (applying this standard to §703(h)). *Goodman* applied this standard to an identical claim, and held: "At best, however, Goodman alleges that defendants had knowledge of this past discrimination when they adopted the [Transition Program]. But knowledge of past and even present discrimination alone does not make it plausible that defendants actually adopted the [Transition Program] with discriminatory intent." 716 F. Supp. 2d at 261.

Defendants have not found a single reported decision that adopted Plaintiffs' theory and held that knowledge of a disparity was sufficient to establish intent under §703(h). Nor would such a ruling be consistent with the Congressional purpose underlying 703(h), which was to preserve merit- and production-based systems regardless of impact on protected groups so long as those systems were equally applied. Therefore, even assuming (as Plaintiffs allege) that Defendants knew that the use of production criteria for the Transition Program or other compensation/reward programs would "disproportionately exclude African American FAs" (Am. Compl. ¶ 20), the law is clear that this is not the same as discriminatory intent. Simply put, "[k]nowledge of a disparity is not the same thing as an intent to cause it or maintain it." *Am. Nurses' Ass'n*, 783 F.2d at 722.

2. Allegations of Other Alleged Discriminatory Practices that Affect a Merit- or Production-Based Pay System Are Insufficient

Plaintiffs focus their Amended Complaint on a host of allegations relating to other discriminatory conduct not at all relevant to Merrill Lynch's actual intent in adopting the Transition Program. (*See* Am. Compl. ¶¶ 11-13.) Plaintiffs rely on allegations related to "inputs" that they allege impact an FA's production credits, including teams and the distribution of resources and business opportunities such as accounts, leads, referrals, walk-ins, call-ins, and initial public offerings ("IPOs"). (*Id*. at ¶¶ 16-17.)

However, allegations regarding past discrimination and discrimination with regard to inputs are immaterial to the questions before this Court regarding the Transition Program. The Supreme Court has said unequivocally that a system otherwise protected by Section 703(h) cannot be attacked merely because it allegedly perpetuates discrimination in other employment practices. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 347-48 (1977). When other practices, such as "hiring, assignment, transfer and promotion policies," are allegedly discriminatory, plaintiffs may obtain "all appropriate relief as a direct remedy for [that] discrimination." *Id.; see also Goodman*, 716 F. Supp. 2d at 261 ("To the extent that other acts of discrimination in violation of Title VII affect the 'inputs' into a bona fide merit, seniority, or production-based system, a plaintiff's remedy lies in challenging those violations directly.").

To overcome Section 703(h), Plaintiffs must establish "that the [§703(h)] *system itself* was negotiated or maintained with an actual intent to discriminate." *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d, 1549, 1576 (11th Cir. 1988), *vacated on other grounds by Pullman-Standard, Inc. v. Swint*, 493 U.S. 929 (1989). Any purported evidence regarding other practices does not relate "directly to [the employer's] intent regarding the *system*," but "tends to prove instead that [the employer] engaged in a number of other, separate discriminatory practices, and . . . the Supreme Court has required us to keep such distinctions in mind." *Id.* at 1577 (emphasis in original). As such, Plaintiffs' reliance on allegations of past discrimination and the "inputs" into the production-based bonus program is misplaced. Under well-established law, this alleged discriminatory conduct cannot serve as the basis for an attack against a Section 703(h) protected pay system.[9]

[9] To the extent the Amended Complaint alleges discrimination with respect to the inputs and resources that Merrill Lynch provides its FAs, those claims simply repeat the claims in the *McReynolds I* Litigation. The named Plaintiffs in this lawsuit are all named Plaintiffs in the *McReynolds I* Litigation.

E. Plaintiffs' Conclusory Allegations of Intentional Discrimination Are Not Sufficient Under the "Plausibility" Standard

Plaintiffs include two conclusory statements in the Amended Complaint regarding the intent behind the Transition Program: (1) "Plaintiffs challenge [the Transition Program's] . . . intentionally discrimination design" (Am. Compl. ¶ 20); and (2) "Defendants intended to retain and more generously compensate white men rather than African Americans and women" (*id*. at ¶ 22). These statements simply recite one element of the cause of action, and Plaintiffs provide no facts to support these allegations. Under *Iqbal*, the law is clear that threadbare recitals of the elements of a cause of action are insufficient to bring a claim above the speculative level and survive a Rule 12 Motion.

Similarly, in *Goodman*, the plaintiff included two conclusory sentences in her complaint regarding the intent of the Transition Program: (1) "Defendants intentionally designed and implemented retention bonuses based largely on production that had a disparate impact on and intentionally discriminated against women" and (2) "Defendants intended to retain and more generously compensate white men rather than female FAs." Amended Complaint ¶ 19, *Goodman v. Merrill Lynch*, 2009 WL 2823710 (S.D.N.Y. Aug. 27, 2009) (No. 09 Civ. 05841) (attached as Ex. B). *Goodman* held that such allegations were insufficient to state a claim: "While [the plaintiff] clearly alleges that defendants adopted the [Transition Program] in order to under-compensate and otherwise discriminate against their female FA's, mere conclusory statements and recitations of the elements of a cause of action will not satisfy the plausibility standard." *Goodman*, 716 F. Supp. 2d at 261.

Plaintiffs have not stated a single fact to support the allegation that Defendants adopted the Transition Program with the intent to discriminate against African American and female FAs, other than facts with regard to knowledge of the disparate treatment and tainted inputs, both of

which have been rejected by the Supreme Court and the Seventh Circuit. The Amended Complaint should be dismissed because it "does not contain any factual allegation sufficient to plausibly suggest [defendants'] discriminatory state of mind." *Iqbal*, 129 S. Ct. at 1952. Nor have Plaintiffs addressed the clear logic of the decision to structure the Transition Program in a way that would retain the most successful, production FAs. "As between that 'obvious alternative explanation' … and the purposeful, invidious discrimination" that Plaintiffs ask the Court "to infer, discrimination is not a plausible conclusion." *Id*. at 1951-52. A complaint does not "plausibly establish [discriminatory] purpose" if there are "more likely explanations" for the defendant's actions. *Id*. at 1951.

Comparing the allegations here (and in *Goodman*) with the allegations found insufficient in *Iqbal* highlights how woefully deficient the amended complaint here is.

IV. CONCLUSION

Merrill Lynch respectfully requests that the Court dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6).

Respectfully submitted,

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December 15, 2010

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of Defendants' Notice of Motion, Motion to Dismiss Plaintiffs' Amended Complaint, and Memorandum In Support were served upon counsel for Plaintiffs addressed as follows:

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via e-mail and First Class Mail on December 15, 2010.

By: /s/ James V. Hart .